Hicks Morley Pension, Benefits and Executive Compensation Group
2014 Case Law Update
January 28, 2014

Dear Friends:

We are very pleased to present you with our 2014 Case Law Update, which summarizes significant legal decisions from 2013 in the area of pension, benefits and executive compensation. These cases provide practical guidance that will impact the relationship between employers and administrators, and their respective pension, benefits, and/or executive compensation plans.

This update considers pension, benefits and executive compensation developments involving a number of areas, including corporate restructuring and sales of business, marriage breakdown, changes to pension and retiree benefit, and limitation periods, amongst others.

In our previous case law updates, we have remarked on a general feeling of uncertainty in the pension and benefits landscape. This uncertainty has emerged as the result of significant developments that have left their mark on the industry over the past few years. Market upheaval, pension deficits, nation-wide legislative reform, and the frequency with which pension and benefit cases are now litigated, all pose uncharted challenges to pension and benefit plan sponsorship administration. As a result, these issues have pushed retirement and employee benefit issues increasingly to the forefront of priorities and concern. With increasing frequency, we are now seeing judicial comments on issues where before there was none. While not always the answers employers and plan administrators are looking for, there is nevertheless more and more judicial guidance available to help organizations involved with plan administration navigate the changing times.

We hope that you enjoy the 2014 Case Law Update, and trust that it provides you with a source of timely and helpful information. Please contact any one of us with any questions that you may have arising out of the cases discussed, or if you require further information.
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KEY DEVELOPMENTS IN PENSION LAW

A number of key court decisions were released in 2013 that clarify the rights and duties of pension plan sponsors, administrators and employees. We have selected a number of leading pension cases dealing with, among other things, the priority of pension deemed trusts in a corporate restructuring, plan re-design affecting early retirement subsidies and indexing, deemed employment rules, records retention, and limitation periods. These cases may assist employers and administrators when planning for future changes to pension plans, and with day-to-day administration practices.

STATUTORY DEEMED TRUSTS

The Supreme Court of Canada’s decision in Indalex was perhaps the most widely anticipated pension decision of the year. The decision of the Court of Appeal for Ontario in Indalex had prioritized the deficiency of the pension plan over creditor claims and raised serious issues about the ability of a business to act both as plan administrator and employer. In so doing, the Court of Appeal created much risk and uncertainty for creditors who were considering financing a business with a pension deficiency. The Supreme Court of Canada reversed certain aspects of the Court of Appeal’s decision that had been creating much of that concern.

Two recent cases illustrate how commercial courts are applying the principles and analysis set out by the Supreme Court of Canada in Indalex.

Sun Indalex Finance, LLC v. United Steelworkers, 2013 SCC 6

In a split three-way decision, the Supreme Court of Canada determined that the deemed trust under the Ontario Pension Benefits Act (“PBA”) extends to the full wind up deficit and not only to contributions that were unpaid at the date of the wind up. However, the deemed trust does not apply to the estimated wind up deficit but only once the plan is wound up.

The Supreme Court confirmed that an employer can act as both plan sponsor and plan administrator, but that it must be mindful of conflicts of interest where the employer’s duties to plan beneficiaries would be “materially and adversely affected” by its corporate interests.

Please refer to our FTR Now dated February 4, 2013 for a summary and analysis of this important decision.
Grant Forest Products Inc. (Re), 2013 ONSC 5933

This case involved a priority claim in respect of the remaining funds held by the Monitor following the sale of GFPI’s assets, between the Administrator on behalf of the Plans and GFPI’s creditors.

Facts

On June 25, 2009, Grant Forest Products Inc. (“GFPI”) was granted an order under the federal Companies’ Creditors Arrangement Act (“CCAA”), which provided for a stay of proceedings to enable the restructuring of GFPI’s assets (“Initial Order”). The Initial Order specifically stated the following:

[5] THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee benefits and pension contributions, vacation pay, bonuses, and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, which, for greater certainty, shall not include any payments in respect of employee termination or severance; [emphasis added]

As at the date of the Initial Order, GFPI had four pension plans, two of which were defined benefit plans, the “Salaried Plan” and the “Executive Plan” (collectively, “Plans”). As at the time of the Initial Order, the Plans had not yet been wound up.

By court order dated May 26, 2010, there was a major sale of GFPI assets to Georgia Pacific, with the last significant sale of assets on February 20, 2011.

On August 26, and September 21, 2011, the court granted two further unopposed orders, which included an order authorizing GFPI to take steps to initiate a wind up of each of the Salaried and Executive Plans (“Wind Up Orders”). These Wind Up Orders directed the Monitor to hold back from any distribution of sale proceeds to GFPI's creditors ("Creditors"), an amount that, at that time, was estimated to equal the wind up deficit of the Plans. As a result, the Monitor held back in escrow over $2.3 million. The issue of a deemed trust arising as a result of the Wind Up Orders was not sought to be determined by any party at the time of the Wind Up Orders.

As a result of an order of the Superintendent of Financial Services dated February 27, 2012, the Salaried Plan was wound up effective March 31, 2011, and the Executive Plan was wound up effective June 30, 2010.
On August 27, 2012, GFPI brought a motion to the Ontario Superior Court of Justice (“Court”) for direction with respect to the payment of amounts held in escrow by the Monitor in respect of the Plans. A secured creditor, through a separate motion, sought an order lifting the stay under the CCAA to permit it to petition GFPI into bankruptcy, which would defeat any deemed trusts under the PBA. However, PWC, the Plans’ administrator (“Administrator”), which had been appointed after the Wind Up Orders were issued, argued that the available assets should be paid into the Plan funds toward reducing the wind up deficiencies pursuant to the provisions of the Ontario Pension Benefits Act (“PBA”). The motions were adjourned pending the Supreme Court of Canada’s (“SCC”) decision in *Indalex* (see page 1).

**Decision**

The Court held that the Creditors were entitled to the sale proceeds in priority over the claim of the Administrator to apply them towards the wind up deficiencies.

Distinguishing the facts of this case from those in *Indalex*, the Court noted that neither of the Plans had been wound up at the time of the Initial Order. There was no request made for debtor-in-possession (“DIP”) financing prior to the sale of assets following the Initial Order. The Initial Order contemplated in this case was that GFPI’s business would continue for the purpose of the orderly disposition of various assets of GFPI, the most significant of which were sold to Georgia Pacific, which continued to operate some of the mills.

This allowed the assets of the liquidating company to be sold in a manner that would provide the maximum benefit possible to the greatest number of stakeholders, whereas bankruptcy may have led to larger job losses and reduced recovery for the secured creditors.

The Court also noted that the GFPI liquidation did not proceed under a specific plan voted on by the Creditors and approved by the Court. In addition, the Initial Order permitted, but did not require, GFPI to pay ordinary operating expenses in the course of liquidated assets under the CCAA for the benefit of all stakeholders. No Creditors or Plan member representatives objected to the Initial Order or raised the deemed trust argument at that time.

Since neither Plan was wound up before the Initial Order, the Court considered whether a deemed trust can arise after an initial stay order and the commencement of a CCAA restructuring. The Court found that the sale proceeds held in escrow by the Monitor were not deemed to be held in trust pursuant to ss. 57(4) of the PBA for the beneficiaries of each of the Plans as a result of the wind ups that occurred after the initial order.
According to the Court, *Indalex* shows that it is important to the intended operation of the CCAA that there be predictability at the time of the initial order and stay. Provincial pension priorities will apply prior to the initial order, at which time the federal insolvency rules will begin to apply. Allowing the deemed trust to affect creditor priorities after the Initial Order would create uncertainty and affect the operation and purpose of the CCAA regime.

Since the wind ups, and therefore the provincial deemed trusts, arose after the Initial Order, the Court held that GFPI was not required to make the special payments to fund the wind up deficiencies of the Plans as prescribed under the PBA.

The Court further found that it did not impose the deemed trust by authorizing the wind up of the Plans. Nothing in the Wind up Orders dealt with the issue of the deemed trust, and no one appearing at the motion raised the issue of deemed trust. The Initial Order also did not require GFPI to make the special payments.

A commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to the CCAA order, unless explicitly agreed to. This is precisely the reason for granting a stay of proceedings that is provided for by the CCAA. According to the Court:

> Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made. The decision of the Supreme Court of Canada in *Indalex* appears to stand for the proposition that once a valid Initial Order is made under the CCAA the Federal insolvency regime is paramount, and absent any agreement or other Order where there is a conflict, the Initial Order prevails over the applicant’s obligation under the provincial statute [at para. 95].

The Court lifted the stay of proceedings to permit the secured creditor to petition GFPI into bankruptcy. According to the Court, no party had been prejudiced by the delay in dealing with the priority issue, nor was there any suggestion that any party was not acting in good faith.

It was to the advantage of all stakeholders, including the Plans, that the CCAA process be utilized for the sale of assets, and that process had run its course. In the absence of the provisions of a CCAA plan or a specific court order, any creditor is at liberty to request that the CCAA proceedings be terminated if that creditor’s position may be better advanced under
bankruptcy proceedings. Refusing to lift the stay could result in de facto priority being given to the pension plan deficits.

Implications

This case provided the insolvency court with the opportunity to apply the Supreme Court of Canada’s decision in Indalex on the scope of the PBA’s deemed trust provision in a CCAA proceeding to a slightly different fact situation. Applying the principles outlined in Indalex, the Court concluded that, where a pension plan wind up occurs after the initial CCAA stay order is granted, the PBA deemed trust provisions do not automatically give the wind up deficit priority over other creditors. They also do not prevent the court from lifting the CCAA stay in order to allow a bankruptcy, where it is fair and reasonable in the circumstances.

In the face of Indalex, this case illustrates the manner in which courts are forced to balance the competing interests of insolvent companies, creditors, and pension plan beneficiaries. The Court confirmed that the CCAA operates to provide a flexible solution to restructuring companies, to allow companies to be administered in a way that is advantageous to the largest amount of stakeholders, and emphasizes the role provided by initial stay orders in offering certainty and predictability.

Aveos Fleet Performance Inc., 2013 QCCS 5762

This case, also decided after Indalex, considered the deemed trust under federal pension legislation, where the insolvent employer was located in Québec, and the plans were not wound up before the insolvency proceedings began.

Facts

On March 19, 2012, Aveos Fleet Performance Inc (“Aveos”) applied for creditor protection under the federal Companies’ Creditors Arrangement Act (“CCAA”). Aveos’ operations were largely shut down in conjunction with the commencement of the CCAA proceedings began, and most of the employees were laid off. Its assets were sold through a court-approved divestiture process.

Aveos maintained a contributory defined benefit pension plan (“Plan”), which was subject to the federal Pension Benefits Standards Act, 1985 (“PBSA”). The Plan generally covered non-unionized employees who were employed previously with Air Canada and participated under Air Canada’s pension plans. As at December 31, 2010, the Plan was 79.4% funded on a solvency basis. Consequently, annual special payments were required to be paid into the Plan in monthly installments, as required under the PBSA.
continued to make special payments to the Plan until March 2012 (reflecting special payments owing for January 2012).

The Québec Superior Court (“Court”) granted Aveos an Initial Order, which provided for, among other things, a stay of proceedings and appointed a Monitor. Further, paragraph 19 of the Initial Order suspended special payments to the Plan, but allowed Aveos to make normal cost contributions.

On April 5, 2012, the federal pension regulator, the Office of the Superintendent of Financial Institutions (“OSFI”), removed Aveos as administrator of the Plan, and appointed Aon Hewitt as the Plan’s legal administrator.

Effective May 19, 2012, OSFI wound up the Plan. The outstanding special payments owed by Aveos on the date of the Initial Order to the Plan equalled $509,900. Pursuant to the PBSA, an additional amount of approximately $2.3 million was also owed by Aveos upon termination of the Plan, representing special payments owed for the period between the Initial Order and the end of the year. The parties agreed that the full wind up deficit of approximately $30 million was not subject to the PBSA deemed trust provisions.

OSFI claimed that the deemed trust created by the PBSA obliged Aveos to pay to the Plan, in priority to Aveos’ secured creditors (“Secured Creditors”), the unpaid special payments owed as at the date of the wind up and between the wind up date and the end of the calendar year. According to OSFI, this sum was protected by the deemed trust, and as such, ranked in priority to the Secured Creditors.

**Decision**

The Court held that the amounts owed to Aveos’ Secured Creditors ranked in priority to the special payments owed under the Plan.

The Court noted the purpose of insolvency law is to provide a “fair distribution of a debtor’s assets given that there is not enough money to pay all creditors” [at para. 54]. The priorities accorded to certain types of claims granted in an insolvency reflect the policy decisions of the legislator.

The Court applied an earlier Supreme Court of Canada decision (*Sparrow*) that examined the nature of the deemed trust created by language under the *Income Tax Act* (“ITA”) which at that time was similar to the deemed trust language under the PBSA. It concluded that a deemed trust does not undo an existing security interest and at best, goes back in time to attach to an otherwise unencumbered asset. The Court noted that the ITA deemed trust language has since been amended to grant priority to the deemed trust.
regardless of when the security interest arises, but the PBSA language was not. In the present case, when the deemed trust arose, Aveos’ assets were already encumbered by fixed charges in favour of the Secured Creditors that were created in 2010 and 2011. The deemed trust in respect of the Plan arose either upon Aveos’ liquidation (which would not have been before the CCAA filing on March 19, 2012) or, at the earliest, when a special payment became due following the Plan’s actuarial actual report filed in June 2011. However, Aveos made the special payments up to and including January 2012, and a deemed trust could not arise prior to any payments being in default. In other words, the Secured Creditors’ security was created before any deemed trust in respect of the Plan could have existed. Since the assets were already charged, any deemed trust under the PBSA would be subordinate to the security interests of the Secured Creditors.

The Court referred to the reasoning of the Supreme Court of Canada in Century Services and noted that, as a general rule, deemed trusts are ineffective in an insolvency. Therefore, while the PBSA creates the deemed trust, there is no provision in the CCAA that confirms or preserves it in priority to other claims. According to the Court, the legislature chose not to preserve the PBSA deemed trust in insolvency proceedings when it amended the CCAA in 2009. In 2009, the CCAA was amended to provide that an arrangement may only be sanctioned or an asset sale approved by the court if provisions are made for the payment of certain pension obligations. These obligations, however, do not include special payments, and are limited to deductions from employee pay and normal cost contributions of the employer (neither of which is in issue in the present case). The protections in the CCAA were not extended specifically to the PBSA deemed trust, or generally to special payments for actuarial deficits. Absent express language that concludes that pension claims are to enjoy preferred treatment under the CCAA, no such protection exists, and provincial priorities continue to apply.

The Court distinguished this case from Sun Indalex Finance, LLC v. United Steelworkers, 2013 SCC 6 (see page 1), where the Supreme Court of Canada considered deemed trust language in the Ontario Pension Benefits Act (“PBA”). In Ontario, the Personal Property Security Act (“PPSA”) subordinates certain security interests to the deemed trust under the PBA. Unlike Ontario, there is no equivalent law in Québec and no basis for a priority deemed trust claim under Québec law.

