Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

November 19, 2008

Hicks Morley Pension & Benefits 2008 Case Law Update

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Dear Friends:

2008 has been another exciting year in pensions and benefits. Several provinces have initiated reviews of pension standards legislation, appearing to signal reform on the horizon. Courts are deciding pension and benefits cases at an increasingly frequent rate. As we go to press with this 2008 Pension & Benefits Case Law Update, the Supreme Court of Canada has just heard its fourth major pension case in as many years. Recent market turmoil has confounded even the most sophisticated investment experts. Pension plan deficits prevail and the under funded status of many defined benefit pension plans is a source of concern for members, employers, regulators and governments.

Against this backdrop, we invite you to read our Update. Over the course of the year, the members of the Hicks Morley Pension & Benefits Group have summarized court decisions for the Update. This Update covers everything from surplus entitlement to partial wind ups, member communications to employer and administrator roles, to updates on key cases that continue to move through the courts. We also feature a number of important decisions regarding the provision of employee benefits and taxation issues.

For the first time, this year we have included a discussion of major cases coming out of the United States that may be trend predictors of what we can expect to see in Canada in the near future.

The Update concludes with a discussion of some of the key developments in pension legislation throughout the nation.

On behalf of the Hicks Morley Pension & Benefits Group, we hope you enjoy this special edition of the Update. We hope that the Update 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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Elizabeth Brown, a Partner in the firm, heads up the firm's Pension and Benefits practice group. Elizabeth is also a member of the Firm's five member Executive Committee. Prior to joining Hicks Morley in 1995, Elizabeth was a pension lawyer with Hewitt Associates and prior to that practised civil litigation with a national full services law firm in Toronto. Listed in the 2007 Canadian Legal LEXPERT directory as "repeatedly recommended" in the area of pensions and benefits and was named as “Leaders in their Field” in Chambers Global 2009 as an Employment, Labour and Pensions Lawyer (Pensions & Benefits Canada).

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KEY DEVELOPMENTS IN PENSION LAW

ENTITLEMENT TO SURPLUS ON SALE OF BUSINESS

***Burke* v. *Hudson's Bay Company*, 2008 ONCA 394**

Facts

The Hudson's Bay Company ("HBC") provides a defined benefit pension plan for its employees, which was first established in 1961. In 1987, HBC sold the assets of its Northern Stores Divsiion to another retailer. The 1200 employees of this division became employees of North West Company. By agreement between HBC and North West Company, accrued pension liabilities and asset equal to these liabilities were transferred from the HBC pension plan to the NWC pension plan. HBC transferred the necessary assets to NWC's pension plan to fund the benefits of the transferred employees (including ancillary amounts to fund early retirements benefits), but did not transfer any portion of the surplus that existed in HBC's pension plan at the time of the sale.

Mr. Burke, Mr. Fallis and Mr. Ross, on behalf of the transferred employees, brought an action in which they sought a declaration that HBC had improperly taken contribution holidays and paid pension plan expenses from the pension fund during years in which the plan was in a surplus position prior to the sale– specifically 1982-1986. They also sought an order requiring HBC to transfer a pro-rata share of surplus from its pension plan to the NWC pension plan. The plaintiffs relied in part on statements contained in employee booklets regarding the payment of expenses and the expectations of plan members in relation to the uses of the pension plan surplus.

At trial, the court held that a pro-rata portion of the pension surplus at the time of the sale was required to be transferred to the NWC plan. HBC successfully defended the claims in respect of the contribution holidays and payment of plan expenses and those aspects of the claim were dismissed. HBC appealed from the trial decision regarding surplus entitlement and the members cross-appealed regarding the payment of plan expenses. The claim with respect to contribution holidays was abandoned.

Decision

ENTITLEMENT TO TRANSFER OF SURPLUS

On the main issue of whether a pro-rata portion of pension surplus was required to be transferred, the Court of Appeal found that this was not required. The Court of Appeal characterized the issue as whether the transferred employees had the surplus assets at the time of the sale and if so, whether HBC committed a breach of trust by its failure to transfer a rateable portion of the surplus. To determine the entitlement to surplus in an ongoing pension plan, the Court of Appeal utilized the framework set out by the Supreme Court of Canada in the leading decision of *Schmidt* v. *Air Products Canada Ltd*., [1994] 2 S.C.R. 611. The court found that the HBC pension plan assets have always been held by a trust, and therefore, entitlement to surplus would be determined by considering the provisions of the original trust agreement.

The Court of Appeal found that the purpose of the original trust agreement was to establish the fund. There was nothing in its provisions speaking directly to the matter of entitlement to the fund. Significantly, the Court of Appeal found that the original trust agreement did not bestow any rights to the fund beyond those given to members under the terms of the pension plan text. The Court of Appeal also found that the original trust agreement did not contain any of the language that the courts have found establish entitlement to surplus on behalf of the members of a pension plan, such as statements that the employer's contributions were "irrevocable" or that no part of the fund could ever revert to the HBC or that no part of the fund could be used other than for the "exclusive benefit" of members. By 1984, a new trust was engaged and a new trust agreement was entered into. The 1984 trust agreement did contain exclusive benefit language in favour of plan members. However, the Court of Appeal found that this provision did not alter the analysis because the trust agreement also dictated that the fund was to be disposed of in accordance with the provisions of the plan text. At the time the relevant trust agreement became effective, the plan text stipulated that surplus entitlement rest with HBC. Therefore, the language in the trust agreement could not be relied upon where to interpret the trust agreement as such would be inconsistent with the plan text. This was especially so as both the plan text and the trust agreements historically made the plan text the dominant document.

The Court of Appeal next reviewed the relevant provision of the plan text, finding that those provisions led to the conclusion that the entitlement of plan members was limited to the defined benefits provided by the terms of the plan text. Members had no entitlement to surplus. In particular, the Court of

Appeal noted that the plan text expressly stipulated that no plan member had any right or interest in the fund, except as expressly provided in the pension plan. The Court of Appeal found that when read as a whole, the pension text makes it clear that its purpose was to set out the entitlement of members to benefits on the happening of certain events, and even then, those benefits were expressly set out and limited by the plan text. It was only by amendment in 1980 that the plan text expressly provided entitlement of surplus to HBC. The Court of Appeal found that the amendment did not alter the rights of plan members, as they did not have any right to surplus in the first instance. All the amendment did was expressly state that which was always implicit – that the rights of plan members were limited to the defined benefits provided for by the plan text and that they had no interest in any surplus in the fund.

On the basis of the above analysis, the Court of Appeal found that the failure to transfer any portion of the surplus was not a breach of trust because the employees had no interest in the pension surplus. Where the trial court found otherwise on the basis of members' expectations regarding the use of the surplus, the Court of Appeal outright rejected the notion as a legitimate basis for creating legal rights and obligations at odds with the provisions of the plan documentation. Further, the booklets describing the pension pan and surplus were held to be irrelevant to the determination of surplus entitlement both because HBC had a right to amend the plan and because the booklet language was subject to the disclaimer contained therein that the official plan documentation governs.

Briefly, the Court of Appeal addressed the perceived unfairness resulting from all of the surplus remaining in the HBC pension plan without the NWC plan to which the employees were transferred receiving a pro-rata share. The Court of Appeal accepted that a fundamental trust principle is that beneficiaries of a trust are to be treated in an even-handed fashion –unless the trust instrument so decrees. Here, the Court of Appeal found that the even-handed rule was ousted by the rights prescribed to HBC in the trust documentation. Therefore, the only obligation that existed at the time of the sale was the obligation to ensure that all plan members received their promised benefits. This obligation was satisfied by the transfer of pension fund asset equal to liabilities and did not require a transfer of surplus assets.

ADMINISTRATIVE AND FUND EXPENSES

In the Court of Appeal's second foray into the issue of the propriety of administrative expenses being charged to a pension fund, the analysis in *Kerry (Canada) Inc.* v. *DCA Employees Pension Committee* (2007), 86 O.R.

(3d) 1, leave to appeal to S.C.C. granted, was heavily relied upon. The framework from *Kerry* was restated, recalling that if, in the relevant documentation, HBC undertook to pay the plan expenses, it must do so, unless that undertaking was validly amended. Absent such an undertaking, a pension plan sponsor is under no legal obligation to pay such expenses.

The Court of Appeal reviewed the relevant plan documentation and held that silence does not create a legal obligation to pay plan expenses. The original plan text was silent on the issue of payment of plan administrative and pension fund expenses. In fact, the Court of Appeal found that all versions of the plan text up to 1985 were silent on the issue. In 1985, the plan text was amended and restated, and a provision was added specifically addressing the payment of such expenses from the fund. The amendment was a reflection of the practice that had been ongoing since 1982 when the plan first developed an actuarial surplus.

The Court of Appeal found that during years in which the plan text was silent, HBC was not obligated to pay plan expenses. After the amendment in 1985, the plan explicitly authorized the payment of expenses from the fund, and this amendment was held to be validly made.

It is also necessary to review the trust documentation to determine HBC's ability to pay expenses from the pension fund. The original trust agreement addressed the matter of expenses incurred in the management of the fund, requiring that they be paid by HBC. The Court of Appeal rejected the plaintiffs' arguments that this provision was broad enough to require plan administration expenses to also be paid by HBC. The Court of Appeal emphasised the difference between expenses incurred in the administration of the plan as compared to expenses incurred in the administration and investment of the fund. This difference rests on the inherent purposes of the plan as distinguishable from the pension fund.

The Court of Appeal also found that in 1971, when HBC terminated the original trust agreement and entered into a new trust agreement, a new provision respecting the payment of expenses became effective. This provision permitted the payment of expenses incurred in relation to the administration of both the plan and the fund (with the exception of trustee compensation) from the pension fund.

By 1984, a further amendment to the trust agreement allowed all administrative and fund management expenses (including trustee remuneration) to be paid from the fund. The Court of Appeal found that HBC retained a sufficiently broad amending power with respect to the trust agreement that the amendments to the trust were valid. The Court of Appeal went on to find that the amendments were for purposes contemplated and specified by the plan documentation. Specifically, the Court of Appeal found that the plan text provided for the administration of the pension plan and the trust agreements provided that the fund was held for the purposes set forth in those agreements and the plan text. To ensure that the pension promises were honoured, the pension plan needed to be continued and properly administered and the fund properly managed.

Similar to the analysis in *Kerry*, the Court of Appeal also held that the amendments did not constitute partial revocations of trust. First, the Court of Appeal noting that a revocation requires funds to be returned to the plan sponsor, not to third parties. Second, the Court of Appeal found that even where it could be viewed as a revocation of trust, it was expressly authorized by the plan documentation.

Finally, the Court of Appeal addressed the employees' claims that employee booklets promised that HBC would pay the administration expenses of the pension plan. The Court of Appeal acknowledged that in certain circumstances an employer's pension brochure may form part of the "legal matrix" within which the rights of employers and employees must be determined. However, as noted above, the booklets in question contained clear and unambiguous disclaimers that the plan documentation was authoritative, not any such booklet. Further, the booklet made it clear that HBC reserved the right to change the terms of the pension plan at any time. From this, the Court of Appeal found that a member could not reasonably rely upon the booklet.

In summary, the Court of Appeal held that HBC was entitled to the pension surplus and therefore was not obligated to transfer a portion to NWC's pension plan. The Court of Appeal also held that HBC was not obligated to pay the administration expenses in relation to the pension plan from corporate revenue and was terminated to use pension fund assets to satisfy the costs of administering the plan.

Implications

This decision is welcome news for plan sponsors. The Court of Appeal affirmed that a plan sponsor does not have to transfer a pro rata share of pension surplus in a sale of business, unless the wording of historical plan documentation, trust agreements or specific provisions of the purchase and sale agreement provide surplus entitlement to members or require a transfer of surplus funds. However, if members do own the surplus, it is not clear whether a pro-rata portion must be transferred since this issue was not before the court. Given that surplus entitlement determinations are not easily made in the context of a sale, parties to a corporate transaction will continue to have to address the transfer of sureties assets.

The decision also affirms the Court of Appeal's earlier analysis regarding the payment of plan expenses, once again holding that a plan sponsor does not have to pay for plan expenses out of corporate revenue unless the plan documentation or trust agreement expressly obligates the plan sponsor to do so. the case also provides authority that amendments to plan expense language are permitted despite restrictions on the power to amend the trust.

The Court of Appeal's discussion of the legal significance of pension booklets and the importance of disclaimer language also informative and helpful to employers seeking to rely on official plan documentation despite contrary language contained in historical booklets.

Unfortunately, these issues are not conclusively resolved by the Court of Appeal decision. The former plan members have sought leave to appeal from the Supreme Court of Canada. As well, the Supreme Court of Canada is set to hear the appeal in *Kerry* on November 18, 2008, and the Court of Appeal's decision regarding plan expenses could be varied.

ENTITLEMENT TO SURPLUS IN THE PUBLIC SERVICE PENSION PLAN

***Professional Institute of the Public Service of Canada* v. *Canada (Attorney General)*, 2007 CanLII 50603 (Ont. S.C.J.)**

Facts

The federal government maintains three pension plans for members of the public service, the armed forces and the RCMP. The three plans all currently operate on the basis of legislation enacted in 1985: the *Public Service Superannuation Act* ("PSSA"), the *Canadian Forces Superannuation Act*, and the *Royal Canadian Mounted Police Superannuation Act*.

All three are defined benefit plans, and membership is compulsory for all eligible employees. Employees are required to make contributions via payroll deduction. Until 2000, the government was required by the statutes to match the total amount of employee contributions.

The statutes were historically silent regarding the issue of surpluses. Bill C-78, *Public Sector Pension Investment Board Act*, which introduced the 2000 amendments, contained provisions specifically addressing the treatment of surplus, requiring the government to debit the accounts whenever the surplus was in excess of 110% of the liabilities under the plans. As well, the government was permitted to debit any further surplus revealed by actuarial valuations.

In 2000, the government enacted statutory amendments by virtue of which this equal matching requirement was removed. The government, however, remained obliged to contribute sufficient funding to the Superannuation Account of each plan from time to time to cover any actuarial deficit in that account. When the government enacted Bill C-78, new Pension Funds were established to receive all employee and employer contributions, and from these funds would be paid all benefits in respect of service after April 1, 2000. All benefits for pensionable service prior to April 1, 2000 continued to be charged to the existing Superannuation Accounts.

The plans were created by statute and there is little other supporting documentation. For example, there is no pension plan text or trust agreement. There is no trustee or separate funds established to receive and invest contributions. Instead, all of the terms and conditions of the three plans are found in the respective statutes. Each plan had a Superannuation Account forming part of the Consolidated Revenue Fund, and the transactions and balances of the three accounts were reported annually in the Public Accounts of Canada.

By the early 1990s, the Superannuation Accounts reported substantial actuarial surpluses. By March 31, 1999, the combined surplus in the three plan accounts was $30.9 billion.

The unions and associations which represented the affected public servants, military officials, and RCMP officers jointly initiated a combined set of actions against the federal government, claiming that the employees and pensioners held an equitable interest in the balance of the Superannuation Accounts as of the date of the enactment of Bill C-78. Further, they claimed that the withdrawal of surplus was a breach of trust and a breach of fiduciary duty. They also claimed that the provisions of Bill C-78 breached the equality rights of the affected employees under section 15 of the *Charter of Rights and Freedoms*.

Decision

ENTITLEMENT TO SURPLUS

The court noted that all three plans are substantially similar. Accordingly, the decision references only the PSSA, but the conclusions are equally applicable to all three plans.

The court commenced by assessing whether the plans were governed by a trust or by contractual principles. The court cited the Supreme Court of Canada's seminal decision regarding entitlement to surplus, *Schmidt* v. *Air Products Canada Ltd.*, [1994] 2 S.C.R. 611. In that case, the Supreme Court of Canada held that whether or not any given fund is subject to a trust is determined by the principles of trust law. There must have been an express or implied declaration of trust and an alienation of property to a trustee for the benefit of the plan members.