The Court also rejected OSFI’s argument that paragraph 19 of the Initial Order, which permitted Aveos to suspend special payments of the Plan, should now be modified and Aveos ordered to pay the sum of $2.8 million.
The Court noted that OSFI was, or should have been, aware of the situation, and did not bring an application to vary the Initial Order until after numerous renewals of the Initial Order and court approvals of the sales and distributions to creditors. If OSFI did so, the Secured Creditors could have decided on a course of action, which may have included a petition for bankruptcy or receivership. Given the extremely long delay by OSFI in seeking a modification of the Initial Order, varying the Initial Order retroactively to require payment of the special payments was not appropriate due to the good faith reliance on the Initial Order by the Secured Creditors.

**Implications**

This case, also decided after the SCC decision in *Indalex*, addressed the effect of the deemed trust under the PBSA in a CCAA proceeding, where both statutes are federal, and the concept of federal-provincial paramountcy cannot assist with resolving the apparent conflict.

The Court concluded that a deemed trust does not arise under the PBSA until contributions are unpaid, and is not effective if the employer’s assets are already fully encumbered by secured creditors at that time. In addition, the Court emphasized the fact that the federal government chose not to give the PBSA deemed trust special priority over other creditors in a CCAA proceeding, leaving the Court to apply normal rules of priority. Therefore, where a federally regulated employer is undergoing a CCAA restructuring, absent provincial property or security legislation explicitly providing otherwise, a deemed pension trust will either be ineffective against or subordinate to secured creditors.

The decision also reflects the importance of affected parties making arguments concerning the deemed trust or the suspension of pension contributions at the time of the initial stay or shortly thereafter, not after considerable time has passed, and other steps taken in the restructuring in reliance of the initial order.

**DEEMED CONTINUOUS EMPLOYMENT**

The Ontario *Pension Benefits Act* (“PBA”) provides that employees affected by a sale of business or other restructuring are deemed to continue their employment between two separate employers. The PBA’s sale of business and restructuring provisions are intended to protect members’ pensions and other benefits, and had generally been interpreted as precluding a plan member from receiving pension benefits from the original plan while being employed by the successor employer.
In 2012, the Financial Services Tribunal’s (“FST”) decision in Ontario Pension Board v. Ratansi, surprised the pension industry when the FST held that transferred employees could begin receiving pension benefits from the predecessor pension plan despite their continued employment (and related pension plan participation) with the successor employer. This decision was appealed to the Ontario Divisional Court, which overturned the FST’s decision and restored its earlier jurisprudence on this issue.

**Ontario Pension Board v. Ratansi, 2013 ONSC 1092**

**Facts**

A number of Ontario public servants (“Employees”) were employed with Ontario’s Ministry of Revenue (“MR”). As MR employees, the Employees participated in the Public Service Pension Plan (“Plan”), a defined benefit pension plan administered by the Ontario Pension Board (“OPB”).

In connection with the implementation of Ontario’s Harmonized Sales Tax, the work that had previously been performed by MR employees was transferred to the Canada Revenue Agency (“CRA”). Affected MR employees were offered employment with the CRA, the details of which were dictated by terms contained in a Human Resources Agreement (“HRA”) between the MR and the CRA. The HRA provided that MR employees who accepted employment with the CRA would become members of the federal Public Service Superannuation Plan (“PSSP”).

The Employees sought confirmation from the OPB that those who qualified for early unreduced pensions under the Plan could begin receiving their pensions as soon as they transferred employment from the MR to the CRA. The Employees based their request on the Plan text, which they interpreted as allowing for the termination of their Plan membership and the commencement of pension payments upon their transfer of employment.

The OPB denied the request, instead taking the position that early unreduced pensions from the Plan could not commence as long as employment continued with the CRA. In support of its position, the OPB relied on ss. 80(1) and 80(3) of the Ontario Pension Benefits Act (“PBA”). Subsection 80(3) deems employment to continue for purposes of the PBA where a transaction described in s. 80(1) of the PBA takes place. The relevant portions of ss. 80(1) and (3) are as follows:

80(1) Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer’s business or all or part of the assets of the employer’s business, a member of the pension plan who, in conjunction with the sale, assignment or disposition becomes
an employee of the successor employer and becomes a member of a pension plan provided by the successor employer,

[...]

(3) Where a transaction described in subsection (1) takes place, the employment of the employee shall be deemed, for the purposes of this Act, not to be terminated by reason of the transaction.

In the legislative provisions enacted by the Ontario government to facilitate implementation of the HRA, the transaction contemplated by the HRA was deemed to be a transaction to which s. 80 applies. In a Notice of Intended Decision dated August 8, 2011, the Ontario Superintendent of Financial Services (“Superintendent”) agreed with the OPB.

The Employees then requested a hearing before the Ontario Financial Services Tribunal (“FST”). The FST narrowly interpreted s. 80(3) to mean that employment was deemed to continue for the purposes of the PBA alone; the deemed continuation of plan membership was found to be a separate matter. Based on this interpretation, the FST considered the Plan text and found that under the Plan text, the transfer did not prohibit the commencement of a pension despite continued employment with the CRA. The FST relied on the analysis in Imperial Oil Ltd. v. Superintendent of Financial Services, Decision No. P0169-2011-1 (“Imperial Oil”), in which deemed employment for purposes of the pension plan and deemed employment for the purposes of the PBA were distinguished. The FST dismissed the applicability of Horgan and Anand v. Superintendent of Financial Services et al., Decision No. P0120-2000 and P0146-2001-1 (“Horgan”) and Ontario Pension Board v. Superintendent of Financial Services and Burns, Decision No. P0116-2000-1 (“Burns”), two cases in which the FST held that s. 80 of the PBA prevented employees from receiving earlier pension benefits without first terminating employment with the successor employer.

A detailed summary of the FST decision can be found in the Hicks Morley Pension and Benefits 2013 Case Law Update at page 29.

Following the FST’s decision, the OPB appealed to the Ontario Divisional Court (“Court”), on the basis that the FST erred in its interpretation and application of s. 80 of the PBA.
Decision

The Court reversed the FST’s decision. Section 80(3) of the PBA deemed the Employees’ employment with the MR and the CRA to be continuous such that the Employees were in the same position they would have been had their employment continued with the MR and the divestment had not occurred.

Applying a standard of correctness, the Court found that the FST’s “narrow interpretation of s. 80(3)” was “untenable” and “internally inconsistent”. Rather, the Court found that the meaning of s. 80(3) deemed employment and pension plan membership to continue in relation to a “sale of business” transaction.

The Court disagreed with the FST’s interpretation of the s. 80(3) phrase “for the purposes of the Act”, and found that the phrase clarified the scope of the deeming provision, rather than restricted it. In fact, the Court was of the opinion that the phrase extended the reach of s. 80 to the entirety of the PBA, as well as all pension plans governed by the PBA. It was clarified that, in the event of any inconsistency between the PBA and the plan text, the former will prevail.

The Court chastised the FST for departing from established jurisprudence. The Imperial Oil decision was found to have “no application” to the matter, and the Court opined that the distinction drawn by the FST between employment and pension plan membership was unsupported by the PBA. Moreover, the Court held that this identical issue had already been settled in Horgan and Burns. It was noted that pension plan administrators and plan members had for many years relied on the analysis in Horgan and Burns, and issues concerning pension rights and plan administrator obligations required “certainty and consistency, not the uncertain approach crafted by the Tribunal” (at para. 34).

Implications

The Divisional Court decision is significant because it confirms the common interpretation and application of the PBA’s sale of business and deemed employment provisions, and removes the uncertainty introduced by the prior FST decision. Where a transferred Ontario member joins the successor employer’s pension plan, that member is not eligible to be treated as terminating employment with the seller, and is not eligible to begin receiving a pension or transfer the commuted value out of the plan until he or she leaves employment with the purchaser.
RECORDS RETENTION

The nature of sponsoring and administering pension plans requires the production and retention of numerous documents, often in respect of a large group of individuals, some of whom may no longer be employed with the employer. Administrators are faced with the task of determining which documents to retain, and for how long, in the absence of any specific legislative requirement. The following case reflects the role retention of documents or lack thereof can play in resolving claims by members for benefits, often many years after they ceased to be employees.

Hunte v. Ontario (Superintendent of Financial Services), 2013 ONFST 11

Facts

The Applicant, Mr. Hunte, was employed by the Crown Life Insurance Company (“Company”) from 1970 to 1975. The Applicant left the Company in 1975 to work for another insurance company, but decided to return to the Company a few weeks later, and was rehired in September 1975. The Applicant continued working with the Company until 1982.

The Applicant asserted that he was a member of the Company’s defined benefit pension plan (“Plan”) from 1970 to 1975. The Applicant’s testimony was that he joined the Plan in 1970, and that he made both basic and additional voluntary contributions to the Plan during this period. He testified that he received annual pension statements that reflected these contributions, and that, when he left the Company in 1975, he received no refund of either his basic or additional voluntary contributions.

The Applicant also asserted that when he returned to the Company in 1975, the Company agreed that he would be treated as a Plan member continuously from 1970. Consequently, when he finally left the Company in 1982, he was entitled to a deferred pension from the Plan based on approximately twelve years of service. The Applicant, however, had no documents to support any of his claims.

In contrast, the Company, while acknowledging that the Applicant was a Plan member in the second phase of his employment (from 1975 to 1982), denied that he was a member for the first phase of his employment (from 1970 to 1975). Even if the Applicant had belonged to the Plan in the first phase of his employment, there was no agreement with the Company to credit the Applicant with pension service dating back to 1970. Accordingly, it was the Company’s position that he was properly treated as a new employee for pension purposes when he rejoined the Company in 1975.
The Company also argued that, when the Applicant left the Company in 1982, the Applicant took a cash refund benefit that exhausted his entitlement under the Plan. In addition, it was argued that in 1980, the Applicant transferred additional voluntary contributions made during his second phase of employment out of the Plan into a group registered retirement savings plan (“Group RRSP”), and withdrew them from that Group RRSP in 1981.

The Company had a sparse documentary record pertaining to the Applicant’s employment and pension history. However, the Company was able to obtain or produce some documents that were consistent with its position. For example, the Applicant’s 1981 and 1982 tax summaries (obtained from the Canada Revenue Agency) showed that the Applicant received income identified as “other income” in the amount that coincided with amounts shown on Company microfiche records to have been paid out in 1981 from the Applicant’s Group RRSP account. Further, the Applicant reported taxable income in 1982 corresponding to the amount the Company identified as the return of his basic contributions under the Plan (plus interest).

The Company’s employment records also showed that the Applicant’s employment date was September 1975, and his termination date was in 1982. It indicated that he had “prior service: 70-75” and that his “pension entry date” was September 1975. Finally, the Applicant’s pension certificate number was consistent with the range of employee/pension numbers issued in 1975, and not with those issued in 1970.

In another example, the Company produced a memorandum dated April 18, 1980, that stated that Company practice at the time was not to bridge (or combine) two periods of service for the purposes of the Plan.

On August 27, 2012, the Superintendent of Financial Services (“Superintendent”) issued a Notice of Intended Decision, concluding that the Applicant’s entitlements had been paid out of the Plan when he terminated his employment in 1982, and he was therefore not entitled to a deferred pension. The Applicant filed a Request for Hearing challenging the Superintendent’s intended order.

Decision

The Ontario Financial Services Tribunal (“FST”) held that the Applicant received everything he was entitled to under the Plan when he left the Company in 1982. In other words, he was not entitled to a deferred pension for the alleged twelve years of service under the Plan.

First, the FST noted that the member has the burden of proof to establish an entitlement under a pension plan. If the applicant establishes a sufficiently
persuasive case of entitlement, then the burden would shift to the plan administrator to disprove that entitlement.

In this case, the Applicant failed to prove his entitlement. The Applicant’s evidence depended entirely on his recollection of key events that took place some thirty to forty years ago. The Applicant provided no documentary evidence to corroborate his recollections, leaving the FST to assess the available evidence on a balance of probabilities.

The FST accepted the Company’s evidence of the Applicant’s tax summaries, which illustrated that the Applicant transferred his additional voluntary contributions to the Group RRSP, and cashed them out in 1981, and that he received a cash refund benefit from the Plan in 1982. The Applicant was unable to provide alternative explanations for these amounts in his tax summaries.

The FST further accepted that there was no agreement to bridge the Company’s two periods of service, and, as a result, the Applicant lacked the ten years of continuous membership required to be vested under the Plan. Also, the Plan’s locking-in provisions did not apply to the Applicant, since he was not age 45 at the time of his termination of employment, as required by the Plan’s locking-in requirements.

The FST also found that the Company had not breached its fiduciary duty by failing to retain more documents pertaining to the Applicant’s entitlement. The FST held that it was probable that the Company’s protocol for administering terminations, which included providing the terminated employee with a letter outlining his/her pension options, was followed in the Applicant’s case. According to the FST, it “defies probability that the company would deviate so significantly from normal procedure in the absence of very special circumstances, none of which appear to be present in this case” [at para. 93]. Further, it “defies common sense that the Applicant, a veteran of the financial services industry, would not have raised pointed questions about a complete failure to inform him about his rights under the Plan, or to document the terms of his departure from the Plan” [at para. 93].

Finally the FST drew no adverse inference against the Company for not being able to produce a full documentary record. Although the FST noted that there were defects in the Company’s record-keeping system, these defects were not of “sufficient gravity to raise fiduciary concerns”, and they were consistently applied [at para. 94]. The Applicant provided no evidence to establish that the Company’s record-keeping policies fell short of the
industry standards of the day. The FST did state, however, that the Company “may wish it had adopted a more defensive policy” [at para. 94].

Implications

This case illustrates the importance of record-keeping practices in pension plan administration. In this case, a former employee claimed entitlement to a deferred vested pension almost thirty years after termination of employment. Although the FST makes clear that the employee has the burden of proving entitlement to such a pension, it may not be difficult for the employee to provide enough evidence to shift the burden to the plan administrator. For this reason, plan administrators need to carefully consider what they will retain and for how long, in order to be able to assess and, where appropriate, mount an effective defence against claims from long past.

To assist with this analysis, the Financial Services Commission of Ontario issued Policy A300-200, “Management and Retention of Pension Plan Records by the Administrator”, which provides guidance for plan administrators regarding prudent records management and retention practices.

Although limitation periods were not a factor in this case due to the Applicant’s choice to proceed with a complaint to the Superintendent of Financial Services, it is worth noting that in Boys v. Shoppers Drug Mart, 2013 ONSC 7026 (see page 48), the limitation period did not begin to run until the former employee sought the benefit and it was not paid. Records retention will play an important role in defending against claims for benefits coming many years after an employee’s departure even where limitation periods do apply.

ENTITLEMENT TO ANCILLARY BENEFITS

Under the Ontario Pension Benefits Act, ancillary benefits are typically thought to include benefits such as early retirement, bridging benefits, and indexing, amongst others. Although “ancillary” to the basic pension promise, ancillary benefits have the potential to significantly enhance an individual’s retirement options by increasing that pension amount, or extending the timeframe in which a person may draw a pension. For this reason, they are often the subject of disputes.
EARLY RETIREMENT WINDOWS
There are usually timeframes associated with an individual’s ability to elect special early retirement benefits. Given the value of these benefits to the member, the question arises as to whether that individual might still access those benefits if the election period has been missed.

Olszewska v. Ontario (Superintendent of Financial Services), 2013 ONFST 6

Facts
Ms. Elzbieta Olszewska (“Ms. Olszewska”) was a long-term employee of the University of Toronto (“University”). While a University employee, she was a member of U.S.W. Local 1998 (“Union”) and a member of the University of Toronto Pension Plan (“Plan”).

On April 28, 2008, Ms. Olszewska was provided with a layoff notice, and given a choice of either being placed in the redeployment pool for up to twenty-four months, or ceasing her employment with the University and receiving enhanced severance pay effective the date of layoff. The letter indicated that her employment with the University would be terminated effective July 21, 2008, if she did not elect the redeployment pool. Ms. Olszewska never returned a signed option election form to the University.

At the time of Ms. Olszewska’s notice of termination, there was an early retirement window (“Window”) available under the Plan to certain eligible Plan members who had attained age 55 and whose years and completed months of continuous service under the Plan totalled at least 75 years. This Window and a bridge benefit were set out in the collective agreement between the University and the Union which applied at the times in question. At the date of receiving the layoff notice, Ms. Olszewska was eligible to elect to retire under the Window.

Ms. Olszewska had been advised on April 18, 2008, through a general letter from the University to all eligible Plan members that, in order to exercise the Window and receive the bridge benefit, written notice must be provided by June 27, 2008 to meet the closing deadline of June 30, 2008. Ms. Olszewska testified that she received, read and understood this letter. However, Ms. Olszewska did not, at any time, provide notice of her intention to retire to the University.

On May 21, 2008, a Union representative sent an email advising Ms. Olszewska to apply for the Window before it expired on June 30, 2008. Ms. Olszewska testified that she read and understood the content of this email; however, she did not reply to the email.
On May 28, 2008, the Union filed a grievance against the University on behalf of Ms. Olszewska relating to her termination of employment. At this time, Ms. Olszewska was advised by both the Union and the University that she could not simultaneously pursue both her grievance and early retirement.

On June 11, 2008, Ms. Olszewska received correspondence from the Union which reminded her again of the need to advise the University before June 27, 2008, if she was planning to retire and take advantage of the Window and bridge benefit. Further, the letter requested her direction in continuing the grievance process or opting for the early retirement window, as she could not do both. Ms. Olszewska again testified that, while she did not agree with the letter, she read and understood it and directed the Union to pursue the grievance.

On November 7, 2008 and December 8, 2008, the University made two written offers to Ms. Olszewska to settle the grievance. Both offers included an offer to retire under the Window. Ms. Olszewska rejected both offers.

Following the expiry of the University’s first offer to settle, the University sent a letter to Ms. Olszewska on November 24, 2008. In the letter, the University stated that it had not received any communication from Ms. Olszewska in response to the April 2008 layoff notice providing her a choice between redeployment and severance, and accordingly deemed her employment terminated. Despite contradictory evidence from the University at the hearing, it was determined that Ms. Olszewska’s date of termination of employment was July 21, 2008.

On December 19, 2008, Ms. Olszewska received an option election package in respect of her Plan entitlements. Her entitlements were determined under the normal provisions of the Plan for a reduced early retirement benefit, not the Window, and with no bridge benefit. Ms. Olszewska had not returned her pension election at the time the hearing started.

Ms. Olszewska took the position that she should have been permitted to retire under the Window and simultaneously pursue the grievance against the University in which she sought to have her layoff rescinded and be reinstated to her employment with the University. According to Ms. Olszewska, she intended to retire and was prevented by the University from applying for her pension, or in the alternative, that she had applied for her pension by verbally advising the University of such intention.

On March 30, 2012, the Deputy Superintendent of Financial Services (“Deputy Superintendent”) issued a Notice of Intended Decision (“NOID”) refusing to order the University to amend the Plan to extend the Window beyond its expiry date so that Ms. Olszewska could receive an unreduced
pension and other benefits on early retirement and to retire effective July 1, 2008. Ms. Olszewska appealed this NOID to the Ontario Financial Services Tribunal (“FST”).

**Decision**

First, the FST found that Ms. Olszewska was eligible for the Window prior to June 30, 2008 deadline. The FST determined that Ms. Olszewska was both within the eligibility class and met the age and service requirements under the Plan. However, the Plan text and the collective agreement were “clear and unequivocal” that the Window expired on June 30, 2008, and since Ms. Olszewska had not given notice of an intention to retire by that date or thereafter, her eligibility under the Window and bridge benefit ceased on that date.

Second, Ms. Olszewska produced no evidence that she was prevented from electing retirement or in fact ever elected to retire in writing or verbally. According to the FST, had she written a letter to the University indicating a decision to elect the Window notwithstanding her grievance, the FST may have decided differently in this case.

Generally, the FST found that the University acted reasonably and within the confines of the Plan in denying Ms. Olszewska access to the Window. The language of the Plan was clear as to the closing date. Additionally, it was clear that, prior to the closing date, Ms. Olszewska was required to voluntarily elect to retire, advise the University in writing and cease employment prior to date. On Ms. Olszewska’s own admission, she failed to satisfy the above requirements prior to or after the clearly stated deadline under the Plan and collective agreement. The FST also concluded that it cannot direct the University, as Plan administrator, to act contrary to the clear terms of the Plan to permit Ms. Olszewska to retroactively apply for pension as at June 30, 2008, the deadline for the Window.

**Implications**

This case, while unique in its specific facts, reflects the importance of clearly drafting and communicating special plan provisions like early retirement windows or other terms where failure of a member to take action by a deadline will result in the imposition of a default consequence. Where the consequences of not making an election or taking some other requested step are properly communicated to members, a member who is unhappy with the default will have difficulty challenging the result.
CONSENT BENEFITS

Eliminating consent early retirement benefits after a longstanding practice of paying them, coupled with overall benefit reductions due to the poorly funded status of the plan, may lead to dissatisfaction amongst plan members. The Chapman case is a class action in which affected members are challenging a plan administrator’s decision to continue granting consent benefits while the plan’s funded status declined, and claiming that various service providers, including the third-party administrator and actuary should also be held responsible for their alleged losses.

Chapman v. Benefit Plan Administrators, 2013 ONSC 3318

Facts

The Eastern Canada Car Carriers Pension Plan (“Plan”) is a federally registered, multi-employer, negotiated contribution defined benefit pension plan, administered by a board of trustees (“Trustees”). One-half of the Trustees are appointed by the union (“Union”) and the other half are appointed by participating employers.

The normal retirement age under the Plan is 65. However, the Plan also provides that a member is entitled to receive certain enhanced early retirement benefits, with the consent of the Trustees on the advice of the Plan actuary, after reaching age 55 with the requisite years of service.

The Plaintiff, Mr. Chapman, claimed that, during the period from January 1, 2000 to March 13, 2006, the date when the Trustees announced they would no longer grant consent to the early retirements (“Class Period”), the Plan was experiencing solvency issues. During the Class Period, the Trustees regularly granted their consent to the enhanced early retirement benefits. However, actuarial reports contained an assumption that the Trustees would not consent to the payment of enhanced early retirement benefits.

In 2006, the Office of the Superintendent of Financial Institutions (“OSFI”) identified numerous issues concerning the actuarial valuation report that had been prepared as at December 31, 2002, including the report’s assumption that the Trustees would not consent to future enhanced early retirement benefits. OSFI also found that the Trustees had not complied with pension legislation and OSFI guidelines, including the granting of consent to enhanced early retirement benefits without first obtaining actuarial advice.
Effective January 1, 2008, due to the Plan’s funded status, the Trustees decided to reduce accrued benefits and future benefit accruals under the Plan. The reductions affected both retirees and active Plan members as follows:

- retired members’ lifetime pension benefits and bridge benefits were reduced by 10%;
- active and deferred vested members’ accrued benefits were reduced by 10%; and
- active members’ future service benefits were reduced from $88 to $70 per month per year of service.

In late 2009, most of the active members left the Union and opted to terminate their membership in the Plan.

The Plaintiff commenced an action against the Trustees, the administrative agent and actuarial consultant, as well as certain employees of the administrative agent and actuarial consulting firm ("Defendants"), claiming that the benefit reductions resulted (in part) from their negligence or breach of trust with respect to the granting of the enhanced early retirement benefits during the Class Period. Specifically, the Plaintiff claimed that $14.5 million of the Plan’s total solvency deficiency of roughly $43 million, resulted from the Trustees’ granting of the enhanced early retirement benefits.

The Plaintiff filed a motion to have the action certified as a class proceeding on behalf of approximately 3,500 individuals, representing the Plan membership.

**Decision**

The Ontario Superior Court of Justice ("Court") certified the action as a class proceeding, finding that the five requirements for certification under the Ontario Class Proceedings Act, 1992, were met. The Court’s findings are described in more detail below.

(a) The pleadings or the notice of application discloses a cause of action

The Court affirmed the general test that the claim should be permitted to proceed, unless it is plain and obvious that it cannot succeed. For purposes of applying this test, no evidence is admissible and allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proven, and assumed to be true.

Applying this test to the current case, the Court found that, despite the fact that the Trustees had the ability to increase or decrease benefits, a claim remains regarding whether those benefits were reduced as a result of the
Defendants’ alleged misconduct. Further, even if some class members cannot prove losses, if some class members are able to do so, there has been some damage suffered by the class.

The Court also concluded that it was not plain and obvious that the Plaintiff cannot succeed in establishing that the administrator owed a duty of care to the Plan beneficiaries. In this regard, the Court stated that an administrative agent or custodial trustee may be found to have a common law duty to pension plan beneficiaries beyond the terms of its contract, and whether that duty arises depends on the factual findings about the role played and functions assumed by the administrative agent or custodial trustee, as applicable.

Similarly, the Court found that it is not plain and obvious that the claim against the plan actuary for breach of fiduciary duty could not succeed.

(b) There is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant

The Court found that this requirement is satisfied as the proposed class, consisting of approximately 3,500 individuals representing the Plan membership, is readily identifiable.

Further, the Court held that it is acceptable for class members to have different levels of recovery, and that these differences do not automatically indicate that there is a conflict in the class. The representative plaintiff need not show that everyone in the class shares the same interest in the resolution of the common issues.

(c) The claims or defences of the class members raise common issues

As a basic principle, the Court stated that an “issue is common where it constitutes a substantial ingredient of each class member’s claims and where its resolution is necessary to the resolution of each member’s claim” [at para. 63]. Further, the Court stated that the commonality question should be approached purposively, with the central question being whether the certification of a class would avoid duplication of fact-finding or legal analysis.

In the circumstances of this case, the Court found that the following issues were common:

- whether the Trustees committed a breach of trust in consenting to the enhanced early retirement benefits during the Class Period;
- whether the Plan administrator and the actuaries each had a duty of care to the Plan beneficiaries, and whether they breached that duty;
whether a breach of a duty of care on the part of any of the Defendants caused the reduction in benefits, either in whole or in part;

- if deterioration in the solvency valuation in the Class Period was caused by the breaches of one or more of the Defendants, how is liability to be apportioned among them; and

- are the employer Defendants liable for any breach on the part of their respective employees?

The Court held that litigation of these issues as a class proceeding will avoid duplication of fact-finding and legal analysis, and that the assessment of these issues is distinct from whether individual Plan members can prove that they suffered damages as a result of the benefit reductions.

Notably, the Court declined to certify two issues as common issues. These were the questions of appropriate remedy (restitution or damages), and whether damages can be assessed in the aggregate.

(d) A class proceeding would be the preferable procedure for the resolution of the common issues

The Court rejected the Defendants’ argument that Plan member concerns respecting the benefit reductions should instead be addressed by OSFI, since, according to the Defendants, OSFI has the requisite expertise, is statutorily authorized to take remedial measures, and is in a better position to deal with the competing interests of Plan beneficiaries.

Instead, the Court determined that the litigation “is about the conduct of the defendants and whether they acted improperly, to the detriment of the Plan beneficiaries,” and that there is no basis on which to conclude that OSFI is willing or interested in pursuing any action for the benefit of the Plan beneficiaries [at para. 73].

(e) There is an appropriate representative plaintiff

The Court accepted Mr. Chapman as an appropriate representative plaintiff, despite the fact that he ceased to be an active Plan member in 2009.

Implications

This decision deals only with the certification of the action as a class proceeding, not the merits of the Plaintiff’s claims. If the action proceeds to a hearing, we can expect guidance concerning the duties owed by plan trustees/administrators when granting consent benefits and reducing benefits, particularly when a plan is not fully funded, and those of agents and
advisors, like third party administrators, actuaries, and custodial trustees retained to assist administrators.

AMENDMENTS TO PLAN TERMS

In recent years, as plan sponsors have faced funding deficits and growing special payments, they have reviewed their benefit formulas and plan designs and in some cases, sought to reduce benefits in order to reduce costs, leading to litigation over the scope of the employer’s ability to do so. Changes to administrative practice, although not traditionally thought of in the same way as amendments to official plan documents, may also be challenged as affecting members’ rights under the plan.

ACCRUED BENEFITS AND VOID AMENDMENTS

In Halliburton Group Canada Inc. v. Alberta, an employer sought to convert its defined benefit (“DB”) plan to a defined contribution (“DC”) plan. As part of the conversion, the plan was amended to freeze salary and service as of the date of the conversion. The Alberta Court of Appeal determined the amendment was improper, and held that under the Alberta pension statute members of a DB plan have a vested right to have their pension benefit entitlement calculated at the normal retirement date, rather than to freeze earnings at the date of the conversion amendment. In Ontario, this issue was at the centre of proceedings concerning the Royal Ontario Museum Pension Plan.

ROMCA v. Superintendent of Financial Services, 2013 ONFST 9

Facts


The Plan had provided for benefits to be calculated based on the best 36 consecutive months of earnings prior to retirement. However, effective January 1, 2010, ROM amended the Plan’s benefit formula so that the earnings component of the benefit formula would instead be based on the greater of:

- the best 36 consecutive months of earnings for employment prior to January 1, 2010; and
the best 60 consecutive months of employment prior to retirement ("Amendment").

In November 2009, ROM provided notice of the Amendment to all active members of the Plan and to the three bargaining agents. The Amendment was registered by the Financial Services Commission of Ontario ("FSCO") on January 13, 2010.

The Association subsequently complained to the Superintendent of Financial Services, challenging the Amendment as void under the Ontario Pension Benefits Act ("PBA").¹ The Association alleged that the change to the calculation of “final average earnings” for service prior to January 1, 2010, from one based on a member’s earnings over the entire period of employment, to a calculation based on a member’s earnings prior to January 1, 2010, violated s. 14(1)(a) of the PBA, which prohibits reductions to accrued pension benefits. The PBA does not define the terms “accrued” or “pension benefit accrued”.

According to the Association, under a DB plan where the pension formula is based on a member’s earnings prior to termination or retirement, the pension benefits that have “accrued” to a member include the potential for future earnings to be higher. The argument was that the “accrued pension benefits” should be calculated based on service as of the date of the Amendment and the formula for calculating earnings as of the date of the Amendment. The Association did not challenge the prospective nature of the change to the earnings formula, for employment on and after January 1, 2010.

On August 8, 2012, the Superintendent of Financial Services ("Superintendent") issued a Notice of Intended Decision rejecting the Association’s position. The Superintendent found that the Amendment preserves the highest average salary accrued under the terms of the Plan prior to the effective date of the Amendment. Future earnings are contingent events that do not form part of the amount of the commuted value of a pension benefit that has accrued as at the effective date of an amendment.