First, on the issue of certainty of intention to create a trust, the court found that while all of the rights and obligations of the government and members of the plan were encompassed in the PSSA, the statute contained no reference to a trust or the creation of a trust. The court therefore found that the statute contained no reference relating to a trust, nor did it create a situation in which an intention to create a trust could be inferred to implied.

The court went on to find that there was no certainty as to the subject matter, or corpus, of the alleged trust. The key factor for the court was that no separate or segregated fund was ever established. Similarly, no assets were ever transferred to a third party trustee to maintain or invest. On this issue, the court rejected the argument that several government reports or documents indicated that the government held certain funds in trust accounts for the purpose of providing pensions to employees. The court stated that where the essential characteristics of a trust are not found in legislation establishing the pension plan, the statements and conduct by government officials or indeed government departments are of no assistance to determine the matter.

The court also distinguished the superannuation plans from two other cases in which the Ontario Court of Appeal found that a statute or by-law established a pension plan that was governed by a trust. The superannuation plans were distinguished from the pension plans in *CUPE – C.L.C., Local 1000* v. *Ontario Hydro* (1989), 68 O.R. (2d) 620 (C.A.) and *Markle* v. *Toronto (City)* (2003), 63 O.R. (3d) 321 (C.A.) on the basis that in both of those cases, the funds were held in separate accounts. As well, the pension plans in those cases were administrated by boards of trustees or third party trustees. The court found that the superannuation plans were not similarly situated.

BREACH OF FIDUCIARY DUTY

Turning to the allegation of breach of fiduciary duty, the court ruled that the government had no such duty because a fiduciary relationship did not exist in relation to the superannuation plans. Applying the leading principles established in a number of Supreme Court of Canada decisions, the court held that for a fiduciary relationship to exist, the fiduciary must have the scope for the exercise of some discretion and must have the ability to unilaterally exercise that discretion so as to affect the beneficiary's interest. The court held that the PSSA is a complete statutory scheme and code setting out the rights and obligations of the government and members of the plan. As a complete statutory scheme, the court held that the PSSA clearly expresses the government’s statutory obligations, such that the government had no discretion with respect to complying with the terms of the plan. Therefore, the court found that there was no fiduciary relationship.

The court also found that to the extent that the government was required to comply with the PSSA, the evidence did not establish that the government had failed to do so.

The court also rejected the plaintiffs’ arguments impugning the provisions introduced in Bill C-78 regarding the withdrawal of surplus. The plaintiffs’ contended that the provisions were ambiguous and did not expressly authorize the withdrawal of surplus. The court could not agree, finding that the plain language supported the government’s position that the amendments required the government to debit from the Superannuation Account any amount that exceeds 11% of the amount required to meet the cost of benefits payable. Further, the court found that the amendments validly gave the government the discretion to debit any additional surplus disclosed in an actuarial report.

CHARTER OF RIGHTS AND FREEDOMS

Finally, the court accepted the government's argument that the unions lacked standing to raise *Charter* claims of discrimination. In particular, the court noted that the personal nature of equality rights could only be enforced by those who enjoy its protection.

The court also briefly reviewed the merits of the *Charter* claim, finding that the plaintiffs would not succeed. First, employment status is not a valid ground of discrimination under the *Charter*. Second, the plaintiffs could not establish that the government’s actions amounted to discrimination by harming the employees’ human dignity. In fact, the court noted that public service, military and RCMP careers are well respected and coveted positions in Canadian society.

Implications

It is unlikely that this decision will have widespread implications for private sector. The superannuation plans are particularly distinguishable on the basis that there are no separate funds to support the pension obligations as is the case of private sector pension plans. However, the court’s statements regarding the use of certain pension plan documentation as evidence of the native of the plan may be useful when a plan sponsor seeks to maintain that a pension plan is not a trust despite comments or actions by its employees that may be to the contrary.

GRIEVING ENTITLEMENT TO SURPLUS

***CAW-Canada, Local 1015* v. *Scotsburn Dairy Group (2008)*, 66 C.C.P.B. 317 (Christie)**

Facts

In 1971, Local 1015 (the "Union") and Eastern Dairy Foods Co-operative Ltd. ("EDC"), a predecessor to Scotsburn Dairy Group (the "Employer"), entered into a collective agreement, which contained the following provision:

> The Company agrees that the employees shall be covered by a suitable pension plan on the contributory basis of wages from the employees and a likeable amount from the employer.

At the same time, EDC entered into a contract with Co-operative Life Insurance (the "Co-operators") (the "Contract"), creating a fund to be used to purchase the benefits specified in the EDC pension plan, a defined benefit pension plan, also established at the same time with the Co-operators (the "EDC Plan"). Until 1981, section 16 of the Plan provided:

> The company expects that the Plan will be continued indefinitely; however, if it should be necessary to discontinue the Plan, the entire Fund will vest in the retired members and members and their estates or designated beneficiaries, and no part of the Fund will revert to the benefit of the Company.

Neither the Contract nor the EDC Plan contained a provision enabling the employer to amend the Contract or the EDC Plan, as the case may be.

As of 1978, Article 18 of the collective agreement stated that, "[e]xisting customs and practices, rights and privileges, benefits and working conditions shall be continued unless modified by mutual agreement of the employer and the union". The EDC Plan was amended from time to time prior to 1981 by the Employer and the Co-operators without any formal notice to the Union. Such amendments benefited the employees covered by the EDC Plan and no grievance was ever filed by the Union. In 1981, the EDC Plan was amended by agreement between the Employer and the Co-operators (with no notice to the employees or the Union) to provide that, upon discontinuance of the EDC Plan, any surplus would be returned to the Employer.

On December 31, 1987, the Employer closed the EDC Plan and brought into effect the Scotsburn Pension Plan (the “Scotsburn Plan”), effective January 1, 1988. The Scotsburn Plan was a defined contribution pension plan. The former members of the EDC Plan were to participate in the Scotsburn Plan for future service and it also provided a guarantee of benefits under the ECD Plan for pre-1987 service. At that time, the EDC Plan had a surplus of approximately $500,000, which the Employer used to take a contribution holiday under the new Scotsburn Plan for the years 1989 to 1992.

In 2004, the Union launched a three part grievance. The grievance sought an award to the effect that 1) that the Employer breached the collective agreements from 1972 to1988 by failing to contribute a “likeable amount” as compared to the employee contributions; 2) that the Employer breached the terms of the EDC Plan by amending it in 1981 to authorise the return of pension surplus to the Employer, and; 3) that the Employer utilized trust funds to make its contributions to the Scotsburn Plan with the result that the employees, former employees, retirees and their beneficiaries lost the benefit of the required employer contributions between 1972 and 1988 and the benefit of the then existing EDC Plan surplus and interest thereon.

Decision

The arbitrator found that whether the Employer failed to contribute “a likeable amount” between the years of 1977 and 1998, was barred under the doctrine of *laches* (delay) since the Union did not file a grievance on that issue until 2004. Also considered was the fact that the Union’s failure to grieve in a timely fashion would be very prejudicial to the Employer, given that the Union ought to have known about the employers failure to contribute during this period. It was determined that if the matter was found in the Union’s favour now, there would be significant financial and regulatory complications. The arbitrator found that the doctrine of *laches* did not apply to the second and third issues since the Union neither knew nor could be deemed to have known of the 1981 amendment until 2001.

The arbitrator determined that the Employer breached Article 18 of the collective agreement when it amended the EDC Plan with no notice and/or agreement from the Union to provide itself with surplus entitlement. The fact that the Union had not previously grieved amendments where no notice was given was of no consequence.

Finally, the arbitrator determined that the EDC Plan was never impressed with a trust, since there was never any certainty of intention to create a trust by the parties. However, when the EDC Plan was discontinued in 1987, according to the terms of the EDC Plan, the actuarial surplus in the EDC Plan vested in the employees and must now be distributed to them.

Implications

It may be possible, even in pension cases that are heard before an arbitrator, to raise successful objections to a grievance based on delay, where to hear an issue would cause significant administrative, or cost ramifications to the innocent party. In other respects, this decision is not surprising as it applies established principles to determine surplus ownership and requires that notification provisions in collective agreements be respected.

PAYMENT OF PLAN EXPENSES

OMERS Sponsor Corporation **v** ***OMERS Administration Corporation*****, 2007 CanLII 3970 (Ont. S.C.J.)**

Facts

When it took effect in June 2006, the *Ontario Municipal Employees Retirement System Act, 2006 (*"*OMERS Act")* created a new OMERS governance regime. The *OMERS Act* established two statutory corporations, the OMERS Sponsors Corporation ("SC") and the OMERS Administration Corporation ("AC"). The AC was made responsible for the administration of the OMERS pension plans, and the SC was made responsible for sponsor functions.

This case involves the interpretation and application of certain provisions of the *OMERS Act*. Section 27 of the *OMERS Act* provides that the AC is to reimburse the SC for costs that, in the opinion of the AC, may be lawfully paid out of the OMERS pension fund, and paragraphs 35(2)(c) and 35(2)(d) state that the AC can provide technical and administrative support to the SC. However, the *OMERS Act* does not specify the nature of the costs that are lawfully payable from the fund, or the support that the AC is to provide.

The SC and AC worked cooperatively to develop a joint protocol respecting the nature of support that the AC would provide the SC, and respecting expenses payable from the OMERS pension fund ("Joint Protocol"). The Joint Protocol called for certain SC expenses to paid from the OMERS pension fund that would not typically be payable from a fund of a single employer pension plan. The parties sought a declaration from the Ontario Superior Court of Justice approving the Joint Protocol so as to avoid future litigation on these issues.

Decision

The Joint Protocol was approved by the court.

The court held that, in interpreting provisions of the *OMERS Act*, including the question of whether a cost is one which may be “lawfully” paid out of the pension fund, a court must consider the OMERS pension plans, the Ontario *Pension Benefits Act,* and the common law. Reference was made to the Ontario Court of Appeal decision in *Kerry (Canada) Inc.* v. *DCA Employees Pension Committee* (2007), 86 O.R. (3d) 1, in which it was held that expenses related to the administrative functions may properly be paid out of the fund, while expenses relating to the sponsor functions would not be properly paid out of the fund.

In this case, the court recognized that in a traditional single employer pension plan the employer is both the administrator and the sponsor, but that under the *OMERS Act* these roles are separated between the SC and AC. Unlike the traditional single employer model, the SC has no independent corporate interest beyond fulfilling its duties and ensuring the health and viability of the OMERS pension plans, and indeed that many of the SC interests and obligations are administrative in nature. Specifically, the court stated that “the only interest of the SC would appear to be the proper governance of the OMERS Pension Plans” and that by statute “it is assigned certain duties that are traditionally performed by the administrator.”

According to the court, the statutory role and duties of the SC and AC distinguishes the OMERS governance structure from that of a traditional single employer pension plan, and the court concluded that this difference takes “OMERS out of the ambit of *Kerry* and [permits] sponsor expenses to be paid out of the fund.” On the other hand, the court observed that certain SC expenses, namely, expenses relating to the supplementary decision making mechanisms, were to be paid by way of a separate levy on participating employers and plan members. In this regard, the court stated:

> The supplementary decision-making process is reserved for those situations where the members of the SC are unable to form the required consensus. In other words, the costs are incurred to sort out separate stakeholder interest. This is the situation which most closely reflects collective bargaining type disputes, which under a typical pension plan expenses cannot be charged to the plan because they are associated with distinct employer/employee interests rather than the best interests of the plan as a whole.

Further, the court noted that the levy could only be made on employers and active members. Former members could not be required to pay any part of the levy, and the court stated that employers and active members could consequently pay a disproportionate burden of governance-related costs if the SC was unable to receive compensation from the OMERS pension fund for administrative related expenses.

In conclusion, the court held that reimbursement of a plan sponsor's expenses from a pension plan is a departure from the traditional model of pension governance, but that the statutorily created structure of the SC made the departure appropriate in this case. Specifically, when the SC is acting in the best interest of the plan, and the expenses are administrative in nature, related costs that are incurred will be lawfully paid from the OMERS pension fund. The court held that the categories set out in the Joint Protocol best accord with a proper reading of the overall scheme and purpose of the *OMERS Act*.

The court held that Joint Protocol properly identified costs that are "lawfully" paid from the OMERS pension fund, and categories of technical AC support that are reasonable and appropriate. Included in the list of costs and support that could not, respectively, be paid from the OMERS pension fund or provided by the AC, are costs and support that relate to resolving separate stakeholder interests rather than the interest of the OMERS plan as a whole.

Implications

The decision generally follows the methodology applied by the Court of Appeal in *Kerry* respecting the issue of when expenses are payable from a pension fund. However, the unique structure of OMERS will limit the practical application of this decision to traditional single employer sponsor pension plans.

THE LATEST ON CONTRIBUTION HOLIDAYS

***Smith* v. *Michelin North America (Canada) Inc.*, 2007 NSSC 317**

Facts

This case involves an application by an employee of Michelin North America (Canada) Inc. ("Michelin") for a declaration that Michelin was not entitled to take contribution holidays from its pension plan, and for an order that Michelin pay $268 million into its pension fund (representing the employer pension contributions not made during the contribution holidays). The employee, Mr. Smith, was a forklift operator at one of Michelin's Nova Scotia plants. Mr. Smith was appointed to represent all 600 plan members, spouses and beneficiaries of the pension plan.

Effective January 1, 1965 Michelin established a defined benefit pension plan for its Canadian sales force and staff in its Montréal head office. Michelin established a defined benefit pension plan for manufacturing employees in Nova Scotia effective January 1, 1972. The two Michelin pension plans were merged with one another effective December 31, 1990. The merged Michelin plan was, in turn, merged with the Uniroyal Goodrich Pension Plan effective September 1, 2001 (the resultant plan is herein referred to as the "Michelin Pension Plan").

From 1984 to 1988 and 1995 to 2001, the Michelin Pension Plan had considerable surplus and Michelin took contribution holidays.

Nova Scotia enacted the *Pension Benefits Act* (Nova Scotia) and its related regulations ("PBA") effective January 1, 1977. At all relevant times the PBA permitted (but did not require) employer contribution holidays. The principal question in this case is whether the Michelin Pension Plan permitted Michelin to take employer contribution holidays and, if so, whether the amendments of the Michelin Pension Plan to permit employer contribution holidays were validly effected.

Decision

LEGAL PRINCIPLES

The court canvassed the case law regarding an employer's ability to take contribution holidays under a defined benefit pension plan, including the leading Supreme Court of Canada decision in *Schmidt* v. *Air Products of Canada Ltd.,* [1994] 2 S.C.R. 611. The court summarized the principles set forth in *Schmidt* as follows:

1. where the applicable legislation permits contribution holidays, the question is whether the wording of the specific plan does or does not permit them;
2. the permission to take contribution holidays may be explicit or implicit;
3. the prohibition against taking contribution holidays may be explicit or implicit and may be contained in either the pension plan or the trust creating it;
4. there is a presumption that contribution holidays are permitted where the plan refers to actuarial calculations;

5. accepted actuarial practice includes consideration of actuarial surplus in determining the amount needed to fund plan benefits;
6. taking actuarial surplus into consideration in determining employer contributions is consistent with the nature of a defined benefit plan;
7. taking actuarial surplus into consideration in determining employer contributions is also consistent with tax legislation respecting Registered Pension Plans;
8. a formula for calculating contributions precludes contribution holidays;
9. contribution holidays do not encroach upon the trust fund because they do not reduce the corpus of the fund or apply monies in the fund to purposes other than the employees' exclusive benefit;
10. no monies are withdrawn from the trust fund during a contribution holiday; the monies that the employer would otherwise have contributed to the pension fund are therefore not impressed with the trust;
11. funds once contributed to the pension plan are "accrued benefits" of the employees; and
12. the accrued benefits are of two types: a) employees are entitled to receive the defined benefits set out in the pension plan, and b) employees may have entitlement to surplus on termination of the plan, but the right does not crystallize until plan termination.

An amendment which provides for a contribution holiday does not reduce members' accrued benefits or amount to an appropriation of surplus, because members may only have a contingent right to actuarial surplus in an ongoing pension plan.

The court rejected Mr. Smith's argument that contribution holidays represent a partial revocation of trust. The Supreme Court of Canada in *Schmidt* expressly held that a contribution holiday is not an encroachment on the pension trust fund.

EMPLOYER CONTRIBUTION PROVISIONS OF THE MICHELIN PENSION PLAN

The employer contribution provisions of the Michelin Pension Plan changed three times during the years in which Michelin was taking employer contribution holidays. The court therefore reviewed the employer contribution provisions of the Michelin Pension Plan in force when the various contribution holidays were taken.

i. Contribution Holidays Taken Pursuant to the 1982 Employer Contribution Provisions

The 1982 employer contribution provisions of the Michelin Pension Plan state:

> 4.2 The Company shall contribute to the Fund each year in accordance with the recommendations of the Actuary,
>
> a) such payments as are necessary to meet costs in respect of current service which are not met by contributions by Members; and
>
> b) special payments in respect of an unfunded liability or a deficiency in such amounts and manner and over such term as are required by applicable laws and regulations.

Relying upon the expert testimony of an actuary, Mr. Smith argued that the 1982 contribution formula required an annual contribution in respect of the current service cost of benefits accrued in the year, and that that calculation did not allow the actuary to take actuarial surplus into account.

The court rejected this argument. The court held that the employer contribution provision left the determination of employer contributions in the hands of an actuary, who was entitled to use accepted actuarial practice in calculating the required employer contributions. Accepted actuarial practice permits the application of surplus funds to reduce or eliminate an employer's obligation to make contributions.

The court held that the 1982 employer contribution provision had been validly enacted pursuant to the amending power that had been in the Michelin Pension Plan since 1972. The 1972 amending provision gave Michelin the right to amend the plan subject to the condition that no amendment can affect members' vested rights at the time of the amendment. The court held that the amendment to enact the 1982 employer contribution provision did not affect members' vested rights, since members have no vested right to actuarial surplus.

On this basis, the court held that Michelin's contribution holidays in 1984, 1985, 1986 and up to May 1, 1987 were permissible.

ii. Contribution Holidays Taken Pursuant to the 1987 Contribution Provisions

Effective May 1, 1987 the employer contribution provisions of the Michelin Pension Plan were amended as follows:

> 4.2 Contributions by the Company shall be paid into the Fund in such amounts and within such periods of time as may be prescribed by applicable laws and regulations.

The court noted that nothing in the 1987 employer contribution provision expressly permits or prohibits a contribution holiday. Since the PBA permitted contribution holidays at the relevant time, the court held that the 1987 employer contribution provision permitted Michelin to take contribution holidays from May 1, 1987 to the end of the 1988 contribution holiday period.

The court held that the 1987 employer contribution provision had been validly enacted pursuant to the amending power that had been in the Michelin Pension Plan since 1982. The 1982 amending provision prohibited any amendment which would adversely affect the "benefits accrued" to plan members and their beneficiaries (by contrast, the 1972 amending provision protected members' *vested* benefits). The court observed that "vested rights" are different to "accrued benefits". Nevertheless, the court held that a contingent right to surplus on termination is not a "benefit" of a defined benefit pension plan. The court noted that, in *Schmidt*, the Supreme Court of Canada used the phrase "accrued benefits" in holding that a contribution holiday does not "reduce accrued benefits". On this basis, the court held that Michelin's contribution holiday from May 1, 1987 into 1988 was permissible.

iii. Contribution Holidays Taken Pursuant to the 1990 Contribution Provisions

The employer contribution provisions of the Michelin Pension Plan were amended effective December 31, 1990, as follows:

> 4.2 Contributions to the Fund shall be made by the Employer within such periods of time and in at least such amounts as are required to fund the obligations of the Plan, as recommended by the Actuary and as prescribed by applicable legislation. The Employer may reduce its contributions that would otherwise be required to the extent that the value of the assets of the Fund exceeds the amount of the liabilities of the Plan. To the extent that contributions are required, they shall be paid into the Fund in monthly instalments no later than ninety (90) days following the month for which the contributions are payable.

This provision was in force throughout the contribution holidays from 1995 to 2001. Since, in the court's words, "there could scarcely be any clearer wording to permit contribution holidays", the court held that the contribution holidays from 1995 to 2001 were permissible.

THE 1972 PLAN

In the event that it had erred that the amendments to enact the 1982, 1987 and 1990 employer contribution provisions were invalid, the court considered whether contribution holidays were permitted by the 1972 plan. To do so, the court first had to determine which of three versions of the 1972 pension plan for manufacturing employees applied – the official 1972 French text, an "unofficial" 1978 translation prepared at the request of the Nova Scotia pension regulator when the PBA came into force, or a 2006 translation commissioned by Michelin in support of its position in the litigation.

The employer contribution provisions in the 1978 and 2006 translations differ in a material way. Specifically, in the original 1972 French plan text the employer contribution provision suggests that the actuary has discretion to make a particular determination. The 1978 translation suggests that the actuary has the discretion to calculate the cost of the benefits under the Michelin Pension Plan (which does not *per se* suggest employer contribution holidays are permissible). By contrast, the 2006 translation suggests that the actuary has discretion to determine the sufficiency of the employer contributions. Since accepted actuarial practice allows surplus to be taken into account when determining employer contribution requirements, actuarial discretion with respect to the determination of contributions implicitly authorizes employer contribution holidays.

The court accepted expert testimony adduced by Michelin to the effect that, in French, descriptive phrases generally modify the preceding words, not those that follow. On this basis, the court endorsed the 2006 translation, which supports the conclusion that employer contribution holidays were permitted under the 1972 plan text. Accordingly, the court held that all of Michelin's contribution holidays were permissible.

Implications

This decision reinforces the *Schmidt* analysis with respect to the permissibility of employer contribution holidays. Contribution holidays generally do not encroach upon the trust fund because they do not involve the application of trust monies to purposes other than plan members' benefit. Since employees may only have a contingent right to actuarial surplus, an amendment to permit contribution holidays does not affect members' vested benefits.

There is a presumption that contribution holidays are permitted where the employer contribution provision in a pension plan refers to actuarial calculations. However, contribution holidays may be prohibited where the plan sets out a formula for calculating contributions not involving actuarial discretion.

The trial Court's decision both on the merits of Mr. Smith's application and the award of costs against Mr. Smith have been appealed to the Nova Scotia Court of Appeal, which heard arguments on October 6 to 7, 2008. The Court of Appeal had not rendered its verdict at the time of publication.

COSTS IN PENSION LITIGATION

KERRY (CANADA) INC. V. _DCA EMPLOYEES PENSION COMMITTEE_ (2007), 282 D.L.R. (4TH) 625 (ONT. C.A.)

SUTHERLAND V. _HUDSON'S BAY COMPANY_, 2008 CANLII 5967 (ONT. S.C.J.)

SMITH V. _MICHELIN NORTH AMERICA (CANADA) INC.,_ 2008 NSSC 66

BURKE V. _HUDSON'S BAY COMPANY_, 2008 ONCA 690

The following cases each address the issue of whether the litigation costs of the successful party in pension court proceedings ought to be borne by the unsuccessful party (as is typically the case in Canada) or whether the special nature of pension litigation requires a different result.

Kerry

Facts

In this case, the issue in the litigation included whether the pension plan conversion from defined benefit to defined contribution was appropriate and whether Kerry's payment of administrative expenses from the pension fund rather than from its corporate revenue was permissible. At the Ontario Court of Appeal, Kerry was largely successful and sought to have its legal costs paid by the Employees Pension Committee ("EPC"). A relevant fact as that some of the members of the EPC were in fact the individuals who made the very decisions that they now attacked as being improper.

Decision

The Court of Appeal set out the general principles as to when costs may be payable from a pension fund rather than by the unsuccessful party. The Court of Appeal held that public policy dictates that the legal costs of a successful party may be payable from a pension fund in two categories of cases. Those two categories are where the proceedings are brought: (1) to ensure the due administration of the pension trust fund; or (2) for the benefit of all of the pension plan's beneficiaries.

Given Kerry's success on appeal, the Court of Appeal held that Kerry was entitled to costs of the court proceedings on a partial indemnity basis. The Court of Appeal fixed the costs at $45,000 for the Divisional Court proceedings and $40,000 for the appeal, payable by the employees Pension Committee, not the pension fund. The Court of Appeal made several key determinations that supported the decision: 1) the proceedings were adversarial in nature as the proceedings were not directed at the interpretation of documents to ascertain beneficiaries' rights, and 2) the EPC did not bring its claims for the benefit of all those with a beneficial interest in the pension fund. As such, the Court of Appeal found that the payment of costs from the pension fund was not appropriate, as this would result in there being less money in the fund available for the benefit of all members of the pension plan.

Sutherland

Facts

In this case it was alleged that the Hudson's Bay Company ("HBC") breached its obligations to the members of a contributory defined benefit pension plan established in 1971 (the "Plan"). In 1994 and 1998, HBC added a defined contribution section to the Plan and introduced employees of its wholly owned subsidiaries, Zellers and Kmart Canada, to the defined contribution section of the Plan. HBC relied on the surplus in the trust fund (the "Trust Fund") established in respect of the Plan to take a contribution holiday. The plaintiffs alleged that HBC was not entitled to make these amendments to the Plan nor was it entitled to utilize the surplus in the Trust Fund to fund contributions in respect of the Zellers and Kmart employees. At trial, HBC was successful and the class action was dismissed. Costs were awarded as payable to HBC, however, the parties made submissions to the court regarding whether the plaintiffs were required to pay HBC's costs or whether the costs were payable from the Trust Fund.

Decision

The court awarded costs to HBC of $300,000, plus $51,000 in disbursements, payable from the Trust Fund. Originally the court noted that fair and reasonable costs in the circumstances were $650,000. However, the court took into account the factors mandated by section 31(1) of the *Class*

Proceedings Act and reduced HBC's costs from $650,000 to $300,000 to reflect the extent to which the proceeding involved novel issues of law and issues of public interest. Instead of ordering that the plaintiffs be required to pay HBC's costs, the court held that costs were not foreseeable at the time of commencement of the action nor were the plaintiffs able to take any actions to control or exclude such costs.

The court then dismissed the plaintiffs' claim for <u>their</u> costs to be paid from the pension fund, on the basis that the plaintiffs were not successful, nor were they even partially successful. The court further considered that the plaintiffs rejected a settlement offer, the circumstances of which argued in favour of a denial of costs, particularly in view of the limited prospects for success in the event HBC were found to have breached its obligations to the plaintiffs.

The court found further, in its dismissal of the plaintiff's claim for costs, that it would be inequitable to require the current members of the HBC Plan to bear the costs of a legal action initiated by the members of a distinct pension plan solely by virtue of the existence of a common employer.

Smith

Facts

This decision of the Supreme Court of Nova Scotia addresses the award of costs between the parties to *Smith* v. *Michelin North America (Canada) Inc.*, 2007 NSSC 317. In that case, the Supreme Court of Nova Scotia dismissed Mr. Smith's challenge to Michelin North America (Canada) Inc. ("Michelin")'s decision to take contribution holidays from its pension plan from 1984 to 1988 and 1995 to 2001. The employee, Mr. Smith, was also unsuccessful in his claim that Michelin be ordered to pay $268 million into the pension fund (representing the employer pension contributions not made during the contribution holidays). Michelin's legal fees and disbursements relating to the litigation totalled approximately $1.2 million.

Decision

The normal rule is that the successful party in litigation is entitled to its costs. Mr. Smith argued that the normal rule should be departed from in cases involving the administration of a pension fund, which he characterized as administrative or interpretive, rather than adversarial. The court held that the relevant question in determining whether pension litigation costs are payable from the pension trust is whether the matter is adversarial or administrative/interpretive in nature. The court held that this matter was adversarial, with major financial consequences to Michelin if it was unsuccessful.

On the issue of who should pay Michelin's costs (the pension fund, or Mr. Smith personally), the court observed that Michelin is the only party required to contribute to the Michelin Pension Plan. If Michelin's costs were ordered to be paid from the pension fund rather than Mr. Smith, this would amount to an order that Michelin pay its own costs. The court endorsed the view that an award of costs should penalize the unsuccessful litigant, encourage settlement and discourage frivolous litigation. The court held that the rule in the Nova Scotia Rules of Civil Procedure, which permits a trustee to have its costs of litigation paid out of the trust, was inapplicable to this situation.

However, the court also recognized that Mr. Smith represented the entire group of plan beneficiaries – there was no other group that could be entitled to any surplus remaining on wind up of the Michelin Pension Plan. Had there been another group entitled to surplus on wind up, this would likely have weighed against any part of Michelin's costs being paid from the pension fund, since that would disadvantage the group of beneficiaries not party to the litigation.

For these reasons, the court exercised its discretion and ordered that 50% of the costs award be paid by Mr. Smith personally, and the remaining 50% by the pension fund.

On the issue of the amount of Michelin's costs, the court held that, even though Mr. Smith's application was heard as a complex chambers matter, it was the final hearing in the proceeding. The court awarded Michelin $500,000 in legal fees plus approximately $100,000 in disbursements, a substantial but not complete indemnity for its costs.

The trial Court's decision both on the merits of Mr. Smith's application and the costs award have been appealed to the Nova Scotia Court of Appeal, which heard arguments on October 6 to 7, 2008. The Court of Appeal had not rendered its verdict at the time of publication.

The Nova Scotia Court of Appeal refused Mr. Smith's request for a stay of execution on this costs award, subject to an undertaking by Michelin not to execute against Mr. Smith's home and two horses (see *Smith* v. *Michelin North America (Canada) Inc.*, 2008 NSCA 52). The Nova Scotia Court of Appeal also ordered Mr. Smith to post $50,000 as security for Michelin's costs in the appeal, as a condition to allowing Mr. Smith's appeal to proceed.

Burke

Facts

As discussed above in the summary of *Burke* v. *Hudson's Bay Company*, the Court of Appeal recently held that HBC was not required to transfer surplus to a successor plan following a sale of a part of HBC's business. The Court of Appeal also affirmed that HBC was not required to pay plan administration expenses. Following this decision, HBC sought its litigation costs payable on a partial indemnity basis by the representative plaintiffs personally, instead of from the pension fund. HBC also sought the balance of its litigation costs (those in excess of a partial indemnity award) payable from the pension fund. The plaintiffs argued that both parties should have their costs payable from the pension fund or, in the alternative, that both sides must bear their own costs.

Decision

The Court of Appeal reviewed the general principles for the awarding of litigation costs to in pension cases as set out in *Kerry*. On the facts, the Court of Appeal found that this case differed from *Kerry*, as the action was brought to ensure the proper administration of the pension plan and fund and, in spirit, was brought on behalf of all beneficiaries of the pension plan.

The Court of Appeal found that the issue of whether surplus was required to be transferred on a sale of business was created by ambiguities in the pension plan documentation. Accordingly, the action was necessary to bring clarity to the plan's administration and therefore the costs should be borne by the pension fund. The Court of Appeal went on to reiterate that courts must always ensure the reasonableness of costs charged to pension plans, as the plan members are not provided with proper access to such information to act as a check and balance on the amounts charged to the fund.

Implications

The above decisions discussed make it apparent that the ultimate determination of cost awards in pension litigation will be based on a number of factors. In all cases, the decision to award costs payable personally or from the pension fund will be a highly factual determination with the courts reviewing the purpose of the litigation and whether it was adversarial in nature or for the benefit of the plan as a whole. Certainly, for plan sponsors, these decisions are welcome news that the courts are prepared to require unsuccessful litigants to pay costs personally where frivolous litigation is initiated.