The Association then filed a Request for a Hearing before the Ontario Financial Services Tribunal ("FST"). OPSEU and SEIU supported the Association’s position, and each participated as a party at the FST hearing. ROM supported the position of the Superintendent and also had party status.

¹ The SEIU and OPSEU also filed grievances under their respective collective agreements, alleging that the Amendment violated the terms of the agreements. Both grievances were dismissed at arbitration.
**Decision**

The two issues before the FST were: (1) whether the Amendment contravened the PBA; and/or (2) whether the Amendment contravened the terms of the Plan protecting accrued benefits.

(a) *No contravention of the PBA*

The FST concluded that s. 14(1)(a) of the PBA only prohibits the reduction of the “amount” of a pension benefit accrued based on employment before the effective date of an amendment. The “amount” is to be calculated as of the date of the amendment, based on service and earnings up to that date.

To assist with its interpretation, the FST referred to its earlier decision in *McGrath v. Superintendent of Financial Services*, Decision No. P0335-2008-2 (“McGrath”). *McGrath* involved an amendment to the formula for calculating the CPI adjustment for retired members. In *McGrath*, the FST concluded that the “amount” of pension benefits must be calculated as of the effective date of the amendment in order to determine whether an amendment complies with the requirement that the amount of accrued benefits not be reduced.

The FST also considered actuarial evidence and Canadian jurisprudence supporting the position that “accrued benefits” are calculated on a point-in-time basis, based on earnings and service current at the time of calculation. The FST accepted that it is possible for a benefit to have accrued even though it may not be susceptible of precise calculation at a particular time, but that the Association did not establish that members have an accrued entitlement to a pension based on the earnings formula in place prior to the Amendment.

The FST distinguished the language of s. 14 of the PBA from the parallel language of the *Employment Pension Plans Act* (Alberta) (“EPPA”), considered in the 2010 decision of the Alberta Court of Appeal in *Halliburton Group Canada Inc. v. Alberta*, 2010 ABCA 254 (“Halliburton”). In *Halliburton*, the Court of Appeal upheld a finding of the Alberta Superintendent of Pensions that an amendment to freeze earnings under a similar DB formula was in violation of the EPPA. The FST rejected the application of *Halliburton* to the PBA, citing differences in the relevant legislative provisions, including that the EPPA protects “a person’s benefits in respect of employment” whereas the PBA protects “the amount of pension benefit accrued”. The FST then noted the limited application of *Halliburton* based on the specific language of the plan text in question.
(b) No contravention of the terms of the Plan

The FST also dismissed the Association’s allegation that the Amendment is contrary to the Plan terms, and therefore in violation of s. 19(3) of the PBA which requires that a pension plan be administered in accordance with its own terms. The Plan prohibits amendments that reduce “accrued benefits”.

The FST held that the language in the Plan effectively provided the same level of protection against Plan amendments as the protection provided by s. 14(1)(a) of the PBA, and so dismissed the Association’s argument that the Amendment was a violation of the Plan.

The FST noted, however, that pension plans may provide more protection than the statutory minimum standard against changes to plan terms, and that other cases will have to be determined on the specific plan amendment language.

Implications

This FST decision confirms FSCO’s position that the PBA’s void amendment rules do not preclude amendments to earnings formulae that freeze earnings at the date of the amendment. An “earnings freeze” can be accomplished without running afoul of s. 14(1)(a) of the PBA since benefits based on future (or projected) earnings are not considered to be part of the amount accrued as at the date of the amendment.

The decision also supports the long-standing industry interpretation that the accrued benefit provisions of the PBA do not prohibit changes to earnings definitions (whether to the types of compensation that are included, or to the averaging period adopted), as long as earnings applied to that service are not less that they were at the date of the amendment. This conclusion should apply equally to ongoing DB plans, and to DB plans that are frozen or converted to defined contribution plans.

Finally, the decision confirms that the result reached in the Alberta Halliburton case will not generally apply to Ontario pension plan members. However, as the decision concerns only the Ontario PBA, the legal effect of similar amendments to multi-jurisdictional plans must be reviewed based on the pension standards legislation in every other applicable jurisdiction.

As with other adverse amendments, an amendment that freezes earnings must satisfy the PBA notice requirements, and care must be taken to ensure that such an amendment does not violate the terms of the plan or the terms of applicable collective agreements.
Notice of Intended Decision of the Superintendent of Financial Services relating to the CAMI Automotive Inc. Pension Plan for Salaried Employees, Registration Number 0947556, November 18, 2013

A case involving an amendment to a plan’s indexing provision is moving through the system and being watched closely. At issue in particular is whether it can be removed from all service for a member who has not yet met the retirement eligibility criteria necessary to receive it.

Facts

The CAMI Automotive Inc. Pension Plan for Salaried Employees (“Plan”) was established by CAMI Automotive Inc. (“CAMI”) effective January 1, 1988, as a defined contribution (“DC”) plan. Effective January 1, 1995, a non-contributory defined benefit (“DB”) provision was added to the Plan. Effective January 1, 2011, CAMI was acquired by General Motors of Canada Limited (“GM”). From the date the Plan was established, CAMI or GM, as applicable, was the Plan sponsor and administrator.

Section 6.4 of the Plan text provided an indexation benefit for the DB benefits. Section 6.4 states:

The annual pension payable in accordance with Section 6.1 or 6.2 to or on account of any Pensioner who retired from active employment with the Company shall be increased each January 1st following the Pensioner’s actual retirement date plus one year...[emphasis added]

Initially, the Plan’s termination section described a deferred pension in accordance with various provisions, including s. 6.4 “as applicable.” However, this section was amended in 2003, retroactive to 1995, to delete the reference to the indexing provision (“2003 Amendment”).

From the time the DB provision was added in 1995, CAMI applied the Plan’s indexation benefits only to members who retired from active employment, to the exclusion of members who otherwise terminated membership in the Plan and were entitled to a deferred pension.

Effective June 30, 2011, GM amended the Plan to freeze both the DB and DC benefits (“2011 Amendment”). Under the 2011 Amendment, all active members who were eligible to retire under the terms of the Plan and active members who joined another GM pension plan, continued to have the indexation provisions apply to their frozen accrued pension benefits. The indexation benefits, however, were eliminated for all other active members (who were not then eligible to retire), even for past service credited under the Plan prior to the June 30, 2011 effective date of the amendment.
At issue was whether the Plan’s indexation benefits were payable regardless of whether or not a member retires from active employment, and whether the Plan’s indexation benefits were capable of being eliminated with respect to employment before the effective date of an amendment for members who were not eligible to retire.

GM’s position before the Superintendent was twofold. First, GM argued that the indexation benefits are ancillary benefits for the purposes of the Ontario Pension Benefits Act ("PBA"), and therefore, could be eliminated for those who were not eligible to retire under the Plan. Second, it argued that the indexation benefits were only payable to members who retire from active employment. GM also argued that the PBA’s gradual and uniform accrual of benefits rule did not apply.

Decision

On the first issue, the Superintendent rejected GM’s argument that the indexation benefits are ancillary benefits, finding instead that the indexation benefits provided for in the Plan fall within the definition of a “pension benefit” as defined in s. 1 of the PBA. The Superintendent reasoned that, where an indexation formula is part of a plan’s benefit formula, the indexation benefit, once determined for a year, becomes part of the periodic amount payable to a member during the member’s lifetime, and is properly characterized as a “pension benefit.”

In accordance with s. 14 of the PBA, a “pension benefit,” such as the Plan’s indexation benefit, may not be amended to reduce the amount or the commuted value of the benefit that has accrued with respect to employment before the effective date of a plan amendment (PBA, s. 14(1)), and the indexation benefit must accrue in a gradual and uniform manner (PBA, s. 14.1(1)). The Superintendent stated that if indexation vests only when the member terminates in certain circumstances, the benefit is not accruing in a gradual and uniform manner.

The Superintendent was of the view that the 2003 Amendment purporting to restrict indexation to those who retire from active employment was a void amendment under s.14(1)(a) of the PBA.

In response to GM’s argument that the indexation benefits were only payable to members who retire from active employment (and not payable to deferred vested members), the Superintendent referred to s. 9(1)(b)(i) of the Plan text as it read in 1995, before it was amended in 2003. Section 9(1)(b)(i) provides that members who terminate employment after the completion of 24 months of continuous service, other than for reason of retirement or death, are entitled to a deferred vested pension, as follows:
The deferred pension shall be determined in accordance with Section 6.1 or 6.2(a) and Sections 6.3 and Section 6.4, as applicable, but based on the Active Member’s or Transferred Member’s Best Average Earnings, Best Average YMPE and Credited Service to the date of his termination. [emphasis added]

Interpreting this provision, the Superintendent found that the indexation benefit extended to all members upon termination of membership in the Plan. Moreover, while the Plan text contains the words “as applicable” following the reference to s. 6.4, the text did not indicate that there were any circumstances in which the indexation provision would not be applicable to a terminated member. In addition, s. 9(1)(b)(i), a provision governing the calculation of the deferred pension entitlement, contained a specific reference to the indexation benefit. As a result, the indexation benefits were found to apply to all members and not just those members retiring from active employment.

Based on the finding that contractual indexation is part of a member’s pension benefit and is not an ancillary benefit, the 2003 Amendment would reduce the commuted value of a pension benefit accrued before the effective date.

The fact that the 2003 Amendment had been registered did not, in the Superintendent’s view, prevent this finding because the administrator was required to certify that the amendment complied with the PBA, and disclose the nature of the amendment. Since it did not, the filing did not comply with the PBA.

Amendments made in 2006 and 2011 were void for similar reasons, because they built on the 2003 Amendment. The Superintendent has declined to exercise his discretion to allow the continued registration of the Plan with the amended indexation provision.

Having rejected GM’s argument that the indexation benefits were intended to be limited to members who retired from active employment, and could be eliminated for other members, the Superintendent indicated in the NOID that he:

- intends to revoke the registration of each part of the amendments related to the indexation provisions subsequent to 1995;
- intends to order GM to apply the indexation provisions to all years of service credited under the DB provisions of the Plan, regardless of whether a member retires from active employment; and
• intends to require that GM recalculate and adjust all pension benefits payments and commuted value payments paid under the Plan since January 1, 1995.

Implications
This case deals with important issues about the treatment of contractual indexing benefits under the PBA, how they vest (or become “accrued” benefits), and the extent to which they can be removed from prior service for a member who has not yet retired or otherwise met the eligibility requirements to receive them. The NOID is in contrast to the Quinn v. New Brunswick (Finance and Human Resources), 2011 NBQB 182 decision, and will be of interest to plan sponsors considering amendments to reduce the cost of their DB plans.

Also of interest is the implication that the 2003 Amendment, which would seem to have been intended by GM as a housekeeping amendment, would not likely have been saved because it was consistent with how the Plan had been administered since 1995 (had it not otherwise been viewed as unacceptable).

Update
GM filed a request for a hearing with the Financial Services Tribunal on December 16, 2013 to contest the Superintendent’s NOID.

CHANGES TO ADMINISTRATIVE PRACTICE
Plan texts do not always provide complete answers as to how to administer the plan in a manner that is consistent with its terms. The IESO case below is an example of a situation where a union successfully challenged a change in administrative practice as an alteration to the pension plan that should have been bargained, despite the absence of an amendment to the official terms of the pension plan text.


Facts
The Power Workers’ Union (“PWU”) pursued a grievance that the Independent Electricity System Operator (“IESO”) breached the collective agreement when it discontinued the availability of the “mix-and-match” pension option.

The pension plan in question is a successor plan to the Ontario Hydro Pension Plan (“Plan”), and is bargained by the IESO and two trade unions – the PWU and the Society of Energy Professionals (“Society”). This mix-and-
match option was offered as early as 1991 for Plan members who had service both before and after January 1, 1987. The option allowed members to choose one transfer option with respect to benefits for service prior to 1987, and another transfer option for benefits related to service after 1986.

In 2004, the IESO asked for the view of the Financial Services Commission of Ontario ("FSCO") on whether the mix-and-match option was prohibited under the Ontario Pension Benefits Act ("PBA").

FSCO informed the IESO that the mix-and-match option was not permissible under the PBA. As a result, the IESO discontinued the option. It updated pension administration forms and the Plan brochure to reflect this change.

After it learned of the change, the Society sought an opinion from FSCO on this issue, and received an unofficial verbal opinion (later confirmed by email and letter) that the mix-and-match option was not a violation of the PBA. The Society and the PWU then filed grievances concerning this issue.

Shortly thereafter, a non-union employee of IESO formally asked FSCO to order that the IESO provide the mix-and-match option. FSCO refused to make the requested order. The IESO was not in contravention of the PBA in failing to provide the option, as there was no requirement under the PBA to provide the option, and FSCO was of the view that the Plan did not contain a provision allowing for the option.

At arbitration, the PWU argued that the PBA permits the mix-and-match option, which is contemplated by the Plan, and the removal of this option should have been negotiated with the PWU as required by the collective agreement between the parties.

Arbitrator Albertyn ("Arbitrator") first found that the PBA (in particular, the transfer provision at s. 42) does not preclude the mix-and-match option, provided that the option is available under the Plan terms.

Second, the Arbitrator found that the Plan provides for the option. As the Plan is contained within the collective agreement, which referenced the Plan booklet, the Arbitrator interpreted the collective agreement as well. He held that the longstanding practice of providing the mix-and-match option was described in the Plan booklet, and found that this indicated a common understanding between the parties to provide the option.

Finally, the Arbitrator held that the IESO violated the collective agreement when it unilaterally removed the option. The Arbitrator noted that, while the Plan allows amendments, the amendments are subject to the collective agreement. He held that the IESO can request changes, but, as required by
the collective agreement, they must be negotiated and mutually agreed upon (with the exception of legislative changes).

In summary, the Arbitrator upheld the grievance, and ordered that the IESO reinstate the mix-and-match-option. IESO sought judicial review of this decision by the Ontario Divisional Court (“Court”).

Decision

The Court upheld the Arbitrator’s decision, applying a standard of reasonableness to all three issues.

First, the Court found that the Arbitrator’s interpretation of s. 42(1) was reasonable, in that the PBA merely provides for minimum standards and a plan may permit a member to choose to transfer less than the entire amount. The Court did not impose a standard of correctness on this issue because it was a discrete issue and did not involve questions of law outside the general employment context (for example, contribution holiday issues involve general contract and trust law principles).

The Court also stated that the Arbitrator’s task was not limited to interpreting the Plan, but involved interpreting the collective agreement, which incorporated the Plan. In this case, the parties’ collective agreement incorporated the Plan, as “generally described in the brochure”. The Plan brochure included the mix-and-match option. This brochure, along with the collective agreement and the parties’ long-standing practice, confirmed that the parties understood that the Plan provided for the mix-and-match option.

He noted that, contrary to the arguments of the IESO, the Arbitrator was not required to defer to FSCO’s position that the Plan did not provide for the mix-and-match option. While the Arbitrator had been asked to interpret and apply the collective agreement and determine whether IESO violated the collective agreement when it removed the mix-and-match option, these were not the issues before FSCO.

Additionally, the Court noted that FSCO was not exercising a policy-making function or issuing a policy decision of general application under the PBA. Rather, FSCO was interpreting the Plan. As a result, there was no conflict between the two decisions.