However, in the Smith case, as a result of the costs award, Mr. Smith was personally ordered to pay $300,000 of Michelin's costs out of his own pocket, with no obligation on the other plan members, spouses and beneficiaries he represented in the application to assist with payment. If this costs award is upheld on appeal, it could have a chilling effect on questionable pension litigation, and discourage the bringing of proceedings by representative plaintiffs rather than by way of class action.

FUNDING OF MULTI-EMPLOYER PENSION PLANS

MULTI-MARQUES DISTRIBUTION INC. V. *RÉGIE DES RENTES DU QUÉBEC*, 2008 QCCA 597

Facts

This case addresses under funding of a pension known as the Bakery and Confectionery Union and Industrial Canadian Pension Fund (the "Plan"). The Plan was a Quebec-registered multi-employer pension plan with members across Canada, with a plurality of the membership found in the Province of Quebec. The Plan text authorizes its administrator to reduce accrued benefits when the assets in the pension fund are inadequate to pay pension obligations.

Two groups of employees employed by divisions of Multi-Marques Distribution Inc. ("Multi-Marques") joined the Plan in 1992 and 1994 respectively. The Plan's administrator, on its own initiative and unbeknown to Multi-Marques, granted past service credits in the Plan for service with Multi-Marques to those employees with such prior service. Past service was granted notwithstanding that the collective agreements which required participation in the Plan fixed Multi-Marques' contributions for future service only. The assumption used by the administrator was that the cost of granting such service credits could be fully amortized after 15 years of Plan participation.

Following reorganizations that occurred in 1996 and 1997, the Multi-Marques division employees that had joined in 1992 and 1994 were terminated. As a result of this downsizing, the Quebec pension regulator (the Régie des Rentes du Québec or "Régie") ordered two partial wind ups of the Plan. Actuarial valuations performed revealed an unfunded position (a deficit of $5,000,000). The Plan administrator sought to reduce accrued benefits, as per the terms of the Plan text, in proportion of the Plan's funded ratio. The Régie refused to approve the partial wind up reports on the basis that the *Supplemental Pension Plans Act* ("SPPA") does not permit reductions in accrued benefits on a pension plan wind up. Multi-Marques and other participating employers therefore were required to fund the deficit relating to the Multi-Marques employees.

As permitted under the SPPA, Multi-Marques and the Plan administrator sought a reconsideration of the Régie's decision. The Régie refused the request for a reconsideration maintaining that the provisions of the Plan which would have allowed a reduction of accrued benefits violate section 228 of the SPPA, a section that treats deficits on wind ups (and partial wind ups) to be debts of the participating employer.

Moreover, the Régie argued that SPPA section 211 prohibits the imposition of conditions to the granting of pension benefits including those contained in the Plan which purported to make the crystallization of the benefit dependent on the funded status of the Plan at the relevant time. The Régie's decision was appealed to the Administrative Tribunal of Quebec ("TAQ").

The TAQ affirmed the Régie's decisions by holding that SPPA prohibits a reduction of accrued benefits. On judicial review of the TAQ's decision to the Quebec Superior Court, the decision of the TAQ was upheld. The court deduced that since the Quebec legislature had not adopted a clause specifically allowing the reduction of accrued benefits in the context of multi-employer pension plans, in line with Ontario and other provinces, the Régie's interpretation of the SPPA could stand. the matter was then appealed to the Quebec Court of Appeal.

Decision

The Quebec Court of Appeal reconciled the notion of reducing accrued benefits with the legislative provisions found in sections 211 and 228 of the SPPA. In the opinion of the Court of Appeal, pension benefits must be determined based on the terms contained in the pension plan text. The Court of Appeal stated that so long as the Plan's provisions do not breach any of the legal obligations imposed by the SPPA, they are determinative of the value of an accrued benefit. The Court of Appeal stated that the terms of the Plan were in "perfect agreement" with the SPPA.

Implications

While the decision is good news for multi-employer pension plan ("MEPP") participating employers with Quebec members. Nonetheless, the clarification brought about by the Court of Appeal, may have an impact on the likelihood that employees will agree to participate in MEPPs given that their exposure goes beyond the contributions established in the collective agreement. The Supreme Court of Canada denied leave to appeal from the Court of Appeal's decision on October 16, 2008. However, the Quebec government passed amendments to the SPPA, in Bill 68, to clarify the funding rules, thereby nullifying the effect of the Court of Appeal's decision.

THE TOWNS OF AMHERST ET AL. V, NOVA SCOTIA (SUPERINTENDENT OF PENSIONS), *2008 NSCA 74*

Facts

In 1981, the Police Association of Nova Scotia ("PANS") set up a pension plan for police in Nova Scotia (the "Plan"). The Plan was with PANS as the administrator and, at least initially, the sole sponsor.

Membership in the Plan was open to police members of PANS that were employed by towns or municipalities in Nova Scotia, subject to negotiation by way of collective agreement between PANS locals and various towns (the "Towns"). Under the collective agreements, the sole obligation of the Towns was to contribute a set percentage of police officers' wages to the Plan.

In 2003, an actuarial valuation report identified that the Plan was under-funded on a solvency basis. PANS took the position that, notwithstanding the fixed contribution rates that had been bargained in the collective agreements, the Towns were "employers" for purposes of the Nova Scotia *Pension Benefits Act* ("PBA") and, as such, that they were required to make up the funding deficiencies in the Plan. The PBA defines an "employer" as "the employer required to make contributions under the pension plan".

The Towns disagreed with the assertion that they were "employers", and refused to provide funding above what they had committed to pay under the collective agreements. Among other arguments, the Towns pointed to the terms of the Plan, which required that employers sign participation agreements, and asserted that the Towns could not be employers since they had not entered into such agreements.

The matter came before the Nova Scotia Superintendent of Pensions ("Superintendent"), who agreed with PANS that the Towns were employers within the meaning of the PBA, and that they were required to pay additional amounts to fund the solvency deficiency. The Superintendent was asked to reconsider her decision and the result was the same as her initial decision. She reasoned that the Towns were employers because they make contributions to the Plan, and that their conduct over the previous twenty-four years supported the view that the Towns had accepted responsibility as such. Moreover, the Superintendent held that the Plan was not a multi-employer pension plan ("MEPP") under which employer contributions could be limited to those set out in a collective agreement; and the Plan terms required that employers contribute amounts necessary to fund benefits. Consequently, the Superintendent held that the Towns were required to fund the Plan's solvency deficiency. The decision was appealed to the Nova Scotia Supreme Court.

The Nova Scotia Supreme Court allowed the appeal. The court held that the Towns did not become participating employers in the Plan by virtue only of having had made contributions to it over several decades, and that there was nothing in the PBA that deemed that they were employers onto whom the solvency funding obligations would fall. Also, the court stated that the imposition of additional liability on a contributing employer (i.e., for funding pension plan deficits), requires clear and unequivocal language, and that these obligations must be contemplated by both parties at the commencement of their relationship. The court concluded that the Towns are not participating employers and that they are not responsible for the funding deficiencies of the Plan. This decision was appealed to the Nova Scotia Court of Appeal.

Decision

The Court of Appeal overturned the lower court's decision and restored the Superintendent's decision.

The Court of Appeal reviewed other court decisions respecting the standard of review that a court should adopt in reviewing the decision of an administrative tribunal, and made the following statement:

> Straightforward matters of pure law that do not involve inextricably mixed issues of fact and law, discretion, policy or technical pension expertise, should be reviewed for correctness. Issues of fact, inextricably mixed fact and law, discretion, policy, or complex legal issues under the PBA that engage the Superintendent's pension expertise are governed by reasonableness.

In this case, the Court of Appeal held that the Superintendent's decision was subject to a reasonableness standard, because the issue to be decided was primarily one that involved a question of mixed fact and law on issues that were policy-laden and within the purview of the Superintendent's specific pension expertise.

The Court of Appeal concluded that Superintendent's decision was reasonable and that the Nova Scotia Supreme Court erred by setting aside the Superintendent's decision.

In the result, the Towns were required to fund the solvency deficit in the Plan on the basis that they were "employers" under the PBA. This was despite the fact that the Plan defined an "employer" to be these with agreements with PANS but technically the agreements to participate in the Plan were between the Towns and PANS local unions, rather than PANS itself. The Towns had also argued that the Towns were supposed to have a role in the administration and amendment of the Plan but had been denied this involvement and that this denial should relieve them from the funding obligation. The Court of Appeal held that any such denial was properly addressed by seeking involvement if necessary through judicial intervention, but did not relieve the Towns from their funding obligations under the Plan and the PBA. Finally, the Towns argued that the collective agreements limited contributions and therefore they could not be required to fund additional amounts. This argument was also rejected on the basis that the Towns have PBA and plan-based funding obligations which cannot be contracted out. The Plan was not drafted or registered as a MEPP to which more limited funding obligations would apply under the PBA.

Implications

This decision demonstrates that in non-MEPP arrangements, collectively negotiated contribution rates will not on their own insulate participating employers from additional funding obligations if the notion of limited liability is inconsistent with the provisions or general structure of the pension plan (i.e., where the plan provides that all participating employers are responsible for funding deficits). Also, in the absence of terms that clearly govern the roles and responsibilities of participating employers, a decision-maker is likely to examine the conduct of the parties when attempting to construe the nature and scope of their obligations.

The decision is also notable for the amount of deference given to the pension regulator when the regulator's decision is challenged an issue which is very much in flux given the Federal Court of Appeal's decision in *Cousins* v. *Marine Atlantic,* 2008 FCA 226 and the Federal Court's decision in *Buschau* v. *Rogers Communications Inc.*, 2008 FC 1023.

TERMINATION AT NORMAL RETIREMENT AGE

***JOHNSON* V. *GLOBAL TELEVISION NETWORK INC.*, 2008 BCCA 33**

Facts

Mr. Johnson was a long service employee whose position became obsolete following a transfer of his functions to another location in 2004. At that time, he was advised that his position would no longer exist but that he would continue to receive his salary and benefits until his Normal Retirement Date of August 1, 2005. The Normal Retirement Date was the first day of the month following his 65th birthday in accordance with the terms of the employer's pension plan.

Mr. Johnson brought a claim seeking a longer period of severance, claiming that there was no term in his employment contract which required him to retire at age 65. In fact, he relied on events in 1998 during which he claimed that he was advised that he could have his position "as long as he want[ed] it."

The trial judge concluded that Mr. Johnson was constructively dismissed and that there was no express term in Mr. Johnson's contract of employment that required him to retire at age 65.

Decision

The trial decision was overturned on appeal. The appeal focused on whether it became a term of Mr. Johnson's employment contract during the course of his employment that Mr. Johnson was required to retire at age 65. The Court of Appeal held that there did not need to be a written contract of employment for such a term to exist and that, as long as such a term was accepted by both parties, mandatory retirement can be a term of the employment contract.

The Court of Appeal held that such a term did, in fact, become a provision of Mr. Johnson's employment contract. It found that this provision was part of the expectation of the parties as a result of the language used in the pension plan. The Court of Appeal held that Mr. Johnson had voluntarily joined the employer's pension plan. In doing so, the Court of Appeal found that Mr. Johnson accepted the retirement provision in the Plan as a term and condition of his employment contract. The Plan's provisions stated that employees were subject to a Normal Retirement Date of age 65, unless the company provided consent to continue in service longer. As such, Mr. Johnson's terms and conditions of employment contained the term that Mr.

Johnson would retire at age 65, unless the employer provided consent. The Court of Appeal held that the statement made to Mr. Johnson in 1998 was not consent to continue employment after age 65.

Implications

The decision is somewhat surprising, given that pension plans are generally considered to be unilateral contracts imposed on employees and the result is likely largely based on the fact that pension plan membership was voluntary and Mr. Johnson's decision to join the plan indicated an agreement to be bond by its terms. The decision will have limited application for employers in jurisdictions where mandatory retirement provisions in employment contracts are contrary to human rights legislation. However, where mandatory retirement policies remain enforceable, the decision demonstrates how such a policy can become an express term of the employment contract.

BONA FIDE PENSION PLAN EXCEPTION TO MANDATORY RETIREMENT

***NEW BRUNSWICK (HUMAN RIGHTS COMMISSION)* V. *POTASH CORPORATION OF SASKATCHEWAN INC.*, 2008 SCC 45**

Facts

This decision concerns a complaint by Mr. Scott, an employee who was required to retire from employment at age 65. Mr. Scott was asked to retire at the age of 65 pursuant to the mandatory retirement policy contained in his employer's pension plan. He alleged that this constituted age discrimination. Mr. Scott reported to work in New Brunswick and this decision is specific to the provisions of New Brunswick's Human Rights Code.

Although typically requiring retirement at age 65 would constitute age discrimination, the age discrimination provisions in New Brunswick's *Human Rights Code* do not apply to a decision to terminate an employee if the decision is taken pursuant to a bona fide pension or retirement plan (also known as the "bona fide pension plan exception"). The issue was whether this exception applied. The complaint was first decided by a Board of Inquiry. The Board found that a bona fide pension plan existed if it satisfies the typical three-part bona fide occupational requirement test developed by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*") . The employer challenged this approach arguing that the *Meiorin* test was not applicable given the specific language of the New Brunswick Human Rights Code.

On judicial review, the Court of Queen's Bench set aside the Board of Inquiry's decision. This decision was appealed. The Court of Appeal concluded that the applicable test was whether the pension plan was subjectively and objectively bona fide. The Commission appealed the decision to the Supreme Court of Canada.

Decision

The Supreme Court of Canada held that the *Meiorin* three-part test to determine what bona fide meant in the human rights context does not apply to pension plans. Pensions were traditionally treated differently in most human rights codes because they arose from different protective concerns, the primary concern being the protection of employees' retirement income.

The bona fide test to be applied in this case had a subjective and objective component. The majority of the Supreme Court found that the pension plan has to be a legitimate plan, adopted in good faith and not for the purpose of defeating protected rights. The plan as a whole has to be evaluated, not a piecemeal examination of particular terms. Unless there was evidence that the plan as a whole is not legitimate, it will be found immune from the conclusion that a particular provision compelling retirement at a certain age constitutes age discrimination.

Implications

This decision has limited application to employers outside of New Brunswick, given the specific language of the human rights statute in that province. However, the decision is interesting, as the Supreme Court affirms that a different standard of analysis will attach to conditions in pension plans, as opposed to bona fide occupational requirements, given that the primary objective of pension plans being to provide financial security to retirees.

Now that the standard to be applied to determine if the employer's pension plan is bona fide has been determined, the matter will be adjudicated on its merits.

CHALLENGING MANDATORY RETIREMENT IN THE FEDERAL SECTOR

THWAITES* V. *AIR CANADA, 2007 CHRT 54

Facts

With facts similar to those in *Vilven* v. *Air Canada*, 2007 CHRT 36 which was decided by the Canadian Human Rights Tribunal in August 2007, another Air Canada pilot challenged the mandatory retirement age of pilots and also challenged the constitutionality of the exception for mandatory retirement in the *Canadian Human Rights Act* ("*Act*"). Air Canada argued that the complaint should be dismissed as an abuse of process as the issue was fully litigated in *Vilven*. In that case, the exception allowing for mandatory retirement was upheld given that retirement at age 60 was an industry norm. In *Vilven*, the Tribunal held that the exception permitting mandatory retirement in these circumstances did not breach the *Charter of Rights and Freedoms*.

Decision

The complainants in the *Vilven* decision had already filed for judicial review when Thwaites' case was heard by the Tribunal. As a result, the Tribunal rejected Air Canada's arguments that the case should be dismissed outright. Instead, the Tribunal held that the issue of the constitutionality of the mandatory retirement exception under the *Act* had not been conclusively decided. The Tribunal held that Air Canada could bring a motion for dismissal of the Thwaites action if the *Vilven* decision was conclusively decided and upheld.

Implications

As with many other mandatory retirement cases under the *Act*, the outcome of the judicial review of the *Vilven* decision will have important implications for their continuation. If the Tribunal's decision in *Vilven* is overturned by the Federal Court, mandatory retirement may no longer be permissible under the *Act* and it is likely that we will see an increase in challenges to mandatory retirement policies in the federal sector.

***CKY-TV* V. *COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 816 (KENNY GRIEVANCE)*, [2008] C.L.A.D. NO. 92 (PELTZ)**

Facts

The grievor in this case, Terry Kenny, had worked at CKY-TV (the "Employer") in Winnipeg for 27 years as a technician. The grievor's employment was terminated when he reached the age of 65 years based on the Employer's mandatory retirement policy. CKY-TV is owned by CTV Television Inc., which has a national corporate policy requiring retirement on or before the employee's 65th birthday.

The Union grieved that Mr. Kenny's discharge was without just cause or, in the alternative, that the Employer acted in an arbitrary and discriminatory manner contrary to section 7 of the *Canadian Human Rights Act* ("*Act*") and the collective agreement as a whole. Section 7 of the *Act* provides that it is a discriminatory practice to refuse to continue to employ an individual based on a prohibited grounds of discrimination, in this case age.

The Employer justified its mandatory retirement policy based on the exception to the age discrimination prohibitions, which states:

> It is not a discriminatory practice if
>
> (c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual.

Decision

Arbitrator Peltz first held that since the Employer can be expected to have the necessary information regarding similar positions in the industry, the Employer should bear the burden of proving the "normal age of retirement for employees working in positions similar to the position of that individual" under the *Act*. In determining what the "normal age of retirement for employees working in positions similar to the position of that individual" is, since this principle only applies to federally-regulated employers who are subject to the *Act*, only those employers should be considered. In addition, it is the number of positions nationally which should govern, regardless of the fact that this may allow a dominant industry player to skew the analysis. Upon this analysis, the normal age of retirement for employees working in positions similar to the grievor was found to be age 65 and therefore there was no discrimination under the *Act*.

Arbitrator Peltz went on to consider whether the *Act* violated the equality guarantee found in section 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") which provides that "every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on…age."

In considering the alleged violation of the equality guarantee, the arbitrator held that the most persuasive factor was whether the impugned legislation takes into account the claimants' actual needs, capacities and circumstances. Since section 15(1)(c) authorizes mandatory retirement regardless of the individual employee's needs and capacities, it favours a finding of discrimination. Thus, he held that section 15(1)(c) of the *Act* is discriminatory. After making this determination, the next issue considered was whether the discrimination was a reasonable limit under section 1 of the *Charter* and therefore justifiable. In applying the reasonable limits test, Arbitrator Peltz found that although the objective of the legislation was pressing and substantial and it was arguable that there was a rational connection between the objective and the legislation, the minimal impairment test was not met. This conclusion was a departure from prior age discriminatory decisions (for example, *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229).

In summary, Arbitrator Peltz held that the Employer's mandatory retirement policy fit within the exception to the general prohibition again age discrimination under section 15(1)(c) of the *Act*. However, section 15(1)(c) of the *Act* was found to be in violation of the equality rights guarantee under the *Charter* and the violation was not justifiable under section 1 of the *Charter*. As a result, section 15(1)(c) of the *Act* was treated as being of no force and effect. Being unable to rely upon the section 15(1)(c) exception, the Employer's mandatory retirement policy was found to be contrary to section 7 of the *Act*. The grievor was found to have been terminated without just and sufficient cause

Implications

This is the first case to hold that a mandatory retirement policy that conforms with section 15(1)(c) of the *Canadian Human Rights Act* is invalid under the *Charter*. Although the jurisdiction of the arbitrator was not enough to strike down section 15(1)(c) of the *Act*, it opens up that possibility when a similar case is heard by the courts, such as the judicial review of *Vilven* v. *Air Canada*, 2007 CHRT 36. The case may pave the way for the elimination of mandatory retirement in federally-regulated industries.

CHALLENGING THE MAXIMUM AGE FOR PENSION COMMENCEMENT

***GILL AND GHAN* V. *R.*, 2008 FC 185**

Facts

Jagmohan Singh Gill and Shatru Ghan (together, the "Plaintiffs") were lawyers with the Department of Justice and were therefore public service employees. According to the *Public Service Superannuation Regulations* ("PSSRs"), all eligible public service employees were required to contribute to the Public Service Pension Fund (the "Fund"), a defined benefit registered pension plan. However, once an employee accumulated 35 years of pensionable service under the Fund, they were no longer allowed to make contributions nor were contributions made on their behalf. In December 1995, the PSSRs were amended to exclude employees over the age of 71 from making contributions to the Fund (and employer contributions were also excluded), whether or not the particular employee had accumulated 35 years of pensionable service. The Plaintiffs had both reached 71 years of age and continued to work for the public service and, therefore, were no longer able to contribute to the Fund. At the relevant time, Mr. Gill had 32 years of pensionable service and Mr. Ghan had 28 years of pensionable service.

The Plaintiffs sought a declaration that the relevant provision of the PSSRs (section 12.1) violated subsection 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and was therefore of no force and effect as age discrimination. The Plaintiffs also sought retroactive relief from the date their pension benefits were frozen at age 71.

Decision

The Federal Court reviewed the test for discrimination under subsection 15(1) of the *Charter* and noted that courts must undertake three broad inquiries in order to determine whether a particular law is discriminatory. To undertake this analysis first, an appropriate comparator group must be selected. The court determined that the relevant comparator group in this case was public service employees who had joined the public service at such an age that they could still provide 35 years of service before reaching age 71 but had not yet reached that age. Therefore, they had the opportunity to make 35 years of contributions receive a pension based upon 35 years of service whereas the plaintiffs did not.

The court agreed with the Plaintiffs that they were being subjected to differential treatment on the basis of age, an enumerated ground of the *Charter*, since the it was the Plaintiffs' age that triggered the loss of benefit.

However, the court determined that the distinction between the Plaintiffs and the comparator group was only temporal in that it was based on the time at which an individual joined the public service. The Plaintiffs joined the public service at a time that did not allow them to work for 35 years before the age of 71. This did not constitute an enumerated ground of discrimination since the distinction was not based purely on personal characteristics of the Plaintiffs.

The court stated that the key question was whether a reasonable person in the claimant's position, possessed of similar attributes and in similar circumstances as the claimant, would find that the legislation imposing the differential treatment had the effect of demeaning his or her dignity.

Because the court determined that the PSSR provisions did not impose mandatory retirement, did not make any adverse assumptions about older people and rather, assumed that people who joined the public service later in life had less of a need for retirement planning since other options were available to them before they joined the public service, the court determined that the denial of the opportunity to continue to contribute to the plan beyond age 71 did not substantively discriminate against the Plaintiffs.

Implications

Much as the age of mandatory retirement has been challenged in the past, more recently, challenges to the maximum age for pension accruals are increasing in number. The court appears to have acknowledged that an age limitation is valid and that the pension system requires a delicate balance. The Plaintiffs have sought leave to appeal to the Federal Court of Appeal.

THE FEDERAL MONSANTO: DISTRIBUTION ON PARTIAL WIND UP

COUSINS **V.** ***CANADA*****, 2008 FCA 226**

In its much anticipated decision in *Cousins* v. *Canada (Attorney General*) *and Marine Atlantic Inc.* ("*Marine Atlantic*"), the Federal Court of Appeal has concluded that the federal *Pension Benefits Standards Act, 1985* (the "PBSA") does not require a proportionate distribution of surplus on a partial termination of a defined benefit ("DB") pension plan. The Federal Court of Appeal's decision, which was released on June 26, 2008, overturns the May 1, 2007 decision of the Federal Court.

In its May 2007 decision, the Federal Court had held that the relevant provisions of the Ontario *Pension Benefits Act* (the "Ontario PBA") and the federal PBSA were essentially analogous, and that, following the Supreme Court of Canada's July 2004 decision in *Monsanto Canada Inc.* v. *Ontario (Superintendent of Financial Services),* [2004] 3 S.C.R. 152, the administrator of a federally-regulated DB pension plan must provide for a proportionate distribution of surplus on partial plan termination.[1]

Facts

Marine Atlantic Inc. ("MAI") is a federal Crown corporation that operates ferry services between various points in the Atlantic provinces. MAI maintains a DB pension plan for certain of its employees (the "Plan"), which is governed by the PBSA.

In the late 1990s, MAI discontinued routes between New Brunswick and Prince Edward Island ("PEI"), New Brunswick and Nova Scotia ("Fundy"), and Nova Scotia and Newfoundland and Labrador ("Labrador"). MAI also relocated its Moncton head office.

In 1997, MAI terminated the Plan in respect of the employees terminated in connection with discontinuation of the PEI route. The federal Superintendent of Financial Institutions (the "Federal Superintendent") approved the PEI partial termination report, which did not provide for the distribution of a proportionate amount of surplus. In April 1998, the Federal Superintendent approved the partial termination report submitted by MAI in connection with the closure of the Fundy route. Again, the Fundy partial termination report did not provide for a distribution of surplus. In 2004, MAI filed a partial termination report in connection with its termination of the Labrador route and relocation of its Moncton head office. The Labrador/Moncton partial termination report contemplated a refund of surplus to MAI on the eventual full wind up of the Plan. The Federal Superintendent had not approved or rejected the Labrador/Moncton partial termination report at the time the *Marine Atlantic* proceedings were commenced in the Federal Court.

At some point, the *Monsanto* proceedings came to the attention of certain former Plan members, and in 2005 a formal request was made to the Federal Superintendent to reconsider his decision to approve the PEI and Fundy

[1] In *Monsanto*, the Supreme Court of Canada held that subsection 70(6) of the Ontario PBA requires a plan administrator to distribute a proportionate share of surplus on partial plan wind up. Since *Monsanto*, sponsors of Ontario-registered pension plans have faced myriad challenges in calculating, administering and distributing surplus in the context of a partial wind up.

partial terminations, and to order a distribution of surplus to members of the Plan affected by the PEI, Fundy and Labrador/Moncton partial terminations.

The Federal Superintendent determined that he had no authority to re-open the PEI and Fundy matters unless new information was presented, and that the decision of the Supreme Court of Canada in *Monsanto* did not constitute new information.

In September 2005, the former Plan members applied for judicial review of the Federal Superintendent's decision to approve the PEI and Fundy partial termination reports without provision for a proportionate distribution of surplus. The former Plan members also sought an order that the Federal Superintendent not approve the Labrador/Moncton partial termination report unless it provides for a proportionate distribution of surplus within a reasonable time.

Relevant Legislative Provisions

Subsections 29(11) and 29(12) of the PBSA state:

> (11) <u>Where the whole of a pension plan has been terminated and the Superintendent is of the opinion that no action or insufficient action has been taken to wind up the plan, the Superintendent may direct the administrator to distribute the assets of the plan</u> in accordance with the regulations made under paragraph 39(j), and may direct that any expenses incurred in connection with that distribution be paid out of the pension fund of the plan, and the administrator shall forthwith comply with any such direction.
>
> (12) <u>Where a plan is terminated in part, the rights of members affected shall not be less than what they would have been if the whole of the plan had been terminated on the same date as the partial termination.</u> [emphasis added]

By way of comparison, the relevant provisions of the Ontario PBA, considered by the Supreme Court of Canada in *Monsanto*, are as follows:

> 70(6) <u>On the partial wind up of a pension plan, members</u>, former members and other persons entitled to benefits under the pension plan <u>shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.</u>

> 79(4) <u>A pension plan that does not provide for payment of surplus money on the wind up of the pension plan shall be construed to require that surplus money accrued after the 31st day of December, 1986 shall be distributed proportionately on the wind up of the pension plan</u> among members, former members and any other persons entitled to payments under the pension plan on the date of the wind up. [emphasis added]

The Federal Court's Decision

The Federal Court considered the appropriate standard of review to be applied when it judicially reviews decisions of the Federal Superintendent. The Federal Court held that decisions of the Federal Superintendent are owed a low degree of deference (as the Supreme Court of Canada held in relation to the Ontario Financial Services Tribunal (the "Ontario FST") in *Monsanto*). In order to withstand scrutiny, the Federal Court held that a decision of the Federal Superintendent on a pure question of law must be correct. .

On the substance of the *Marine Atlantic* matter, the Federal Court held that subsection 29(11) of the PBSA does not contemplate a situation where assets can remain in a plan indefinitely following full termination. The Federal Court reasoned that the Federal Superintendent's discretion in respect of a fully terminated plan is limited to *when*, not *if*, a full termination occurs. Since the assets of a fully-terminated plan must, in all cases, be distributed at some point, the Federal Court held that subsection 29(12) of the PBSA necessitates a proportionate distribution of surplus on, or shortly after, partial termination of a federally-regulated pension plan. As a result, the Federal Court directed that the Labrador/Moncton partial termination report not be approved by the Federal Superintendent unless it provides for the distribution of a proportionate amount of surplus.

However, the Federal Court dismissed the applications for judicial review of the Federal Superintendent's decision to approve the PEI and Fundy partial termination reports. Since the time limit for application for judicial review of a federal board or tribunal decision is 30 days, the PEI and Fundy judicial review applications were years out of time (assuming that the limitations period started running when the Federal Superintendent's decisions were made). The former Plan members did not apply for judicial review of those decisions until September 2005, even though the Federal Superintendent had approved the PEI and Fundy partial termination reports in 1997 and 1998, respectively.

Decision of the Federal Court of Appeal

STANDARD OF REVIEW

The Federal Court of Appeal held that the decisions of the Federal Superintendent to approve the PEI and Fundy partial termination reports without requiring a partial distribution of surplus were owed a significant degree of deference. The Federal Court of Appeal observed that, in approving the partial termination reports:

> [T]he Superintendent was required to exercise his discretionary powers in the face of a range of policy-laden remedial choices that involved the balancing of multiple sets of interests of competing constituencies. These are precisely the circumstances where the Supreme Court of Canada has urged a higher degree of deference.

The Federal Court of Appeal attempted to distinguish the roles of the Federal Superintendent and the Ontario FST, the source of the decision under consideration in *Monsanto*, noting among other things that: (1) the Ontario FST is not the pension regulatory body and therefore does not have the advantage of being closer to the dispute and the industry; (2) the Ontario FST has no policy function as part of its pensions mandate; and (3) the decisions of the Ontario FST are subject to a statutory right of appeal.

In its final analysis, the Federal Court of Appeal held that the Federal Superintendent's decision to approve the PEI and Fundy partial termination reports were owed a significant degree of deference and only needed to be reasonable, not necessarily correct. It went on to hold that, even if "correctness" was the appropriate standard of review, the Federal Superintendent's decisions to approve the partial termination reports without a proportionate distribution of surplus had been correct.

INTERPRETATION OF THE RELEVANT PBSA PROVISIONS

The Federal Court of Appeal distinguished the relevant provisions of the federal PBSA and Ontario PBA and held that the reasoning in *Monsanto* could not be applied in the context of a federally-regulated DB pension plan.

The Federal Court of Appeal noted that the Ontario PBA defines "wind up" to mean the termination of a pension plan <u>and</u> the distribution of the assets of the pension fund. Under the federal PBSA, "termination" is defined to mean the cessation of crediting of benefits to plan members, and "winding-up" is defined separately to mean the distribution of the assets of a pension plan that has been terminated.

In light of this distinction, the Federal Court of Appeal held that under the Ontario PBA there was a "strong and inextricable connection between the termination of a pension plan and the distribution of assets". Subsection 70(6) of the Ontario PBA – which entitles members to the same rights and benefits on partial wind up that they would have on full wind up – requires a proportionate distribution of surplus on partial wind up.

By contrast, subsection 29(12) of the PBSA affords members of a federally-regulated pension plan the same rights on partial termination that they would have on full termination. On this basis, the Federal Court of Appeal held:

> While the PBSA contemplates that winding-up is a step that follows the termination of a pension plan, there is no provision in the PBSA that compels the distribution of assets to be done on the termination of a pension plan.