Finally, the Court found that the Arbitrator was reasonable in his conclusion that even though IESO had not amended the Plan text, it had contravened the collective agreement by making a unilateral change in practice (i.e. which termination options were offered). Whether the IESO unilaterally changed its administrative practice or unilaterally changed the text, the impact on Plan members was the same, that is, they no long received a benefit that was
available prior to the change. As required by the collective agreement, this change should have been mutually agreed by the parties.

**Implications**

This decision illustrates that longstanding practices and employee communications can in certain circumstances have an effect on the rights of members under the pension plan in a unionized environment. When considering a change to an administrative practice, it may be appropriate before proceeding to consider the wording of the collective agreement (including whether the pension plan is incorporated into that agreement), and whether the employer has the ability to make unilateral changes to the plan (which might include employee booklets, or an administrative practice) without negotiating such changes with the union. It is also of interest that the Court accepted an arbitrator’s jurisdiction to interpret the PBA and a pension plan and that this ability was distinct from the role of the pension regulator.

**SPOUSAL ENTITLEMENTS**

Pensions are often the largest asset a spouse may own. As the cases below demonstrate, entitlement to a portion of the plan member’s pension can be complicated and fiercely contested after the member’s relationship has ended.

**PENSION ASSIGNMENT LANGUAGE**

In marriage breakdown situations, a spouse may sometimes assign a portion of his or her pension to the former spouse when dividing the assets of the marriage. In 2012, the Ontario Superior Court of Justice held that the assignment of a plan member’s pension entitlement must be “clear and unambiguous.” This decision was later appealed to the Court of Appeal for Ontario. A summary of the appellate decision is below.

**Vladescu v. CTVglobemedia Inc., 2013 ONCA 448, leave to appeal to SCC refused (2014)**

**Facts**

Mr. Filotti was employed by CTV and was a member of one of its defined benefit pension plans, which was registered under the federal Pension Benefits Standards Act, 1985 (“PBSA”).

In 2002, Mr. Filotti and Ms. Vladescu executed a separation agreement (“Separation Agreement”). The Separation Agreement contained specific provisions addressing Mr. Filotti’s pension benefits. Attached to the Separation Agreement was a document, entitled “Schedule C”, which
purported to authorize and direct CTV, as the plan administrator, to pay all “survivor benefits” to Ms. Vladescu. The pension provisions in the Separation Agreement stated that Ms. Vladescu was “solely entitled to full survivor benefits” and would continue to be the “sole and exclusive person entitled.” It also included language requiring Mr. Filotti to make all possible efforts to enter into a “Cohabitation Agreement or Marriage Contract wherein […] his future wife or common-law wife releases all rights or claims of any kind or nature whatsoever to his pension”. These provisions were also incorporated into the divorce order that was ultimately completed in 2003 (“Divorce Order”).

CTV treated the Separation Agreement as containing an irrevocable beneficiary designation in favour of Ms. Vladescu. A beneficiary cannot receive death benefits in preference to an eligible surviving spouse, if there is one.

By the time Mr. Filotti died in 2009, he had remarried. CTV took the view that Mr. Filotti’s current spouse was entitled under the PBSA to the pre-retirement death benefit, and that the Separation Agreement and Divorce Order were not sufficient to create an assignment that would affect that spousal priority. Ms. Vladescu, however, sought payment of the full value of the death benefit on the basis that the death benefit was assigned to her under the Separation Agreement and Divorce Order.

At trial, the Ontario Superior Court of Justice determined that the PBSA permitted Mr. Filotti to assign his pre-retirement death benefit to Ms. Vladescu. However, pension assignments under the PBSA required “clear and unambiguous” language, especially in cases where the assignment would supersede the statutory rights of another person. Given the language of the Separation Agreement and Schedule “C”, the Separation Agreement was found to be an irrevocable beneficiary designation in favour of Ms. Vladescu, rather than an “assignment”. As a result, CTV was ordered to pay the full amount of the pre-retirement death benefit to Mr. Filotti’s spouse at the time of his death. For a more detailed analysis of the lower court decision, see page 54 of the Hicks Morley Pension and Benefits 2013 Case Law Update.

Ms. Vladescu appealed this decision to the Court of Appeal for Ontario (“Court”).

**Decision**

The Court dismissed Ms. Vladescu’s appeal. Justice Gillese, writing on behalf of the Court, held that the relevant provisions of the PBSA created a presumptive entitlement to the pre-retirement death benefit in favour of Mr.
Filotti’s spouse at the date of his death that could only be overridden by specific, clear and unambiguous language. The Court also noted that clear language is needed to allow plan administrators to fulfill their duty to pay benefits to the correct recipients.

The Court found that the disputed provisions in the Separation Agreement did not constitute an assignment since there was no transfer of Mr. Filotti’s pension rights or interests under the Plan; the language merely described Mr. Filotti’s pension benefit and acknowledged Ms. Vladescu’s legal rights to those benefits at the time the Separation Agreement was executed. The disputed direction in Schedule “C” simply directed and authorized a payment; it did not reflect an intent to transfer rights.

The Separation Agreement did not use the term “assign” or state that Ms. Vladescu would continue to be entitled to the pre-retirement death benefit irrespective of the existence of a subsequent spouse. In fact, the Court noted that the Separation Agreement contained an express recognition that a subsequent spouse could have priority to the benefits, which was inconsistent with an intent to assign or transfer the member’s rights. The Court also commented that the use of the term “survivor benefit” in the Separation Agreement lacked clarity since a “survivor benefit” could refer to either a monthly spousal payment following the plan member’s death, or a lump-sum pre-retirement death benefit. In sum, these facts indicated to the Court the absence of a clear transfer of Mr. Filotti’s pension interest to Ms. Vladescu.

Because the Court found that the Separation Agreement did not contain an assignment, it declined to comment on whether the PBSA permitted the assignment of pre-retirement death benefits.

**Implications**

The Court of Appeal’s decision provides welcome guidance to plan administrators who are faced with confusing pension language in a court order or separation agreement, particularly where a pre-retirement death benefit is at stake and there are competing claims to the payment. This case is the first clear judicial pronouncement on how pension assignment language must be drafted in order to be effective, and will provide assistance as plan administrators continue to examine separation agreements and court orders, particularly those that fall under the pre-Bill 133 regime in Ontario, the federal PBSA and the legislation of other provinces.
Update

On January 16, 2014, the Supreme Court of Canada denied Ms. Vladescu’s leave to appeal, thereby leaving the Court of Appeal’s decision on pension assignment language as the final word on the issue.

STATUTORY DEFINITION OF SPOUSE

Since pension reform in the late 1980’s, the widespread understanding was that Ontario pension legislation made a pre-retirement death benefit payable to a common-law spouse in priority to a designated beneficiary, even if the deceased member was separated from, but still married to, an earlier spouse. A former spouse challenged this decision, which led to unexpected results.


On October 31, 2012, the Court of Appeal for Ontario released its decision in *Carrigan v. Carrigan Estate* ("Carrigan"), which denied the payment of a pre-retirement death benefit to the deceased plan member’s common-law spouse due to the existence of a legally married spouse. The majority of the Court of Appeal concluded that in that situation, there was no “spouse” entitled to the benefit, and instead directed the payment to the plan member’s designated beneficiaries. A more detailed summary of the Ontario Court of Appeal’s *Carrigan* decision can be found in our *FTR Now* and in the *Hicks Morley Pension and Benefits 2013 Case Law Update*.

To those in the pension industry, the decision of the Court of Appeal for Ontario was an unexpected interpretation of the pre-retirement death benefit provisions in the Ontario *Pension Benefits Act* ("PBA") in a “dual-spouse” situation. Accordingly, the common-law spouse’s application for leave to appeal to the Supreme Court of Canada was widely watched by pension lawyers and administrators alike. The Supreme Court denied leave to appeal on March 28, 2013, leaving many seeking guidance on how spousal benefits should be administered in future “dual spouse” situations.

The Financial Services Commission of Ontario (“FSCO”) published “FSCO’s Position on the Implications of the *Carrigan* Decision” on July 3, 2013, and, in the absence of legislation on the matter, issued the following conclusions:

- The *Carrigan* interpretation in respect of rights granted to the “spouses” of members, former members and retired members, who are not living “separate and apart” from the member when the right is exercised, is limited to pre-retirement death benefits.
Subject to a tribunal or court decision that holds otherwise, the Carrigan decision “does not take away the common-law spouse’s right to a joint and survivor pension…even if the member is still legally married to another person (who is living separate and apart from the member) on the date the pension begins.”

Any pre-retirement payment made to the common-law spouse in a dual spouse situation prior to October 31, 2012, does not need to be corrected.

The Ontario government has also reacted to the Carrigan decision. In the May 2013 Budget, the government announced that it would “review the Ontario Court of Appeal’s recent ruling regarding spousal entitlements in the case Carrigan v. Carrigan Estate, propose amendments to the PBA and, if necessary, amend the regulations under the PBA.”

On December 11, 2013, the Ontario government introduced Bill 151, the Strengthening and Improving Government Act (Bill 151) which proposes amendments to the PBA to reverse the impact of Carrigan. These amendments clarify that the common-law spouse is entitled to a pre-retirement death benefit or joint and survivor pension benefit in a “dual spouse” situation as in Carrigan. Bill 151 also proposes a discharge for all administrators who paid the joint and survivor benefit or pre-retirement death benefit to the member’s common-law spouse over the legally married spouse, prior to the release of the Carrigan decision.

At the time of writing, it is unknown whether or when Bill 151 might come into effect, and there is uncertainty as to how to handle deaths which occur during the period after the Carrigan decision but before Bill 151 comes into effect.

“DOUBLE DIPPING” AT TERMINATION OF EMPLOYMENT

Non-unionized employees who are terminated without cause may be entitled to significant reasonable notice entitlements, particularly if they worked for the employer for a long time. Traditionally, the reasonable notice period represents the period of time it would reasonably take for the employee to find other employment. In light of the purpose of the reasonable notice period, receiving additional employment-related income benefits during that period can appear to be a “double win” for the employee.
In this next case, the employer argued that it should be able to deduct a “collateral benefit” (i.e. pension benefits) from the wrongful dismissal damages it might otherwise be required to pay to a terminated employee who began receiving a pension from the employer’s pension plan after he was terminated.

**IBM v. Waterman, 2013 SCC 70**

**Facts**

IBM Canada Ltd. (“IBM”) dismissed a long-term employee, Mr. Waterman, as a result of corporate restructuring. At the time of his termination, Mr. Waterman was 65 years old and had 42 years of service.

During his employment with IBM, Mr. Waterman was a member of IBM’s defined benefit pension plan, which was funded by IBM. Members did not contribute. Upon his termination date, Mr. Waterman began receiving a full, unreduced pension under this plan.

Mr. Waterman decided not to accept the severance package offered by IBM, and pursued a claim for wrongful dismissal. He was successful in this claim, and the Supreme Court of British Columbia awarded him damages based on a 20-month reasonable notice period.

IBM took the position that Mr. Waterman’s pension payments should be deducted from the salary and benefits otherwise payable to him during this 20-month reasonable notice period. IBM relied on the 1997 decision of the Supreme Court of Canada, *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315 (“Sylvester”), where that Court found that disability benefits under an employer-funded plan were deductible from wrongful dismissal damages, based on the premise that “it makes no sense to pay damages based on the assumption that [the employee] would have worked in addition to disability benefits which arose solely because he could not work” [at para. 17].

Both the Supreme Court of British Columbia and the British Columbia Court of Appeal, however, found that the pension benefits Mr. Waterman received during the reasonable notice period were not deductible from the wrongful dismissal damages. For a detailed summary of the Court of Appeal decision, see page 56 of the *Hicks Morley Pension & Benefits 2012 Case Law Update*.

This decision was then appealed to the Supreme Court of Canada (“Court”).
Decision

Justice Cromwell, writing for the majority of the Court, concluded that unless the pension plan text or employment contract expressly requires otherwise, receipt of a pension does not generally reduce damages otherwise payable to an employee for wrongful dismissal. The Court confirmed that this principle applies regardless of the type of pension plan in question, and regardless of whether the employer pays the full cost of the plan.

In coming to this conclusion, Justice Cromwell revisited first principles in the law of damages. As a starting point, the compensation principle provides that contract damages should place the plaintiff in the position that he or she would have been in “but for” the defendant’s breach. In the present case, IBM owed Mr. Waterman reasonable notice of dismissal or pay in lieu thereof. This means he would have received only his regular salary and benefits during the reasonable notice period; however, Mr. Waterman instead received both his regular salary and his pension for that period. IBM argued this amounted to a “collateral benefit” or “compensating advantage”, and if the general rule was applied, the pension benefits would be deductible from the wrongful dismissal damages.

However, Justice Cromwell determined that the issue of whether a collateral benefit is deductible requires more careful scrutiny. Generally, a collateral benefit problem arises where the “compensation of the plaintiff is beyond his or her actual loss and either (a) the plaintiff would not have received the benefit but for the defendant’s breach, or (b) the benefit is intended to be an indemnity for the sort of loss resulting from the defendant’s breach” [at para. 32]. In these cases, the collateral benefit should be deductible.

However, an important exception relates to private insurance or other analogous types of benefits, including pension payments. In determining whether the exception should apply to the collateral benefit in this case, Justice Cromwell reviewed the authorities, and provided the following general guidance with respect to the deductibility of a collateral benefit [at para. 76]:

- There is no single marker to sort which benefits fall within the private insurance exception.
- One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant’s breach, the stronger the case for deduction. The converse is also true.
- Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.
• In general, a benefit will not be deducted if it is not an indemnity for the loss caused by the breach and the plaintiff has contributed in order to obtain entitlement to it.

• There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

Justice Cromwell then applied these general principles to the facts of the case. First, he looked at the nature and purpose of the pension benefit in question, distinguishing this case from the disability benefits at issue in Sylvester. In Sylvester, non-contributory disability benefits received during the notice period were deducted from wrongful dismissal damages in part because the benefits were intended to be indemnity for lost wages while the employee was unable to work. In Waterman, however, the pension benefit in question was not an indemnity for wage loss, but rather a form of retirement savings to which an employee earns an absolute entitlement to over time. Justice Cromwell likened vested pension benefits to property, over which the plan member has specific and enforceable rights, rather than a form of indemnity against wage loss.

Second, Justice Cromwell found that the parties’ intention disclosed that pension benefits should not be deducted from wrongful dismissal damages, again distinguishing this case from the disability benefits at issue in Sylvester. In Sylvester, not only was it impossible in all circumstances to receive salary and disability benefits at the same time, it was clear that the amount of disability benefits would be reduced by other income received by the employee. This was not the case with pension entitlements, which Justice Cromwell characterized as free-standing entitlements to which an employee earns entitlement over time that are not generally reduced by other income or benefits received by the employee.

Finally, Justice Cromwell considered broader policy considerations regarding the deductibility of pension benefits from wrongful dismissal damages. In Sylvester, the Court held that failure to deduct disability benefits in that case might discourage employers from funding wage replacement benefits. This concern did not arise in Waterman, given that pension benefits are not intended to be an indemnity for wage loss and that employees contribute to the cost of the pension benefits through their employment with the employer. Further, to allow deductibility of pension benefits in this case could provide an incentive for employers to dismiss pensionable employees rather than other non-pensionable employees, given that they could potentially deduct the amount of pension entitlement from any wrongful dismissal damages.
Implications

The *Waterman* decision is consistent with prior cases that have found that a terminated employee is entitled to both pension benefits as well as wrongful dismissal damages during the reasonable notice period. Further, this decision confirms prior cases, including *Sylvester*, regarding the deductibility of other income replacement benefits from wrongful dismissal damages.