Similarly, the Federal Court of Appeal held that subsection 29(11) of the PBSA does not require a distribution of surplus on partial termination of a pension plan. The Federal Court of Appeal held that, at most, that provision gives members the ability to ask the Federal Superintendent to direct the plan administrator to distribute the plan assets in accordance with regulations made under paragraph 39(j) of the PBSA. However, as was noted by the Federal Court of Appeal, no regulations have been made under subsection 39(j) of the PBSA to date.

The Federal Court of Appeal also distinguished *Monsanto* on the grounds that, in *Monsanto,* the parties had agreed that on full wind up of the plan members were entitled to a distribution of surplus. In *Marine Atlantic* the distribution of the Plan surplus on wind up was an unresolved issue between the parties.

In conclusion, the Federal Court of Appeal overturned the Federal Court's ruling that the PBSA requires a proportionate distribution of surplus on a partial termination of a federally-regulated DB pension plan.

Although the Federal Court of Appeal held that subsection 29(12) of the PBSA does not require a proportionate distribution of surplus in the event of a partial termination of a federally-regulated DB pension plan, there is an open question as to whether, based upon subsection 29(11) of the PBSA, affected plan members might persuade the Federal Superintendent to direct that a proportionate share of surplus be distributed from the plan in accordance with regulations made under paragraph 39(j) of the PBSA, on the grounds that no action or insufficient action has been taken by the plan administrator to wind up the plan. This will presumably remain an open question unless and until regulations are made under paragraph 39(j) of the PBSA.

Implications

This decision suggests that, since the distribution of plan assets is tied to “winding-up” rather than “termination” under the federal PBSA, subsection 29(12) of the PBSA does not require the administrator of a federally-regulated DB pension plan to distribute a proportionate share of surplus on partial plan termination. *Marine Atlantic* also suggests that, due to her expertise and policy-intensive mandate, decisions of the Federal Superintendent attract a significant degree of deference and, in many cases, need only be reasonable to withstand judicial scrutiny.

Unless it is successfully appealed to the Supreme Court of Canada, the Federal Court of Appeal’s decision in *Marine Atlantic* represents a welcome relief to sponsors of federally-regulated DB pension plans. The former Plan members have sought leave to appeal the Federal Court of Appeal’s decision to the Supreme Court of Canada. The Supreme Court of Canada’s decision on the former Plan members’ leave application was pending at the time of publication.

In light of the Federal Court of Appeal’s decision in *Marine Atlantic*, administrators of pension plans registered in a common law province other than Ontario should not assume that the *Monsanto* decision requires them to distribute a proportionate share of surplus when a plan is partially terminated. In order to determine whether a proportionate share of surplus must be distributed on partial termination or partial wind up (depending on the terminology used in the applicable pension standards legislation), a plan administrator must carefully consider the requirements of the applicable provincial pension standards legislation and the plan documents.

PARTIAL WIND UPS: THE SIGNIFICANCE OF SIGNIFICANT

***HYDRO ONE INC.* V. *ONTARIO (SUPERINTENDENT OF FINANCIAL INSTITUTIONS)* (2008), 67 C.P.P.B. 86 (ONT. DIV. CT.)**

Facts

At the request of the Hydro One Members’ Committee, the Superintendent of Financial Services (the “Superintendent”) conducted an investigation to determine whether or not to order a partial wind up of the Hydro One Pension Plan (the “Plan”) for the three year period from 2000 to 2002. After the completion of its investigation, the Superintendent issued a Notice of Proposal under which it declined to order a partial wind up.

Between 1999 and 2002, Hydro One Inc. and its affiliated companies commenced four key initiatives to reduce its workforce and labour costs. Each of these programs was independently conceived at the time that it was initiated and was designed to address a particular concern faced by the organization at that time. All of the initiatives were found to constitute "reorganizations" of the business of the employer. However, the Superintendent of Financial Services ("Superintendent") found that in each case, either the number of members of the Hydro One Pension Plan (the "Plan") affected was insignificant or the enhanced benefits provided to affected members were sufficiently generous that he exercised his discretion not to order a partial wind up.

Dissatisfied with the Notice of Proposal, the Members' Committee requested a hearing before the Financial Services Tribunal ("Tribunal"). They sought a declaration that the Plan should be partially wound up for persons who lost their jobs as a result of the initiatives between January 1, 2000 and December 31, 2002.

The Tribunal held that, in order for multiple initiatives to be considered a single "reorganization" under section 69(1)(d) of the *Pension Benefits Act* ("PBA"), there must be a group of intended events occurring as a result of some deliberate plan. The Tribunal held that the initiatives undertaken by Hydro One Inc. and its affiliates were not linked in fact and that a common driving motivation to reduce costs was insufficient to link the initiatives together for purposes of the PBA. As such, the Tribunal held that it was not appropriate to consider the terminations of employment within the period cumulatively. Rather, each initiative was required to be considered on its own. The Tribunal went on to confirm the position of the Superintendent in connection with each of the initiatives except for one.

In late August 2002, Hydro One determined that it would re-merge its two main operating subsidiaries. This resulted in a decision to reduce management staff and to offer a voluntary separation program to members of one of the unions, the Society of Energy Professionals. In the end, 73 management members of the Plan ceased to be employed. Also, 53 Society members elected to participate in a voluntary separation program. At the time, the total active membership of the Plan was approximately 3900. The parties conceded that this change in Hydro One's business constituted a "reorganization" but argued that it did not result in the cessation of employment of a significant number of members of the pension plan as required by section 69(1)(d) of the PBA.

The Tribunal determined otherwise. It held that this was an appropriate case to segregate the pension plan membership into smaller sub groups for the purpose of evaluating the level of significance of the terminations from employment. The Tribunal held that it was appropriate to consider whether 73 management employees was a significant number of the approximately 400 management members of the pension plan at that time. The Tribunal concluded, on this basis, that there should be a partial wind up of the Plan ordered for the management members of the Plan who lost their jobs with an effective date between September 1, 2002 and December 31, 2002.

The Tribunal's decision to order a partial wind up for the management employees terminated between September 1, 2002 and December 31, 2002 was appealed to the Divisional Court.

Decision

The Divisional Court upheld the Tribunal's interpretation of the significant number test and further expanded the test. The court found that when considering whether the number of terminations warrants a partial wind up, the Superintendent is entitled to consider a number of factors. Specifically, the Superintendent may consider 1) the total number of affected members, 2) the group of members affected by the reductions as a percentage of the total active plan membership, 3) the group of members affected by the reductions as a percentage of an affected sub-group of active members, or 4) any other factors as may be warranted, because the term "significant number" does not have a precise meaning.

The court appears to have placed weight on factors such as the employer-initiated nature of the management employee terminations and the demographics of the affected group when determining the interpretation of what constitutes a "significant" number of plan members affected by the downsizing. The court determined that the term "significant" connotes import, and that the lack of definition of the term was intended to provide the Tribunal with flexibility to address unique situations on their own facts.

When reviewing the Tribunal's decision, the court found that the Tribunal was correct in its interpretation of the PBA and upheld the Tribunal's decision ordering the Superintendent to execute a Notice of Proposal partially winding up the Plan, finding that the Tribunal's order was reasonable.

Implications

The decision of the Divisional Court makes it extraordinarily difficult for employers to determine when a partial wind up should be voluntarily declared when a relatively small number of pension plan members are affected. The threshold set for determining whether a significant number of plan members have been terminated and a partial plan wind up has occurred has been effectively lowered by the Divisional Court's decision and it will be open to terminated employees to argue they are within a subset of plan membership based on such criteria as union or non-union status in order to trigger a partial wind up when very few members are affected by reorganization or downsizing.

Hydro One Inc. has successfully sought leave to appeal to the Ontario Court of Appeal, so this matter is not yet settled.

MISREPRESENTATIONS ON PLAN CONVERSION

***BEAULIEU* V. *COMPAGNIE ABITIBI-CONSOLIDATED DU CANADA (CACC)*, [2008] Q.J. NO. 7075 (S.C.)**

Facts

Twenty-five non-unionized employees of Abitibi-Consolidated brought an action against their employer in respect of certain representations made to them in 1995 when they elected to enrol in a new defined contribution provision added to the pension plan.

The employees had been employed by Abitibi-Price and had participated in a defined benefit pension plan. Historically, the defined benefit benefits offered under the plan were improved from time to time as the benefits provided to unionized employees were improved. In 1995, Abitibi created a defined contribution pension plan option and provided its non-unionized employees with the option to enrol in the defined contribution provisions of the plan or to maintain their membership in the defined benefit provisions of the plan. At that time, Abitibi held a series of information sessions to inform non-unionized employees about the change. One piece of information communicated was that the existing defined benefit pension plan would no longer be amended to improve the benefits payable under that plan. In fact, they were also told that Abitibi's defined pension portion of the plan was likely to be closed altogether. Based on the information imparted during these sessions, non-unionized employees opted to enrol in the defined contribution plan despite the fact that the employee contributions to that plan were significantly higher.

In the years following this decision, as a result of a series of corporate transactions which resulted in the merged company, Abitibi-Consolidated was sponsoring a variety of pension and benefit arrangements which it had "inherited" from the predecessors. Effective in 2002, amendments were made to Abitibi-Price pension plan so that it would be better harmonized with the pension arrangements offered to employees of the other predecessor employers. Since the other predecessor employer plans were more generous defined benefit pension plans, Abitibi-Consolidated decided to improve the benefits provided by the Abitibi-Price defined benefit pension plan and continue that plan. The non-unionized employees who switched to the defined contribution provisions of the plan in 1995 attempted to revoke their decision and return to the defined benefit plan; however Abitibi treated their elections to join the defined contribution provisions of the plan as irrevocable.

As a result, the non-unionized employees commenced an action alleging that Abitibi was responsible for the difference between the benefits they would have earned under the defined benefit plan, as amended and improved, and the benefits they earned under the defined contribution plan. They alleged that their elections to join the defined contribution provision were vitiated because Abitibi had misrepresented the future of the defined benefit plan.

Decision

The Quebec Superior Court held in favour of the employees on the basis that their decisions to join the defined contribution part of the pension plan were vitiated by the misinformation. The court held that Abitibi knew or ought to have known that when it improved the defined benefit plan that the verbal representations made to the non-unionized employees in 1995 would result in prejudice to the employees. It was open to Abitibi to not improve the plan or to make different improvements, and the court held that Abitibi was obliged to respect the representations made in 1995 when deciding how best to harmonize the plans. The prejudice to the employees became reality in 2002.

Abitibi had argued that the damages were hypothetical and unascertainable until the point of retirement. However, the court determined that it was able to assess damages so as to put the employees into the position they would have been in if they had continued as members of the defined benefit component of the plan.

Ultimately, the court awarded almost $4.4 million in damages to the plaintiffs, as the 25 non-unionized employees received amounts ranging from $81,000 to $320,000, depending on the damages they suffered.

Implications

This decision once again highlights the importance of clear and accurate communications to employees regarding pension benefits particularly when employees are being asked to make an irrevocable decision or election. In all cases, plan sponsors and administrators must ensure that communications strategies provide complete and accurate information and that misrepresentations are not made. Given the inherent uncertainty about the future, it is unadvisable to make any comments or offer predictions about future changes to pension or benefit plans.

COMMUNICATING WITH MEMBERS AND SPOUSES

SMITH **V.** ***CASCO INC.*****, COURT NO. 05-0680, (ONT. S.C.J.)**

Facts

James Smith, the husband of the plaintiff, Judith Smith, worked for the defendant corporation, Casco Inc. ("Casco"), from October 1961 until he took early retirement in July, 2000. Upon his early retirement, Mr. Smith elected the "normal form" of pension that provided guaranteed payments for the first five years after his retirement date but no survivor pension for Mrs. Smith. By choosing that option, the monthly pension payments were higher than if he had chosen one with a survivor benefit. At the time of his retirement, Mr. Smith was in good health but died suddenly in 2003.

In the late 1990's, Casco began to offer incentive packages to some of their senior employees to encourage early retirement. At that time, Mr. Smith sought and received information about his pension options and was offered financial planning advice at the expense of Casco. Mrs. Smith claims that she was not aware of Mr. Smith's requests for early retirement information, nor any of the offers relating to financial planning advice. There was no evidence as to whether Mr. Smith took advantage of the earlier offer of Casco to pay for financial planning advice.

In the spring of 2000, Mr. Smith was offered a specific retirement incentive package which he accepted. At the time that the package was provided to Mr. Smith, no offer of financial consultation was made by Casco. Also, Mrs. Smith did not seek nor was she offered, any information or advice regarding the implications of Mr. Smith's early retirement. The retirement documentation that was required to be completed included the "Post-Retirement Spousal Survivor Benefit Waiver Form" to be completed by Mrs. Smith.

Mrs. Smith's evidence was that she signed the "Post Retirement Spousal Survivor Benefit Waiver Form" without reading it carefully. Though she later understood that by signing it she had given up her right to be entitled to a joint and survivor pension, at that time she did not understand the significance of the waiver, the detailed implications of signing the document and the references it made to "Section 44 of the *Pension Benefits Act*". Significantly, the language in the Waiver Form was different, and arguably less clear, than the language in the spousal survivor benefit waiver form prescribed under the *Pension Benefits Act*. Following her husband's death, Mrs. Smith was shocked to discover that the pension would expire in 18 months.

Mrs. Smith argued that the 14 different retirement options that had been presented to her husband were complicated and not easily understood by a lay person. Further, no offer of financial advice was given at the time that the early retirement option was presented to him in early 2000. Mrs. Smith pointed out that her husband could not reasonably have chosen to have no survivor benefits when he had a spouse with no significant income or significant assets of her own. Mrs. Smith further highlighted that nowhere in the document did it state plainly that the effect of signing would be that she would no longer be entitled to a survivor's pension.

Decision

The court accepted Mrs. Smith's evidence that she had no knowledge that she would not receive survivor benefits in the event Mr. Smith predeceased her. Further, the court concluded that Mr. Smith's choice of pension options indicated that he either did not seek or did not understand any financial advice he might have been given based on a determination that a form of pension that provided no survivor pension did not make common sense given the Smith's financial situation.

In order to support her claim for negligent misrepresentation, Mrs. Smith had to establish five general requirements. First, a duty of care based on a "special relationship" had to exist between the person making the representation and the person receiving the information. The court found a duty of care was owed by the Company to Mr. Smith as well as Mrs. Smith. The court noted that the pension implications for a wholly dependent long term spouse are as serious as those of the pensioner himself. Therefore when a spouse, in the position of Mrs. Smith, is asked to relinquish survivor benefits as part of a pension option chosen by their employee, the special relationship between the employer and the employee extends to that spouse.

The second element is that the representation in question must be untrue, inaccurate, or misleading. Casco offered the services of a person trained to provide pension information. That person made no effort to make sure that Mrs. Smith was informed of the implications of signing the waiver. Therefore, the court concluded that Mrs. Smith had been misled by Casco.

Third, Casco must have acted negligently in making the impugned representation. The standard of care in this case was that which is reasonably expected to be within the competence of Casco's employee who was designated to be consulted by the employees, including Mr. Smith, with pension related questions. The court found that it would have been well within Casco's competence to have outlined the situation and options more clearly than was done.

Fourth, Mrs. Smith must have relied, in a reasonable manner, on the negligent misrepresentation. The court found that it would have been reasonable for Mrs. Smith to rely not only on her late husband, but on Casco. Mrs. Smith was a long term spouse who was completely dependant upon her husband. She had been dependant on his employment as the primary source of income for the family and it was reasonable for her to assume that Casco was treating her husband fairly, providing him complete financial information on which he could make an informed decision regarding his pension. Casco argued that Mrs. Smith's failure to read the waiver form was unreasonable and mitigated any damages the Company's actions may have caused. The court, on the other hand, held that even if Mrs. Smith had read the form, the lack of clarity would have required independent legal advice to fully comprehend its contents

Finally, the reliance must have been detrimental to Mrs. Smith in the sense that damages resulted. In this case, the option selected by Mr. Smith resulted in a loss being suffered by Mrs. Smith which was incurred as a result of the failure of Casco to properly advise Mr. Smith and Mrs. Smith of the implications of the pension options available to them.