Ultimately, the Court has made clear that, in both instances, the deductibility of any payments from wrongful dismissal damages will be a matter of contractual interpretation. This suggests the parties could agree in the employment contract, or a pension plan could provide, that certain payments can be deducted from amounts owing to employees upon the termination of their employment.

It is also important to note that the case did not explicitly canvass the treatment of pension loss as part of wrongful dismissal damages (i.e. separate from loss of salary and non-pension benefits). Presumably, since Mr. Waterman was already at his normal retirement date, he did not pursue that claim. The decision of the Court of Appeal for Ontario in *Peet v. Babcock & Wilcox Industries Ltd.* (2001), 53 O.R. (3d) 321 continues to provide important guidance on this principle, particularly where pension payments begin following termination.

LIMITATION PERIODS

The long-term nature of a pension plan can make it difficult to predict when liability might arise, since litigation can commence years after the fact. Additionally, pension issues, including payments and investment decisions, often have an ongoing effect, which makes the determination of when the breach occurred challenging for employees and plan administrators alike. The following cases demonstrate some limitation period considerations that may offer guidance for administrators and plan sponsors when facing pension-related litigation.

*Weldon v. Teck Metals Ltd.*, 2013 BCCA 358

**Facts**

This class proceeding concerns the conversion of a defined benefit (“DB”) pension plan to a defined contribution (“DC”) arrangement, and allegations by affected plan members that they were not sufficiently warned of the inherent risks associated with a DB to DC conversion. This decision is procedural in nature, with Teck Metals Ltd. (the “Employer”) and its actuarial
consultant, Towers Perrin Inc. ("Towers"), advisors to the Employer, appealing a decision of the British Columbia Supreme Court ("Court") dated March 4, 2013, postponing the time for commencing the claim under British Columbia's *Limitation Act* ("Act").

In 1992, non-union employees of the Employer and related companies were offered a one-time opportunity to transfer their pension benefits from a DB plan to a DC plan, effective January 1, 1993. Two individuals, Weldon and Bleier, subsequently commenced actions to act as representatives in a proposed class action on behalf of members affected by the conversion ("Plaintiffs"), against the Employer, Towers and the Cominco Pension Fund Coordinating Society ("Society"), which managed the assets of the pension fund (collectively, "Defendants"). The Plaintiffs alleged that they were not aware of any potential problems with their pension benefits until 2005. At that point, they started to realize that their pensions would be smaller than what they would have been had the Plaintiffs remained in the DB plan.

The Plaintiffs claim that they were not informed of the risks involved when they were offered the option to convert in 1992, and that the Defendants breached their fiduciary duties to the Plaintiffs, as well as their statutory duties under the federal *Pension Benefits Standards Act* ("PBSA"), and were liable for deceit and/or negligent misrepresentation as they provided information that was untrue, incomplete, inaccurate or misleading.

In earlier proceedings, the Court allowed the application of the Society for summary judgment but dismissed the applications of the Employer and Towers for summary judgment.

Following the certification of the action as a class proceeding, the first two common issues that arose were:

- When did the right to bring the action arise pursuant to the Act? and
- If the limitation period has expired, to what extent can it be extended under the postponement provision of the Act?

Before the Court, the Plaintiffs argued that the right of action does not arise and no limitation period can begin to run until a claimant suffers a loss. According to the Plaintiffs, no Plan member suffered a loss until he or she was eligible to receive money from the Plan. The Defendants took the position that the Plaintiffs’ right to bring an action arose and the time began to run when the pension plan was converted from a DB to a DC plan on January 1, 1993. The Defendants argued that, subject to the postponement provisions of the Act, the Plaintiffs’ claims were statute-barred.
On the first issue, the Court provided a number of reasons in favour of the Defendants’ position that the action arose on January 1, 1993, the primary reason being that, in an earlier related proceeding, the British Columbia Court of Appeal had previously indicated in *obiter* when a cause of action accrues, which the Court found to be binding upon it. The Court also reasoned that if a pension plan exposes beneficiaries to greater risk than other plans, the present value of future benefits could be discounted to reflect that risk, and those alleged losses would have occurred when the plan member obtained the less valuable pension plan, which is at the time of the conversion.

However, on the second issue, the Court concluded that the Plaintiffs’ claims were all for damage to property, and as a result, found that all the claims against the Employer were subject to the postponement provisions in the Act, which extend the basic limitation period that otherwise would have expired. The claims against Towers for professional negligence were also held to be subject to postponement.

While the Employer and Towers appealed the Court’s decision on the application of the postponement provisions of the Act, the Plaintiffs cross-appealed on the determination that their action arose on January 1, 1993.

**Decision**

The British Columbia Court of Appeal (“Court of Appeal”) agreed with the Employer and Towers that the Plaintiffs’ action arose and the limitation period began to run when the pension plan was converted from a DB to a DC plan on January 1, 1993. The Court of Appeal agreed with the Court that the deprivation to the Plaintiffs grounding the cause of action is the 1993 conversion of the Plan from a DB to a DC plan. It was not necessary for the Plaintiffs to have been able to quantify their losses before the limitation period began to run, only that the most material facts on which the claim is based were discovered or ought to have been discovered by the exercise of reasonable diligence.

With respect to the application of the postponement provisions, the Court of Appeal held that the Court erred in finding that the Plaintiffs’ claims are for “damage to property” and thus on that basis subject to the postponement provisions of the Act. The Court of Appeal held, “The general rule is that a claim for damage to property is a claim for physical damage to or defects in tangible property. No such damage can occur to intangible property. Although this general rule has been extended at common law to include certain claims for pure economic loss, the extension has no application to the respondents’ claim.” [para 44]. The Plaintiffs’ pension plan, which had not
been altered since 1993, was not damaged or defective. It was not the intention of the legislature to apply postponement to all pure economic loss. Accordingly, the Court of Appeal concluded that the postponement provisions could not be used by the Plaintiffs to extend the limitation period applicable to the claims against the Employer or Towers.

The Employer accepted that postponement could apply to the claims against it under the PBSA for deceit and breach of trust duties.

In addition, since the Court did not deal with the Plaintiffs’ claims for professional negligence, wilful concealment and breach of trust, the Employer sought to have the Court of Appeal make a finding on these claims so that the parties could be spared any further expense. Based on the facts of the record, the Court of Appeal found that the Plaintiffs’ claim against the Employer for wilful concealment was statute-barred, but the postponement provisions of the Act could apply to the Plaintiffs’ claims against the Employer for professional negligence and breach of fiduciary duty, and to certain claims against Towers for professional negligence. Those claims were therefore were not clearly statute-barred.

**Implications**

This case is of interest to plan administrators which may have undergone DB to DC plan conversions in the distant past. Although decided in British Columbia under the specific language of its limitations statute, the decision contains an interesting discussion of when a cause of action arises in a conversion claim. Here, the Court of Appeal confirmed that the action arose when the plan was converted and the Plaintiffs elected to switch to the DC provisions, despite not knowing at that time what their losses or damages would be (although the limitation period might be extended under the Act’s postponement provisions). It is interesting to compare this decision to *Boys v. Shoppers Drug Mart* (see page 48), which determined under Ontario’s limitation statute that a claim for supplemental pension benefits was not discovered when the members were told they would not be paid a benefit, but rather, when the payment failed to occur.

Since certain claims against the Employer and Towers have been allowed to proceed, the case is also of interest to the extent that, if ever heard on its merits, it will define the scope of the duty to plan members of an actuarial consultant retained by a plan sponsor to provide it with assistance.
O’Flanagan v. Ontario (Ministry of Education), 2013 HRTO 121

Facts

In this case, the Applicant, Mr. O’Flanagan, alleged that the post-retirement survivor pension provisions of the Ontario Teachers’ Pension Plan (“Plan”) were discriminatory based on sex and marital status, contrary to the Ontario Human Rights Code (“Code”). This claim was one of over 80 applications, which advanced arguments of a similar nature.

Under the Plan, members may choose from a number of post-retirement survivor benefit options which allow for a spouse (or other party) to receive a percentage of the member’s pension should the member predecease him or her. In particular, the Plan offers two types of spousal joint and survivor pension forms:

- **Survivor benefits where the member has an eligible spouse at the date of retirement.**

  The Ontario Pension Benefits Act (“PBA”) creates a statutory minimum survivor benefit equivalent to 60% of the member’s pension benefits. Under the Plan, members may opt for a survivor pension in excess of the statutory minimum, of up to 75% of the member’s pension benefits.

  The Plan further provides that the first 50% of this spousal survivor benefit is free, in the sense that there is no corresponding actuarial reduction to the member’s own pension benefits. However, for any amount in excess of a 50% survivor benefit, the member’s own pension benefit is automatically subject to a permanent actuarial reduction. This actuarial reduction is calculated at the time of the member’s retirement.

- **Survivor benefits where the member does not have an eligible spouse at the date of retirement, but acquires a spouse after retirement.**

  In this situation, a Plan member may opt to provide the new spouse with a survivor pension benefit. However, under this option, members do not benefit from a 50% spousal survivor benefit without actuarial reduction to their own pension. Rather, their pension benefits are permanently and actuarially reduced to account for the full amount of the survivor benefit. The permanent reduction is determined and applied at the date the Plan receives a direction from the member that he or she wishes to provide a survivorship benefit to a new spouse.
The Applicant retired under the Plan in 2000. At the time of his retirement, he was divorced and did not have a spouse eligible for survivor benefits under the Plan.

In 2004, approximately three-and-a-half years after his retirement, the Applicant remarried. He did not elect to provide survivor benefits to his new spouse and his benefits were not reduced.

The Applicant acknowledged that he was aware before his date of retirement that the Plan’s survivor benefit provisions for new spouses were potentially discriminatory under the Code. This was reflected in a letter written by the Applicant to a fellow retired Plan member. Also, before he remarried, the Applicant and several other retired teachers formed a group called the Ontario Teachers Survivor Benefit Group (“Group”) in January 2003, to advocate for amendments to the survivor benefits provision of the PBA and the Plan. However, the Applicant did not advance the human rights claim until 2011, several years after retirement and his remarriage.

The Plan administrator, the Ontario Teachers’ Pension Plan Board (“Board”), sought early dismissal of most of the applications because they were filed outside the Code’s limitation period. Specifically, s. 34 of the Code states the following:

34(1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

(a) within one year after the incident to which the application relates; or

(b) if there was a series of incidents, within one year after the last incident in the series.

(2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

The remaining applications were placed on hold pending determination of the delay issue in the Applicant’s case.

Decision

The Human Rights Tribunal of Ontario (“Tribunal”) found that the application was untimely.
On the question of whether there was a series of discriminatory events, the Tribunal agreed with the Board that “the Application relates to a single incident of alleged discrimination, which occurred more than a year before the Application was filed”. Relying on a recent decision Garrie v. Janus Joan Inc., 2012 HRTO 1955 (“Garrie”), the Tribunal summarized the difference between a single act with continuing effects and a series of incidents as follows:

The distinction between a single act with continuing effects and a succession of separate acts or violations is an important, albeit sometimes subtle, difference. If allegations relate to a series of separate incidents of discrimination, section 34 provides that the limitation period will run from the date of the last incident in the series. Conversely, if the allegations relate [sic] to a single incident of alleged discrimination with continuing effects, the limitation period runs from the date of that single incident. The continuing effects of the discrimination do not amount to a series of incidents for the purposes of section 34 [...] [at para. 36]

Applying this distinction, the Tribunal noted that because the Applicant did not elect to take a reduced pension, it did not need to address the Applicant’s argument that each reduced payment created an ongoing series of events. The Tribunal went on to assess the three principles set out in Garrie used to identify a series of incidents, in contrast to the continuing effects of discrimination.

The fact that the Plan provision continued to exist throughout the period in question did not establish that there was a series of separate contraventions of the Code. Rather, it is the application of the Plan provision in question that triggers the alleged event.

Secondly, the calculation of the Applicant’s pension is not an ongoing event. That calculation is performed once either at retirement or at remarriage. There were no fresh steps taken following the calculation. The consequences of the application were manifest to the Applicant when he retired and at the latest when he remarried.

The Tribunal also rejected the Applicant’s argument that the last incident of discrimination would be when the member dies, which would lead to an absurd result, nor would the limitation period be triggered upon “actual harm”. Regardless of whether the one-year limitation period was triggered upon retirement or upon acquiring a new spouse, the Tribunal concluded that the application was untimely.
With respect to the principle of discoverability, it exists “to ensure fairness to parties who cannot know within the limitation period that they have a case” [at para. 72]. The Tribunal concluded that such was not the case here.

The Tribunal also concluded that the Applicant had not established that the delay was incurred in good faith. While the Applicant may have misapprehended when the limitation period was triggered, this was insufficient to establish delay in good faith.

**Implications**

This decision will be applicable in other circumstances where discrimination complaints are made against employers and pension plan administrators. Although decided based on specific language in the Code, the Tribunal’s discussion of the difference between a single incident and a series of incidents and how those concepts apply to the determination and payment of a benefit under a pension plan may also be of interest in pension litigation generally.

**Boys v. Shoppers Drug Mart, 2013 ONSC 7026**

**Facts**

On February 4, 2000, Shoppers Drug Mart Inc. (“Shoppers”) purchased a division of Imasco Ltd. (“Imasco”). As a result of the sale, some Imasco employees, including Mr. Boys and Mr. Groskopf (“Plaintiffs”), were transferred to Shoppers. They became participants of Shoppers’ registered pension plan for executives (“Pension Plan”) and a non-registered supplementary plan (“SERP”).

Shoppers subsequently terminated the employment of both Mr. Boys and Mr. Groskopf without cause, effective February 11, 2000 and October 26, 2004, respectively. After their termination of employment, the Plaintiffs received a termination statement and option form from Shoppers outlining their Pension Plan and the SERP entitlements.

Shoppers later declared a partial wind up of the Pension Plan for members who ceased to be employed by Shoppers between 2000 and 2004. This group included the Plaintiffs.

As a result of their age and years of service at the date of partial wind up of the Pension Plan, the Plaintiffs were entitled to grow-in benefits under the Ontario *Pension Benefits Act*, and the Plaintiffs’ entitlements under the Pension Plan increased. However, since the SERP was a top-up plan, Shoppers took the position that the Plaintiffs’ entitlements under the SERP should be correspondingly deceased as a result of the increased benefits owing to the Plaintiffs under the Pension Plan.
On November 6, 2009, Shoppers sent the Plaintiffs an option statement setting out the amounts determined by Shoppers to have resulted from the partial wind up and grow-in benefits. These statements indicated that there was no payment owing under the SERP to either of the Plaintiffs.

On November 14, 2012, the Plaintiffs pursued an action against Shoppers about their entitlements under the SERP. In response, Shoppers argued that the Plaintiffs’ action was statute-barred because the two-year limitation period under s. 4 of the Ontario Limitations Act, 2002 (“Limitations Act”) had already elapsed. According to Shoppers, the Plaintiffs’ option statements made clear that Shoppers was not going to pay any SERP benefit, and that Mr. Boys and Mr. Groskopf had two years from that date to commence an application, which they failed to do.