Casco argued that Mrs. Smith should be found contributorily negligent. The court rejected that argument by stating that this shifted the burden of clarification to Mrs. Smith. The lack of clarity in the retirement documentation prepared by Casco, combined with the lack of a requirement for independent legal advice created this unfortunate situation for the parties.

The judgment was granted in favour of Mrs. Smith. Casco is seeking leave to appeal this decision.

Implications

This case reaffirms that a pension plan administrator has significant communication obligations to fulfill when dealing with the waiver of spousal survivor benefits. More specifically, a duty of care exists between the administrator and the spouse of the pensioner to ensure that the spouse fully understands the implications of signing such a waiver. This is a positive obligation that has been placed on plan administrators. At a minimum, the court indicates that independent legal advice should be provided to a spouse in this situation who is waiving survivor pension benefits. Given that many pension plan use standard form waivers for survivor benefits prepared by third party administrators which may depart from the prescribed form approved by the regulators, it is important for administrators to consider whether the forms satisfy the duty to both the employee plan member and the spouse. The court was generally critical of the retirement documentation provided to Mr. Smith and indicated that the implications of the various pension options could have been communicated much more clearly. Administrators will want to review their retirement documentation to determine whether the implications of the various forms of pension can be articulated in a more understandable fashion.

JURISDICTIONAL MATTERS – ISSUES OF DEFERENCE

BUSCHAU V. *ATTORNEY GENERAL OF CANADA AND ROGERS COMMUNICATIONS INCORPORATED*, 2008 FC 1023

Facts

In 2006, the Supreme Court of Canada found that the plan members of the Pension Plan for Employees of Premier Cable Systems Limited (the "Plan") could not use principles of trust law to unilaterally require the termination of the pension trust. The Plan had been closed to new members since 1984 and was later merged with other pension plans maintained by Rogers Communications Incorporated ("Rogers"). The members were attempting to terminate the pension fund to force a disposition of the assets, (including surplus). The Supreme Court of Canada stated that the *Pension Benefits Standards Act* ("PBSA") provided a course of action to the members and that the members were required to utilize that course of action by requesting that the regulator take action under the PBSA before resorting to the courts.

Following the decision of the Supreme Court of Canada, Rogers elected to revoke the merger of the plan with the Pension Plan for Employees of Rogers Communications Inc. (which the members had strongly opposed), segregated the assets of the two pension plans and passed an amendment to re-open the Plan to new members. Rogers was also using the surplus of the Plan to take a contribution holiday.

As a result of the Supreme Court of Canada decision, the members sought an order from the Superintendent of Financial Institutions (the "Superintendent") terminating the plan. Specifically, the members requested that the Superintendent either deem the Plan to be terminated in order that the Plan be terminated pursuant to section 29 of the PBSA; or order that Rogers must terminate the Plan. If the Superintendent ordered that Rogers must terminate the Plan, the members also requested that the Superintendent remove Rogers as the administrator of the Plan and wind up the Plan, thereby causing annuities to be purchased for members and causing the surplus to be distributed. Rogers opposed the submissions of the members.

The Superintendent held that the decision to revoke the merger between the two pension plans was not a breach of the PBSA or contrary to the terms of the Plan. Similarly, on the issue of the amendment to open the Plan to new members, the Superintendent reviewed the terms of the Plan and held that the Plan permitted such an action. The Superintendent found that the Plan had not been terminated under the provisions of the PBSA nor had Rogers taken any actions to terminate the Plan. The Superintendent further held that she would not deem the Plan to be deemed terminated pursuant to the PBSA.

Finally, the Superintendent found that section 29 of the PBSA only provided discretion to the Superintendent to terminate a pension plan in specific circumstances. The Superintendent did not find that the present circumstances justified termination and refused to exercise her discretion to declare that the Plan be terminated. Specifically, the PBSA allows for the Superintendent to declare a pension plan terminated if contributions have ceased. However, the Superintendent found that the contribution holiday was permitted by the PBSA and therefore was not grounds for the exercise of her discretion to terminate the Plan. The Superintendent concluded that the continuation of the Plan was beneficial and that Rogers continued to provide the benefits as set out in the Plan and was complying with the funding requirements of the PBSA. In fact, the Superintendent went so far as to say that an order for the termination of a pension plan was an extreme measure, that may be used when pension benefits are at risk or a plan is not funded as required by the PBSA.

The members sought judicial review of the Superintendent's decision at the Federal Court.

Decision

The members requested that the Federal Court overturn the decision of the Superintendent and direct the Superintendent not to approve the Plan amendment to open the Plan to new members. The members also sought an order directing the Superintendent to order that the Plan be terminated. In the result, the court upheld the application for judicial review and sent the matter back to the Superintendent for re-determination.

The court addressed the Superintendent's decision not to exercise her discretion to terminate the Plan under the PBSA. The court found that the Superintendent failed to "appreciate the extent of her discretion" under section 29. The court stated two reasons in support of its finding. First, the Superintendent failed to recognize that statutorily permitted contribution holidays may still be illegitimate for the purposes of section 29 if they are used to "hide an improper refusal to terminate [the pension plan] on the part of the employer". The court stated that the evidence before the Superintendent revealed that Rogers had, in the past, replaced an uncooperative actuary and trustee, had improperly amended the Plan and had improperly withdrawn funds from the Plan. These actions, along with the fact that Rogers had not re-opened the Plan until the members applied to the Superintendent for termination, made the Superintendent's decision unreasonable according to the court.

The court went on to find that the Superintendent failed to appreciate her duty to plan members under section 29. The court noted that the Supreme Court of Canada in its decision in this case noted that the powers delegated to the Superintendent under the PBSA must be exercised in light of the statute's remedial purpose. The court stated that the duty is not to be taken lightly as it provides pension plan members with a needed remedy. For those reasons, the court found that the Superintendent's decision was unreasonable and allowed the judicial review.

Implications

The Federal Court decision in this case is the latest in a long line of decisions attempting to resolve the issues between the plan members and Rogers. The prior conduct of Rogers appears to have heavily influenced the court in reaching its conclusion that Rogers contribution holiday may be illegitimate and it appears that it will be necessary for the Superintendent to consider such conduct when the matter is re-adjudicated. This most recent decision introduces more uncertainty regarding the appropriate deference to be given to pension regulators.

Leave to appeal has already been submitted to the Federal Court of Appeal.

SEEKING AN INJUNCTION FOR A WIND UP

***LOMAS* V. *RIO ALGOM LIMITED* (2008), 290 D.L.R. (4TH) 363 (ONT. DIV. CRT.)**

Facts

The applicant, Alexander Lomas, sought an order, on behalf of himself and those he sought to represent, granting relief from the alleged wrongdoing of Rio Algom Limited ("Rio Algom") with respect to the Pension Plan for Salaried Employees of Rio (the "Plan"). In the application, Lomas sought either an order partially winding up the Plan or an injunction requiring Rio Algom to take the necessary steps to wind up the Plan. Under the Ontario *Pension Benefits Act* ("PBA"), an employer may voluntarily wind up a plan, but is not required to do so unless an order is made by the Superintendent of Financial Services.

Lomas alleged that Rio Algom unilaterally and improperly revised the trust agreement at various times to provide for the payment of residual surplus to itself and to reduce its obligation to fund the Plan. Lomas also alleged that Rio Algom unlawfully caused the Plan to accept liabilities for the benefit of Rio Algom and caused the Plan to pay certain costs and obligations on behalf of Rio Algom.

Rio Algom brought a motion to strike portions of the application the grounds that the Court does not have jurisdiction to order a full or partial wind up of the Plan. A motions judge agreed with Rio Algom that the courts do not have jurisdiction to directly order the wind up of the Plan, following the Supreme Court of Canada's decision in *Buschau* v. *Rogers Communications*, [2006] 1 S.C.R. 973. However, the motions judge refused to strike the claim requesting an injunction requiring Rio Algom to take all necessary steps to wind up the Plan.

Rio Algom appealed the decision to the Ontario Divisional Court.

Decision

The majority of the Divisional Court upheld the motions judge's decision. The majority noted that the threshold for Rio Algom to succeed on their motion is to establish that it is plain and obvious that the claims asserted by Lomas could not succeed at trial.

Rio Algom argued that the Buschau principles applied and there was no authority for the court to order an employer to wind up a pension plan. Conversely, Lomas argued that *Buschau* does not speak to the situation where the employer has been found in breach of the trust and the court seeks the appropriate remedy for that breach. In such a case, Lomas argued and the majority agreed, there is no reason why the court cannot direct the faithless fiduciary to take the step, open to it under section 68(6) of the PBA, of applying to the Superintendent to wind up the trust if that is the best way to remedy the breach of trust. Such an order in no way interferes with the authority of the Superintendent who retains authority as provided by the statute when the employer proposes to wind up pursuant to section 68, and therefore, would not interfere with the comprehensive code established by the legislation.

The majority of the court noted that where there is no conflict with the legislative scheme, trust law principles continue to have effect. The majority found that the *Buschau* decision was primarily focused upon the application of a specific trust law rule to pension trusts, not on the general question of the role of equity and trust law in relation to the pension benefits legislative scheme. The majority concludes that nothing in the reasons in *Buschau* rules out resort to trust law when the facts make trust principles applicable.

The fact that Lomas was seeking a specific remedy for breach of trust by directing Rio Algom to remedy the wrong-doing by taking a step which is expressly contemplated by the legislation, led the majority of the court to find that a fuller record was required and it was not “plan and obvious” that the claim could not succeed. The majority noted that this type of order is a classic equitable remedy and if, in the opinion of the court on a full record, it can only be achieved by a mandatory order requiring Rio Algom to act as permitted by the statute, there is no policy reason to prevent that. On this basis, the majority dismissed the appeal.

Implications

As this was a preliminary issue, the matter must still go to trial on the merits. However, leave to appeal on this issue to the Ontario Court of Appeal was granted on June 27, 2008. In the event that the majority decision prevails, this case provides the courts with the ability to craft injunctive remedies requiring employers, found to have committed breaches of fiduciary duties in respect of pension plans to take certain actions that were previously accepted to be within the exclusive purview of the pension regulator.

CLASS ACTIONS VERSUS REGULATORY PROCESSES

MCGEE V. *LONDON LIFE INSURANCE COMPANY LIMITED,* 2008 CANLII 20985 (ONT. S.C.J.)

Facts

In 1996, as a result of a reorganization of London Life Insurance Company and a discontinuance of a significant portion of London Life's business, several hundred employees were terminated. These employees were members of London Life's Staff Pension Plan (the "Plan").

As a result of the 1996 reorganization, Ontario's Superintendent of Financial Services ("Superintendent") began an investigation under section 69 of the provincial *Pension Benefits Act* ("PBA") to determine whether or not to order a partial wind up of the Plan. In February 2000, the Superintendent ordered a partial wind up of the Plan. London Life appealed the Superintendent's decision to the Financial Services Tribunal, which determined that the statutory criteria for ordering a partial wind up had been met and ordered the Superintendent to carry out the partial wind up of the Plan in respect of Plan members who were affected by the reorganization.

In October 2002, a partial wind up report was filed with the Financial Services Commission of Ontario ("FSCO") showing that there were 491 Plan members affected by the partial wind up and a surplus of $5,283,500 in the fund as at December 31, 1995. FSCO accepted the report. After the Supreme Court of Canada granted leave to appeal in *Monsanto Inc.* v. *Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, which dealt squarely with the issue of distribution of surplus on a partial wind up under the PBA, FSCO announced that, until this case was decided, the Superintendent would not be taking any specific action to require the distribution of surplus assets related to partial wind ups. However, plan administrators were advised to ensure that adequate assets were maintained in the pension plans to meet their obligations.

After the Supreme Court of Canada decided in *Monsanto* that surplus assets relating to the partial wind up of a pension plan under the PBA must be distributed at the time of the partial wind up, FSCO wrote to London Life in August of that year noting that the partial wind up had not yet been completed and reminded London Life of its obligation to ensure that any remaining assets related to the wound-up portion of the Plan were paid out in an expeditious manner. FSCO also requested an update of the funding position of the wound-up portion of the Plan together with a timetable for the distribution of any surplus. Eventually, London Life informed FSCO that the surplus attributable to the partial wind up, calculated as at May 1, 2005, was estimated to be $11,050,500. London Life submitted that it was entitled to this surplus and proposed to retain it in the Plan.

Taking the view that the former employees affected by the partial wind up were entitled to the surplus and that matter had been taking too long to reach a resolution, the Members' Committee applied to the Ontario Superior Court of Justice for certification of a class action against London Life. The proposed representative plaintiffs argued that they had a clear cause of action, as London Life had created the Staff Pension Fund as a special purpose fund in 1916 and had funded and later registered the Plan as a trust. They alleged that London Life breached its equitable and statutory obligations by failing to complete the partial wind up, failing to distribute the partial wind up surplus to members of the class and applying all or part of the wind up assets to purposes other than the exclusive benefit of class members. They maintained that the former employees affected by London Life’s actions constituted an identifiable class with appropriate common issues, and that a class action was the preferable way to proceed from the perspective of access to justice and judicial economy.

London Life did not dispute the existence of a cause of action to be decided by a court. London Life’s key objection to certification was that an individual representative action, rather than a class action, was the preferable way to proceed.

Decision

The court granted the motion for certification, finding that the class members had satisfied the preferable procedure requirement in respect of both the ownership and distribution of surplus issues. The court rejected London Life's argument that a representation order was the preferable way to proceed.

The court found that the class was entirely composed of members who have a direct interest in the proceedings. In coming to this decision, the court relied on one of the actuarial reports submitted to FSCO identifying the number of members affected by the reorganization and subsequent partial wind up.

The court also distinguished the case before it from other pension cases in which certification was denied. The basis of the objection in those cases is that since the pension plan was ongoing, the right to surplus was not crystallized or the remedy sought was not individual monetary relief but rather a declaration of rights that would bind the sponsor of the Plan in future. Since this portion of London Life's Plan was wound up, the remedy sought was payment of surplus assets and therefore the cases where representative actions were preferred the pension plans in were distinguishable. The court also expressed doubt as to whether a representative action could be utilized since all of the affected pensions were ascertained.

Finally, the court noted that class proceedings have been found to be generally appropriate in pension and employee benefit cases to resolve issues that are similar, if not identical to the issues regarding the Plan. On that basis, the court held that a class action was the most comprehensive method for the resolution of the issues before the court.

Implications
This decision is yet another instance in which the courts view class actions as an appropriate and preferable procedure for resolution of litigation. Despite the matter being in the hands of FSCO, the court openly accepted jurisdiction over the case and certified the class. Plan sponsors should be aware of this decision if the resolution of a partial or full wind up is proceeding slowly before FSCO, as it appears that plan members may be able to turn to the courts despite the matter being before the regulator.

ARBITRAL DEFERENCE

CALGARY (CITY) **V.** ***INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS (LOCAL 255)*****, 2008 ABCA 77**

Facts
The City of Calgary (the "City") and the International Association of Fire Fighters, Local 255 were parties to a collective agreement, the Local Authorities Pension Plan (the "LAPP"), and the Firefighters Supplementary Pension Plan (the "FSPP"). The FSPP was created to provide certain benefits for members between the ages of 60 and 65 and also to provide other enhanced benefits relative to the LAPP. FSPP was registered under the *Income Tax Act* (Canada) ("ITA") as a registered pension plan. Although firefighters had access to benefits under the LAPP, such as long-term disability and workers' compensation benefits while they remained employed, these benefits envisioned a recovery of the disability and that the fire fighter would return to active employment. On the other hand, Article 14 of the FSPP provides for disability benefits where fire fighters are "totally and permanently" disabled, with no return to work envisioned.