The Plaintiffs in turn argued that the damage did not occur until payments were to be made under the SERP, which, if owing under the SERP, would be made at the same time as payment under the Pension Plan. Mr. Boys did not start to receive his monthly pension until July 2012. Mr. Groskopf had not yet received any payment out of the Pension Plan at the time of the action.

**Decision**

The Ontario Superior Court of Justice (“Court”) found that the Plaintiffs’ claims were not statute-barred under the Limitations Act.

The two-year limitation period begins to run when a claim is “discovered.” Paragraph 5(1)(a) of the Limitations Act provides that a claim is discovered on the day on which the claimant knew that “the injury, loss or damage had occurred.” In this case, the Court held that the damage would not occur until a Pension Plan payment was made without the corresponding SERP payment. For Mr. Boys, the payment that was made under the Pension Plan was within two years of the commencement of this action. For Mr. Groskopf, that date had not arrived. However, the Court stated that there was no reason why Mr. Groskopf could not now sue for declaratory relief and claim the payment should be made.

According to the Court, the act that gave rise to the Plaintiffs’ claim was Shoppers’ failure to pay benefits under the SERP, and not the issuance of the option statements. Rather, the option statements merely indicated that when any such claimed payment became due, Shoppers did not intend to pay it. Under contract law, when there is an anticipatory breach of contract, the claimant can elect to accept the breach or terminate the contract and sue for damages, or continue the contract and commence an action when the actual breach occurs. If Shoppers was right in its contention that the
Plaintiffs were required to sue when the option statements were given in November, 2009, it would run contrary to settled contract law.

**Implications**

This decision illustrates the manner in which statutory limitation periods can be applied in pension cases. In this case, the Court found that the claim was not discovered and the limitation period did not begin to run when the employees were notified that they would not receive a SERP payment, but rather, when the amounts alleged to be owing were due but not paid to the Plaintiffs from the SERP.

Often, payment might not be due for many years after an employee has terminated and the pension entitlement calculated. Retaining records for an appropriate amount of time is critical when claims can be made years after a member has terminated his or her employment.

**KEY DEVELOPMENTS IN BENEFITS ISSUES**

**BENEFICIARY DESIGNATIONS**

An improperly completed or amended beneficiary designation can lead to litigation after an employee's death and generate liability for the employer administering a group insurance policy. *Love v. Love* is a recent example of how the concept of rectification can be used to resolve incomplete or deficient beneficiary designations after the employee has died.

*Love v. Love, 2013 SKCA 31*

**Facts**

Dennis and Lori Love were married in 1976 and had four children, with Thomas being the oldest. Through his employment, Dennis was insured under a group life insurance policy. He designated his wife Lori as his beneficiary under this policy.

Dennis and Lori separated in 2002 and divorced in 2006. They entered into a separation agreement (“Separation Agreement”), which purported to deal completely and finally with all property division issues. However, the Separation Agreement was silent with respect to Dennis’ life insurance coverage.
In the same year, Dennis contacted his employer’s human resources department by email and asked for the paperwork needed to “change the beneficiary on my pension, etc.” from his former wife to his son, Thomas. The human resources department provided Dennis with a beneficiary designation change form (“Change Form”), which Dennis completed. In 2009, Dennis died without a will.

After his death, it was discovered that Dennis improperly completed the Change Form and failed to sign it. Most notably, the “Beneficiary Designation Change” portion was left blank, even though it was accompanied by explanatory text stating, “This section must be completed to change the designated beneficiary or beneficiaries for your life benefits.” Further, the “Current Beneficiary Name Change” portion was filled in as follows “From: LOVE LORI M. to: LOVE THOMAS N.” This was done despite accompanying explanatory text saying “Complete if a current beneficiary has had a legal change of name.”

Following Dennis’ death, Lori was contacted by the insurance company and she submitted a claim report. Thomas also submitted a claim report, alleging that he was the beneficiary of the life insurance proceeds and indicating that as per his father’s wishes, he would share the money with his siblings. Lori then applied to court to have herself declared the beneficiary of the insurance proceeds.

At the Court of Queen’s Bench for Saskatchewan, the trial court concluded that: (a) Lori had originally been properly designated as the beneficiary; (b) the Change Form partially completed by Dennis did not effect a change in beneficiary; (c) the Separation Agreement did not change the beneficiary; (d) the doctrine of unjust enrichment did not assist Thomas; and (e) the doctrine of rectification had no application to the matter at hand.

Thomas appealed this decision to the Saskatchewan Court of Appeal (“Court”).

Decision

The Court agreed with the trial court on all issues except with respect to rectification, where it found in favour of Thomas. The Court ordered that the Change Form be amended to indicate that the beneficiary of the life insurance proceeds be changed from Lori to Thomas.

The Court declined to rule on the admissibility of the affidavits submitted by Thomas (which stated that the day before his father died, Dennis had told Thomas that he and his siblings would receive everything and Lori would receive nothing) and by the human resources (“HR”) manager (which stated
that she understood that Dennis wanted to change beneficiaries under his life insurance policy from Lori to Thomas). The Court found that Thomas’ and the HR manager’s recall of the events, even if accurate, did not speak to the legal effect of the Change Form.

Second, the Court ruled that the combination of Dennis’ March 2006 email and the improperly completed Change Form was not sufficient to effect a valid change in beneficiary under The Saskatchewan Insurance Act (“Insurance Act”). The Insurance Act provides that an “insured may alter or revoke [a beneficiary designation] by declaration”. “Declaration” is correspondingly defined as “an instrument signed by the insured” that “described the insurance or insurance fund” and designates a new beneficiary. According to the Court, the email was not an instrument within the meaning of this statute, but merely a statement of intention made two weeks before the partial entries on the Change Form. Further, “pension, etc.” did not adequately describe the life insurance policy for the purpose of the Insurance Act.

The Court refused to find that Lori was unjustly enriched in these circumstances. According to the Court, this was not a case where a benefit passed from mother to son, but an instance where the Court was asked to determine entitlement to benefits. Additionally, the Court also held that there was a juristic reason for receipt of benefits since the mother remained the beneficiary under the life insurance policy.

The Court also addressed and rejected the broader suggestion that a constructive trust be imposed on the proceeds in favour of Thomas and his siblings. The Court declined to grant the remedy of a constructive trust on the basis that Thomas had failed to meet the requirements under the case law for the award of a constructive trust as a remedy.

Finally, the Court considered the doctrine of rectification, which can be used where the agreement between parties is clear but the written document does not properly reflect that agreement. The Court recognized the need for certainty and predictability in the field of insurance. However, the Court found that there could be no doubt that Mr. Love intended to change the beneficiary of his benefits from Lori to Thomas. Moreover, it was clear that, despite the errors in completing the form, it was not his intention to suggest that Lori Love had changed her name to Thomas Love, but that he was changing his beneficiary designation. The Court also noted that by submitting the form, Dennis took all of the steps which were necessary to give full legal effect to the change. Additionally, the Court noted that the employer and the insurer had accepted the Change Form as valid by acting on it and adjusting their internal records to remove Lori as dependant. The
absence of a signature on the Change Form was not a determinative issue, since there was no dispute or suggestion that it was not Dennis who had completed the form.

The Court referred to an Ontario life insurance rectification case, Sharom v. Sharom Estate (1992), 8 C.C.L.I. (2d) 14 (Ont. Ct. J. Gen. Div.), and concluded that given the self-evident nature of the mistake in this case, rectification would be the appropriate remedy to give legal effect to Dennis’s decision to change his designated beneficiary from Lori to Thomas.

**Implications**

Often situations like the one in this case can be avoided if the form the employee returns to the employer is reviewed by the HR department for completeness before it is placed in the file. Alerting the employee to a deficiency allows the employee to correct it and may, if appropriate procedures are followed, help minimize any liability the employer might otherwise incur due to its role in the process (see, for example, Grams (Estate of) v. Maple Leaf Metal Industries Ltd., 2006 ABQB 146).

Where that does not occur, this case applies the rectification doctrine to an incomplete life insurance beneficiary designation, demonstrating that, in the right circumstances, relief may be available, even after the employee’s death, to correct the mistake and direct payment to the intended beneficiary. While not binding in Ontario or other provinces except Saskatchewan, this decision is nevertheless a helpful appellate level illustration of the application of the rectification doctrine in this context.

**POST-RETIREMENT BENEFITS**

Containing the cost of employee benefits has been a growing challenge for employers in recent years. As the cases below demonstrate, employers have frequently looked to reduce or eliminate post-retirement benefits in order to obtain cost reductions. In recent years, a number of class actions have been launched by retirees in Ontario and elsewhere challenging changes made by their former employers to their post-retirement benefits. While there are a number of decisions on whether or not those actions should be certified as class actions, they have typically been settled without any decision on the merits. The cases discussed below are important because they are not procedural and they do address the merits of the retirees’ claims.
CHANGES TO THE PREMIUM-SHARING ARRANGEMENT

One method employers may use to reduce the cost of retiree benefits is to adjust the portion of the cost paid by the employer. In the absence of any other changes to the benefits themselves, the issue is whether this is a change within the employer’s power when applied to current retirees.

*Lacey v. Weyerhaeuser Company Limited, 2013 BCCA 252, leave to appeal to SCC refused (2013)*

**Facts**

This case concerned changes to the cost-sharing arrangements for certain post-retirement benefits for retired salaried employees of Weyerhaeuser Company Limited (“Weyerhaeuser”), and a predecessor company. At issue were employer-paid post-retirement health benefits, including extended health insurance and the British Columbia Medical Services Plan (“Retiree Benefits”).

The Retiree Benefits, which were voluntarily introduced by the employer, had been communicated to employees in various written documents (including benefit handbooks, human resources committee documents, insurance policies and internal memoranda), and also verbally discussed with employees (both in one-on-one meetings and in human resources group seminars).

In 2009, Weyerhaeuser advised the retirees that its contribution to the Retiree Benefit premiums would be frozen at 50% of the then-current levels, and that retirees would be solely responsible for any future premium increases. In response, the retirees brought an action against Weyerhaeuser for breach of contract, claiming that their entitlement to the fully-funded Retiree Benefits vested during the course of, and as a term of, their employment. As such, according to the retirees, Weyerhaeuser was precluded from instituting the premium changes following their retirement.

At trial, the Supreme Court of British Columbia ("Trial Court") considered the various written and verbal communications, and held that Weyerhaeuser was contractually required to continue to pay the full cost of the Retiree Benefits.

According to the Trial Court, the Retiree Benefits were intended as a form of deferred compensation, not as a gratuitous and discretionary perk. Also, although the Retiree Benefits were originally offered voluntarily, they became enforceable as a unilateral contract, the acceptance of which was confirmed by employees through their continued work.

A key aspect to the Trial Court’s decision was the finding that the Retiree Benefits vested at retirement, and that Weyerhaeuser did not reserve the
right to terminate the vested retiree benefits in benefit-related documents and employee communications. According to the Trial Court, these documents and communications contained language that promised to provide the Retiree Benefits through retirement. This language included terms such as “the company will pay” or “the company will also provide” in relation to the Retiree Benefits.

Significantly, one 1996 benefit booklet stated that Weyerhaeuser was permitted to “make changes from time to time.” However, the Trial Court did not accept that this language authorized Weyerhaeuser to make the changes at issue, noting that much stronger language would be required to give Weyerhaeuser the right to make the changes following an employee’s retirement, particularly in light of the other communications suggesting a contrary intention.

You can find a more detailed overview of the Trial Court’s decision on page 63 of the Hicks Morley Pension and Benefits 2013 Case Law Update.

Weyerhaeuser appealed the Trial Court’s decision to the British Columbia Court of Appeal (“Court of Appeal”).

**Decision**

In the appeal, the Court of Appeal agreed with the Trial Court’s conclusion and found that Weyerhaeuser was contractually bound to continue the Retiree Benefits for retirees for the full duration of their retirement.

The Court of Appeal found that these commitments had been made to the retirees as an incentive to remain in employment with the company, finding that employees’ compensation would presumably have been greater if the promise had not been made. The Court of Appeal stated that the benefits were a form of “deferred compensation”, noting that the benefit documents frequently used phrases such as “part of your compensation”, and that “benefits will be provided for the lifetime of you and your spouse”. The Court of Appeal also noted that it was significant that the benefits were referred to as an “entitlement”.

The Court of Appeal specifically noted that the various written commitments had been reinforced verbally during seminars and meetings with employees.

Significantly, the Court of Appeal concluded that Weyerhaeuser could have made changes to the Retiree Benefits during employment, but that it could not change those terms after an employee retired, when “the retired employee no longer had the option to seek more attractive employment within the salaried-labour market.” Rather, once the employee retired, the unilateral change to the Retiree Benefits amounted to a breach of contract.
Also notable, the Court of Appeal stated that whether the Retiree Benefits were “vested” was not a stand-alone issue. According to the Court of Appeal, once the Trial Court determined Weyerhaeuser’s contractual obligation to provide the Retiree Benefits, it was unnecessary to separately determine whether the right to the benefits vested in each employee. Moreover, if contractual entitlement and vesting are not one and the same thing, the one is superfluous to the other.

On November 21, 2013, the Supreme Court of Canada denied leave to appeal from the decision of the Court of Appeal.

Implications

In this case, the Court of Appeal treated the employer’s commitment to pay the full cost of the promised retiree benefit coverage as part of the contract between the employer and the retirees, and when it unilaterally attempted to alter its obligation, the employer breached that contract. It also dismissed the application of the Supreme Court of Canada’s decision in *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230, which, although decided in a unionized environment, is widely thought to be the seminal decision on an employer’s ability to unilaterally change retiree benefits, even for salaried retirees.

CHANGING BENEFITS AFTER RETIREMENT

*O’Neill v. General Motors of Canada, 2013 ONSC 4654*

Facts

In the midst of the 2007-2009 financial crisis, General Motors of Canada (“GMCL”) made several announcements about reductions to the post-retirement healthcare and life insurance benefits of certain retired non-unionized salaried employees and executives.

In December 2007, GMCL announced various changes to extended heath benefits, including the availability of semi-private hospital coverage, the right to add new dependents for coverage, out-of-province coverage, and co-payments on the cost of prescription drugs. These changes would take effect over three years.

In September 2009, GMCL announced that it would reduce life insurance benefits beginning in 2010. For example, affected salaried employees were advised that their basic life insurance benefit would be reduced in stages to $20,000.
GMCL did not apply the benefit reductions to employees who had retired before 1995 because, according to GMCL, prior to that year, benefit communications did not contain a reservation of rights ("ROR") clause reserving GMCL’s right to reduce or eliminate post-retirement benefits.

The affected retirees commenced a class action in response to these changes, alleging that GMCL breached its contract with them. The class action was certified on consent on October 20, 2011. The parties agreed that the retirees’ allegations would be decided based on specified benefit plan documents listed in a schedule to the settlement agreement. The approximately 260 documents primarily consisted of brochures, booklets and member communications, which it was agreed formed the “contract” between the parties to be analyzed by the court.

**Decision**

The Ontario Superior Court of Justice ("Court") ultimately found that GMCL breached its contract with the salaried retirees when it reduced their post-retirement benefits, but not its contract with the retired executives.

As a starting point, the Court made two general propositions. First, whether retirement benefits can be changed after retirement is first and foremost a matter of contractual interpretation. Second, an employer can have the contractual right to change such benefits, but only if the contractual language allowing the employer to do so is clear and unambiguous.

**Salaried Employees**

The Court first stated that, based on the language of the benefit documents, salaried employees had a “reasonable expectation” that they could plan for and rely on the post-retirement benefits and life insurance benefits to be provided to them for their entire lifetime. The documents repeatedly stated that such benefits would be provided for “your lifetime” or “for the rest of your life”.

The Court also found that the benefits were provided to the salaried employees as deferred compensation for services rendered, and not gratuitously. The benefit documents consistently described the benefits as a fundamental component of the salaried employees’ compensation package, using terms such as the benefits being “compensation for your job”, or adding “significantly to the total pay you receive for the work you do.”

Importantly, the Court found that the ROR clause that appeared in many post-1994 benefit documents did not clearly and unambiguously provide GMCL with the ability to reduce benefits for already-retired salaried employees. The applicable ROR clause stated:
General Motors reserves the right to amend, modify, suspend or terminate any of its programs (including benefits) and policies by action of its Board of Directors or other committee expressly authorized by the Board to take such action.

The Court set out five reasons why, in its view, GMCL had not reserved the right to reduce the salaried employees’ post-retirement benefits once the employee had retired. First, it was not clear and unambiguous that the language applied to retirees. The Court noted that the ROR clause in a 1996 document contained a broader term (“salaried employee/retiree”), which did not re-appear in the ROR clause until 2009.

Second, the Court cited the contra proferentem principle of contractual interpretation, which provides that ambiguity in a contractual provision will be interpreted against its drafter. The Court reasoned that because it was not clear, the ROR clause should be interpreted to limit GMCL’s right to reduce a salaried employee’s post-retirement benefits while he or she is actively employed.

Third, the Court held that employment contracts are unlike “ordinary commercial contracts”, in that the contracting parties have unequal bargaining power. According to the Court, employment contracts should be interpreted to protect employees who are “generally vulnerable in the bargaining relationship.”

Fourth, the Court held that the contract between the parties with respect to post-retirement benefits “must be interpreted through the lens of good faith.” The Court concluded that the ROR clause cannot have been intended to allow GMCL to reduce salaried employees’ post-retirement benefits after they retired, because, in the Court’s view, such an interpretation would be inconsistent with GMCL’s “oft-repeated reassurances of retirement security.”

Fifth, the Court noted that GMCL modified its standard ROR clause in 2012 as follows:

GMCL reserves the right to amend, modify, suspend or terminate any of its programs covering employees and former employees, including retirees, at any time including after employees’ retirements.

In the Court’s view, the 2012 ROR language made it sufficiently clear and unambiguous that post-retirement benefits could be reduced after an employee had retired. The Court reasoned that this modification to the ROR clause to expressly refer to retirees was an indication that retirees had previously been excluded from the ROR clause.
Executives

In contrast to the salaried employees, the Court held that it was sufficiently clear, based on the benefit plan documents pertaining to executives, that post-retirement benefits were subject to change.

According to the Court, executives should reasonably have known this from the outset. The main benefit document made sufficiently clear that the benefits were unfunded, were “not guaranteed”, and could be reduced or eliminated. This language was, in the Court’s view, significantly different from that governing the salaried retirees.

Further, retiring executives were required to sign an acknowledgement confirming that the executive had read and understood the terms of the Canadian supplemental executive retirement program, including the provision that benefits may be reduced or eliminated after retirement.

Implications

It is important to note that in this case, the parties agreed to have the court examine only a specified set of documents. Nevertheless, it emphasizes the importance of the wording used in the booklets summarizing group and retiree benefits, letters provided to employees at the time of retirement, and other benefit-related communications. Not only will a court look for clear language reserving the employer’s right to unilaterally change benefits, but when interpreting that language, may look at other statements highlighting the importance or value of the benefit to employee.

The Supreme Court of Canada’s 1993 decision Dayco (Canada) Ltd. v. CAW-Canada, [1993] 2 SCR 230, continues to be the starting point for any analysis of an employer’s ability to change post-retirement benefits for existing retirees. However, cases like GM, TRW Canada Ltd. and Thompson Products Employees’ Assn. (Retiree Benefits) (Re) (2012), 110 C.L.A.S. 338 (Kaplan) (see page 87 of the Hicks Morley Pension and Benefits 2013 Case Law Update) and the Lacey v. Weyerhaeuser B.C. Court of Appeal decision (see page 54), all demonstrate that courts will carefully scrutinize the language relied on by the employer in the context of the entire set of communications framing the contractual promise.

Update

This decision has been appealed by GMCL to the Court of Appeal for Ontario. A hearing has been set for March 18, 2014.
LIMITATION PERIODS

In the next case, an employer successfully argued that its self-funded long-term disability insurance plan was a “contract of insurance” subject to a short one-year limitation period under the applicable insurance act, and that the member’s claim was brought too late to proceed.

*Kopet v. Simon Fraser University, 2013 BCCA 143*

Facts

The applicant, Mr. Kopet, brought an action against his employer, Simon Fraser University (“University”), for failing to pay benefits under its long term disability plan (“LTD Plan”).

The LTD Plan was contained in the collective agreement (“Collective Agreement”) between the University and the Union that represented Mr. Kopet. The Collective Agreement stated that the University “shall maintain long term disability insurance and group life insurance for all eligible employees.”

The University had entered into an administrative services only agreement (“ASO”) with Manulife, under which Manulife agreed to perform all aspects of the administration of the LTD Plan. The University remained financially liable to its employees for the payment of all LTD Benefits. Manulife did not underwrite the plan, and had no liability to employees for any LTD Benefits.

Mr. Kopet originally applied for benefits under the LTD Plan in November 2008. Manulife denied the claim in December 2008. Mr. Kopet commenced an action against Manulife, but later withdrew the action. Mr. Kopet then commenced an action against the University in December 2009.

The University asserted that Mr. Kopet’s action should be dismissed on the basis that it was untimely under the *Insurance Act*, R.S.B.C. 1996, c. 226 (“Insurance Act”), as it was not commenced within the one-year limitation period applicable to insurance contracts. The *Insurance Act* defines a “contract” of insurance as “a policy, certificate, interim receipt, renewal receipt or writing evidencing the contract […].” [emphasis added]

Mr. Kopet argued that the LTD Plan was not a contract of insurance, that the University was not an insurer, and that the *Insurance Act* therefore did not apply. Mr. Kopet claimed that the LTD Plan was part of his employment contract and, as such, his claim was for breach of contract, and was therefore subject to a longer limitation period. Both Mr. Kopet and the University agreed that the Court had jurisdiction to hear the matter, despite the LTD Plan’s origins in the Collective Agreement.
The Supreme Court of British Columbia found that the LTD Plan was a contract of insurance as defined under the *Insurance Act*, and Mr. Kopet’s action against the University was not commenced within the one-year limitation period.

Mr. Kopet appealed this decision to the British Columbia Court of Appeal (“Court”).

**Decision**

The Court agreed that the LTD Plan was a contract of insurance to which the *Insurance Act* applied. As such, Mr. Kopet’s action for the breach of that contract of insurance was statute-barred because it was not commenced within one year of his furnishing proof of the loss he maintained he suffered by reason of a long-term disability.

According to the Court, the Collective Agreement *required* that the University maintain the LTD Plan as a form of insurance. This wording established the University’s written obligation to provide an insurance plan, and it did not matter that the insurance was underwritten by the University as opposed to a third party insurer. The Court was of the view that it is possible to have a contract of insurance between an employer and an employee without the need for a third party to assume liability for the benefits in question.

To support its conclusion, the Court referred to the 1995 Ontario decision in *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 (Ont. Gen. Div.) (appeal on other grounds dismissed 145 D.L.R. (4th) 747, 32 O.R. (3d) 102). In that case, the Ontario court found that an employer’s obligation to provide group benefits as reflected in booklets and plan documents, can constitute a written “contract.” The promise to indemnify the employees in the event they suffer the specified loss is sufficient to constitute “insurance,” such that together, they constitute a written “contract of insurance.” The premium, an essential characteristic of insurance, can be in the form of the employees’ labour and is not required to be a cash payment.

Applying that reasoning in this case, the Collective Agreement featured a covenant requiring the University to provide the LTD Plan for the benefit of its employees, the operation of which was to be governed by an ASO. The LTD Plan was a contract between the University and its employees, based on mutual consideration, the terms of which were contained in a plan document. The University undertook to indemnify the employees for their loss of income in respect of the risk of long-term disability. The plan was a “contract of insurance,” and the University was the insurer, as those words are understood in the *Insurance Act*. 
Implications

Employers who chose to self-insure group benefit plans may be able to establish that the applicable limitation periods provided in provincial insurance legislation, as here in the B.C. Insurance Act, will apply. As a result, employers may be able to successfully rely on any one-year limitation period contained in the applicable legislation, if an employee sues for benefits.

However, being subject to insurance legislation may mean that other statutory duties and obligations arise, of which employers will need to be aware. It is also important to note that an ASO contract will not necessarily be considered to be “insurance” for the purposes of the Income Tax Act.

KEY DEVELOPMENTS IN EXECUTIVE COMPENSATION ISSUES

In order to attract and retain executives, companies will often link an executive’s benefits to a company’s performance in order to reward results. In *Levinsky*, the Ontario Superior Court of Justice considered the validity of a forfeiture clause in a claim for a long-term incentive payment by a terminated employee.

*Levinsky v. The Toronto-Dominion Bank, 2013 ONSC 5657*

Facts

Mr. Levinsky (“Plaintiff”) began his career with Toronto-Dominion Bank (“TD Bank”) as an associate and steadily rose through the ranks in the TD Securities Inc. business. Upon attaining the position of Vice President, the Plaintiff began participating in the Bank’s Long Term Compensation Plan (“LTCP”), under which he was allocated restricted share units (“RSUs”) each year as part of his overall remuneration. An RSU is a bookkeeping entry, which tracks the value of one share of company stock.

Under the LTCP, RSUs vest, or “mature”, at the end of a three-year period. If certain conditions are met on the day RSUs mature, the LTCP entitles the employee to a cash payment equal to the value of an equivalent number of company shares based on the share price on the maturity date.

The LTCP expressly provided that RSUs would be forfeited without notice if the employee resigned prior to their maturity date. Each year, the Plaintiff was required to sign a participation agreement acknowledging his award. Pursuant to the participation agreements signed annually by the Plaintiff, he
acknowledged having reviewed and understood all of the terms and conditions of the LTCP, and agreed to be bound by those terms and conditions, as amended from time to time. Later participation agreements also contained a provision requiring the Plaintiff to initial a box acknowledging that TD Bank had drawn his attention to the forfeiture and reduction of award provisions of the LTCP. The Plaintiff acknowledged in his testimony having understood the terms of the LTCP, including the forfeiture-on-resignation provision.

In January 2010, the Plaintiff resigned from the Bank to establish his own hedge fund. As a result of his resignation, the Plaintiff forfeited the RSUs that were allocated to him in 2007, 2008 and 2009, which had not yet matured on his resignation date. At the time of his resignation, the combined cash value of the unmatured RSUs to the Plaintiff’s credit was approximately $1.6 million.

The Plaintiff commenced an action against TD Bank claiming entitlement to the value of the RSUs he had forfeited upon resignation. According to the Plaintiff, the LTCP’s forfeiture rule was unenforceable as a restraint of trade.

**Decision**

The Ontario Superior Court of Justice (“Court”) reviewed the law on restraint of trade and the treatment of deferred compensation upon termination of employment, from which it distilled two general legal principles.

First, when examining a clause in an employment contract which results in the forfeiture of deferred compensation when an employee resigns, a court must assess whether the clause, on its face, or in practical operation, ties forfeiture to the event of termination itself, or whether it ties forfeiture to the employee’s post-employment conduct. If the forfeiture simply results from the cessation of employment, the forfeiture does not operate in restraint of trade.

Second, in the event that the forfeiture results simply from the cessation of employment, the terms of the deferred compensation plan must be examined to determine whether or not the employee possessed any vested rights in the forfeited compensation. If vested compensation would be forfeited, it is necessary to assess whether the forfeiture constitutes an unenforceable penalty clause.

Applying these general legal principles to the present case, the Court noted that other LTCP provisions specifically addressed the impact of an employee’s post-employment conduct on his or her entitlement to the payout of RSUs. For example, the LTCP contained provisions contemplating the
forfeiture of RSUs in the event of post-employment solicitation of TD Bank clients, post-employment solicitation of TD Bank employees, unauthorized disclosure of confidential TD Bank information and post-employment competitive activities. The Court did not rule on the enforceability of those provisions of the LTCP.

In contrast, the forfeiture section at issue in this case caused forfeiture upon resignation without regard to the employee’s post-employment conduct, and was therefore a permissible form of loyalty incentive rather than an unlawful restraint on trade. In making its ruling, the Court noted that the section had not operated to restrict the Plaintiff’s activities after his resignation. The Court held that the Bank had a legitimate purpose in tying entitlement to the RSUs to the continuation of service as a means of maintaining employee retention and loyalty.

The Court then examined whether the Plaintiff had a vested right in the unmatured RSUs in order to determine whether it is necessary to consider if the forfeiture-on-resignation provision of the LTCP constituted an unlawful penalty. The Court held that the Plaintiff had no vested rights in the unmatured RSUs. The RSUs were clearly subject to forfeiture at all times up to the maturity date. The redemption value of RSUs is calculated based on the price of a TD Bank share on the maturity date, not the award date. Communications to LTCP participants and the TD Bank’s proxy circulars consistently referred to RSUs as vesting upon maturity after three years. On this basis, the Court held that the Plaintiff had no vested right to a payment in respect of his unmatured RSUs on his resignation date. Since the Court found that the RSUs were not vested, it did not need to consider whether the forfeiture-on-resignation provision of the LTCP was an unlawful penalty.

Also notable, the Court dismissed an argument made by the Plaintiff that he had been constructively dismissed by TD Bank when he was promoted to Vice President and became eligible to participate in the LTCP. The Plaintiff argued that he had no choice but to participate in the LTCP, which he characterized as a “take it or leave it” proposition. In rejecting this argument, the Court noted that the Plaintiff was a well-educated, sophisticated businessman who had admitted that he knew the terms of the LTCP. The Court held that the Plaintiff freely accepted his promotion to Vice President without protest and signed participation agreements each year in which he acknowledged that any RSUs would be forfeited if he resigned his employment prior to their maturity.
Implications

This case supports the proposition that an employer can, as a permissible loyalty incentive, tie an employee’s right to a future payment to being employed on the date the right to receive the payment crystallizes. A forfeiture-on-resignation provision will not be found to be in restraint of trade if the provision neither relates to nor fetters post-employment commercial activities.

The Court’s comments further highlight the value of having employees who receive an incentive compensation award sign an agreement acknowledging their understanding of the terms of their compensation plan and award, including the applicable forfeiture/reduction of award provisions. Although failure to do so is not fatal to the enforceability of forfeiture/reduction of award provisions, it is clear that having employees expressly acknowledge their understanding of such provisions can enhance the likelihood that those provisions will be found to be enforceable.