Two fire fighters became totally disabled and applied for benefits under Article 14 of the FSPP. The administrator of the FSPP found that the particular fire fighters were eligible to receive Article 14 benefits; however, it also required that they apply for LAPP benefits within three months of receiving the FSPP benefits. Upon the City's request, the fire fighters were terminated from employment in order to receive the benefits under the FSPP. The firefighters grieved their terminations.

At arbitration, the grievance was allowed. It was determined that the City had no cause for termination and that the fire fighters did not have to apply for LAPP benefits within three months of receipt of their FSPP benefits. However, upon judicial review, where little deference was paid to the arbitrator and a standard of correctness was applied, the court found that the FSPP plan text required a loss of employment status as a pre-condition to receiving benefits under the FSPP. Therefore, the City's termination of the fire fighters was justified and the fire fighters were required to apply for LAPP benefits within three months of receiving the FSPP benefits.

The union appealed the decision stating that the court erred on three counts by: 1) reviewing the arbitrator's decision on a standard of correctness; 2) concluding that the FSPP required a loss of employment status before benefits could be payable under its terms; and 3) concluding that the fire fighters were required to apply for LAPP benefits within three months of their FSPP disability pension benefits commencing.

Decision

Since the case involved the interpretation and application of the interplay between the ITA and pension plans, the Court of Appeal found that the guiding purpose of the arbitral review was not the furtherance of labour relations. Therefore, the case was beyond the expertise of the arbitral panel (notwithstanding that the pension plan was incorporated into the collective agreement) and the court was correct on judicial review in finding that the arbitrator's decision should be granted little deference and held to a standard of correctness.

Due to some ambiguities and inconsistencies in the FSPP, the Court of Appeal found it necessary to look outside the terms of the FSPP to the broader context. Finding that the principles applicable to interpreting contracts also apply to interpreting pension plans, the Court of Appeal noted that where there are two apparently viable interpretations of a provision, the one that will be preferred will be the one that is most consistent with the relevant ITA provisions to which the FSPP was also subject.

The Court held that the ITA and its regulations provided that a pension plan becomes revocable if it allowed a member's service credits to accrue while in receipt of pension benefits for total and permanent disability <u>if</u> that member was employed during the time of receipt. A provision of the FSPP provided that a person who received total and permanent disability benefits, and subsequently recovered, was entitled to service credits for the time that they received the benefits. Therefore, the only interpretation of this provision which maintains the registered status of the FSPP was that the member must give up his employment while receiving the FSPP disability benefits.

It was also found that an interpretation requiring those in receipt of Article 14 benefits under the FSPP to be terminated was justified since these benefits were only paid when a member has become "totally and permanently" disabled. It was found that, barring a miracle, those who became totally and permanently disabled, with a doctor's certification of such, would never return to work and could not be expected to maintain their employment status.

On the final issue, the FSPP requires that if a member is eligible for a LAPP benefit, he must apply for that benefit as a condition of receiving the FSPP benefits. Since it was determined firefighters needed to be terminated to be eligible for FSPP benefits, this made them eligible for LAPP disability benefits as well. It was also determined that recipients of the FSPP benefits were required to apply for LAPP benefits.

Ultimately, the Court of Appeal dismissed the union's appeal and upheld the lower court's decision.

Implications

Notwithstanding that the FSPP was part of a collective agreement, due to the necessity to look at applicable pension legislation, including the ITA, the arbitration board was not given any deference by the Alberta Court of Appeal. Therefore, where the ITA is involved, the decision of an arbitrator will be held to the highest standard, that of correctness. The case is also important because it provides an authority for the proposition that the ITA can be used to interpret the meaning of a pension plan provision that is otherwise ambiguous.

VALIDITY OF AMENDMENTS REDUCING PAST SERVICE

***PPG CANADA INC.* V. *ONTARIO (SUPERINTENDENT OF FINANCIAL SERVICES)* (2007), FST NO. P0290-2007 (FINANCIAL SERVICES TRIBUNAL)**

Facts

The applicant, PPG Canada Inc. ("PPG"), sought to set aside a Notice of Proposal issued by the Superintendent of Financial Services (the "Superintendent"). The Notice of Proposal purported to do two things: 1) it revoked the registration of Amendment 8 to the PPG Non-Contributory Retirement Plan for Salaried Employees (the "PPG Plan"); and 2) it directed PPG to credit service under the PPG Plan for periods of employment of certain employees (the "Restored Service Members") of Duplate Canada Inc.

A resolution dated June 2, 1982 (the "PPG Resolution"), merged the Duplate Plan with the PPG Plan. The resolution also added Duplate Canada Inc. as a Participating Employer of the PPG Plan and characterized the Duplate Plan as a "Prior Plan," all effective July 1, 1982. The PPG Resolution further stated that any rights in respect of benefits under the Prior Plan accrued to June 30, 1982 shall not be diminished or rescinded by virtue of the introduction of the PPG Plan.

Pension benefits under the Duplate Plan were based on "years of service." "Years of service" was defined as the number of years of an employee's continuous employment with Duplate for which the employee received a salary. However, for the Restored Service Members, "years of service" included certain periods of service that occurred prior to breaks in service ("Duplate Restored Service"). The Duplate Plan did not define the term "pensionable service" or contain the term "credited service."

The PPG Plan provides for a pension based on the higher of two formulae. The Regular Benefit is based on "Credited Service" and the Alternate Benefit is based on "Continuous Service." The PPG Plan provides that Credited and Continuous Service prior to July 1, 1982 shall not be less than the amount of pensionable service credited under a Prior Plan. The term "pensionable service" is not defined under the PPG Plan. At issue was whether the Duplate Restored Service was intended to be used to calculate benefits under the Regular Benefit formula, or only under the Alternate Benefit formula (a minimum guaranteed pension). Annual statements were prepared on the basis that Duplate Restored Service counted for both purposes although evidence was tendered that this was in error and was corrected by reissuing annual statements some years later.

By resolution dated April 10, 1988 ("Amendment 8"), PPG purported to amend the PPG Plan effective June 30, 1982. Amendment 8 treats the Duplate Restored Service as Credited Service for the purpose of the Alternate Benefit but not the Regular Benefit formula. PPG did not provide any evidence to establish that PPG Plan members were provided with notice of Amendment 8.

An affected employee contested PPG's position and continued to object to raise objections, bringing the matter before the Superintendent. The Superintendent issued the Notice of Proposal, finding that Amendment 8 reduced an accrued benefit contrary to section 14 of the *Pension Benefits Act* ("PBA") and was void.

Decision

The Financial Services Tribunal (the "Tribunal") reviewed the plan documents and found that the Duplate Restored Service is pensionable service under the PPG Plan. As pensionable service, it counts as both Continuous Service and Credited Service for the purpose of determining pension under both the Regular Benefit and Alternate Benefit provisions of the PPG Plan.

The Tribunal noted that "pensionable service" is a general term, not a term of art. It simply means service for which a pension benefit is given under a pension plan. There was no ambiguity with respect to the use of the term pensionable service under the PPG Plan text.

Even if there was some ambiguity, the Tribunal found that it is entirely reasonable to equate "years of service" with "pensionable service" in this context. Furthermore, in the absence of alternative constructions of the term pensionable service, the Tribunal would apply the doctrine of *contra proferentum* and construct any ambiguity in the meaning of pensionable service against PPG as the drafter of the PPG Plan.

Amendment 8 does not treat Duplate Restored Service as Credited Service for the purpose of the Regular Benefit formula of the PPG Plan. Therefore, the Tribunal held that it is void pursuant to section 14 of the PBA as it is a reduction in accrued pension benefits.

In response to PPG's arguments that the intent was to freeze service at the time of merger, the Tribunal found that there was no evidence to support such a claim. The Tribunal stated that it was within PPG's power to amend the PPG Plan at the time of merge to freeze service accruals, however, it failed to do so and could not retroactively amend the PPG Plan to reduce members' benefits.

Implications

At the time of a plan merger, it is important to fully understand what each of the plans provide for and how they will interact with one another. This will allow plans to be amended before they are merged in order to ensure that expectations are met. If it is the intention of the plan sponsor to freeze service accruals under the prior plan, it is necessary to do so with clear language, as such an amendment cannot be made retroactively.

TRUSTEES' DISCRETION TO TRANSFER COMMUTED VALUES

JAN SZARYCZ **V.** ***ONTARIO (SUPERINTENDENT OF FINANCIAL SERVICES) (2007)*****, FST NO. P0294-2007 (FINANCIAL SERVICES TRIBUNAL)**

Facts

The Applicant, Jan Szarycz, is a former member of the Canadian Commercial Workers Industrial Pension Plan (the "Plan"), a multi-employer defined benefit pension plan. He was employed by a participating employer called Group 4 Falck (Canada) Ltd. Group 4 Falck (Canada) Ltd. ceased to be a participating employer in the Plan effective September 30, 2004, and Mr. Szarycz's membership in the Plan ceased at that time. Mr. Szarycz was over 50 years old on the date his membership in the Plan ceased and was entitled to an immediate monthly pension payment under the terms of the Plan.

Mr. Szarycz sought an order that the administrator of the Plan be required to transfer the commuted value of Mr. Szarycz's pension benefit to a prescribed retirement savings arrangement.

Mr. Szarycz wanted the commuted value of his pension benefit transferred to a prescribed retirement savings arrangement so that he could then take advantage of the "financial hardship" unlocking rule under subsection 67(5) of the *Pension Benefits Act* ("PBA"). The rule states that, with the Superintendent's consent, an individual may unlock the commuted value of a prescribed retirement savings arrangement upon satisfying the Superintendent of the individual's financial hardship. However, the financial hardship unlocking rules do not apply to a pension payable directly from registered pension plans.

Section 42 of the PBA provides a former member of a pension plan a "portability" right requiring the administrator of a pension plan to transfer pension benefits in limited circumstances in lieu of entitlement to a locked-in deferred pension. However, subsection 42(3) states that subsection (1) does not apply to a former member whose employment is terminated and who is entitled to immediate payment of a pension benefit under the pension plan at that time, unless the pension plan provides such an entitlement.

Section 7.07 of the Plan gives the Plan's Trustees a discretionary power to allow a member to transfer the commuted value of his pension out of the Plan subject to the conditions or limitation of the PBA.

The Superintendent found that subsection 42(3) contemplated that it allowed commuted value transfers to pension plan members eligible to commence on immediate pension only if that right is explicit in the Plan documentation. The Superintendent determined that Section 7.07 was not explicit and therefore Mr. Szarycz could not compel a commuted value transfer. As such, the Superintendent refused to order the administrator to transfer Mr. Szarycz's pension benefits to a locked-in vehicle.

Decision

The Financial Services Tribunal (the "Tribunal") found that section 7.07 of the Plan gives the Trustees, as plan administrator, discretion to allow a commuted value transfer of his deferred pension into a prescribed retirement savings arrangement and that this provision therefore is a provision which can be read to entitle a pension plan member to a commuted value transfer. The Tribunal found that the word "permit" has a broad meaning and that the context of section 7.07 does not limit its broad general definition. To give section 7.07 and subsection 42(3) a narrow reading would yield a result at odds with the general policy of the PBA. The Tribunal summarized the general policy of the PBA as follows:

> [to] permit portability into a prescribed retirement savings arrangement … while reserving to the Superintendent the discretion under the financial hardship provisions to consent in appropriate circumstances to the commutation of an individual's pension entitlement within the prescribed retirement savings arrangement.

The Superintendent was ordered to ask the Trustees to determine whether they will exercise under Section 7.07. If the Trustees exercise their discretion in favour of Mr. Szarycz they will be required to make the transfer requested by Mr. Szarycz pursuant to the Plan and the PBA will permit him to transfer the commuted value of his pension entitlement under the Plan to a prescribed retirement savings arrangement in those circumstances.

Implications

The restriction on commuted value transfers for members entitled to commence on immediate pension will be read narrowly to allow such transfers even in circumstances where the pension plan terms do not explicitly permit the transfer.

TERMINATION PRIOR TO BRIDGING AGE

***DURRER* V. *CIBC*, 2007 FC 1290**

Facts

Mr. Durrer was employed by the Bank for over 28 years when his employment was terminated as a result of a reorganization of the compliance department. He was offered a package which included 12 weeks working notice and two years of salary continuance. At the time, he was 48 years of age. Terminated employees who reached 55 years of age, inclusive of their salary continuance, were eligible for unreduced early retirement. In accordance with Bank policy, Mr. Durrer was eligible for preferable treatment to obtain temporary or permanent positions within the bank. Mr. Durrer attempted to continue his position with the Bank through a variety of temporary positions while seeking a permanent position and sought to do so until he reached his 55th birthday in order to be eligible for an unreduced early retirement. In fact, he managed to obtain three consecutive temporary positions which provided him with an additional two and a half years of service, but at the end of his third temporary position was unable to obtain another placement. Even when his two years of salary continuance were included, Mr. Durrer fell short of reaching age 55 such that he was not eligible for an unreduced early retirement. Mr. Durrer brought a complaint alleging discrimination on the basis of age to the Canadian Human Rights Tribunal (the “Tribunal”).

The Tribunal found no discrimination on the basis of age in any of the actions of the Bank (the decision to terminate, and the decision not to provide additional temporary or permanent employment). The Tribunal found that the criteria used for the termination of certain positions within Mr. Durrer’s department were primarily compliance, experience, understanding and support of a new model for a compliance department and that the elimination of Mr. Durrer's position was for lawful business reasons – the position was redundant. The fact that the Bank saved money by eliminating the position was specifically found not to make the act a discriminatory one. The Tribunal also accepted evidence from a pension actuary that the overall effect of the reorganization did not result in a disproportionate number of people in any age group being terminated. Although the complaint alleged that the Bank interfered with Mr. Durrer's ability to find a fourth temporary position, the Tribunal found no evidence of such interference.

Mr. Durrer sought judicial review of the Tribunal's decision.

Decision

The Federal Court dismissed the judicial review. The court rejected Durrer's argument, based on the Supreme Court of Canada's decision in *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU,* [1999] 3 S.C.R. 3 ("*Meiorin")*, that an employer has a duty of care in terminating employees, requiring the employer to weigh a number of factors in respect of each individual employee to determine whether based on a prohibited ground such as age there is an adverse effect of the termination and to ameliorate such impacts. The court rejected that *Meiorin* imposes such a duty, finding that there is nothing in the *Canadian Human Rights Act* to require an employer to make an assessment, before terminating an individual or class, as to the circumstances of each and whether the impact upon one will be different from that upon others.

Implications

It is not discrimination on the basis of age to fail to bridge a long service employee to an unreduced early retirement benefit. This decision confirms that where acceptable criteria are developed to evaluate which employees to maintain in a reorganized department, that a long service employee's age and proximity to early retirement is not something which must be given special consideration from a human rights perspective.

CONSTRUCTIVE DISMISSAL FOR FAILURE TO CONTRIBUTE TO PENSION

***HLEWKA* V. *MOOSOMIN EDUCATION ET AL.*, 2007 SKPC 144**

Facts

Ms. Hlewka sought damages in constructive dismissal from the defendant employer. When hired, Ms. Hlewka was promised both a written contract of employment and participation in the employer's pension plan and employee benefits plan. After two years and no written contract of employment or pension plan contributions, Ms. Hlewka resigned and brought her action for constructive dismissal.

Decision

The court found that Ms. Hlewka was entitled to damages for the pension plan contributions that the employer did not make on her behalf. The lack of a written employment contract did not constitute constructive dismissal. The failure to provide pension contributions was not found to be a fundamental breach of the employment contract in these circumstances because they are compensable by damages and were relatively insignificant in amount. The contributions were to be 3% of her salary.

While Ms. Hlewka did not receive a written employment contract, she still had a verbal contract of employment. The court found that the failure to provide a written contract did not vary the terms of the verbal contract of employment on which Ms. Hlewka was still entitled to rely. As a result, there was no fundamental breach of the employment contract and Ms. Hlewka was not entitled to damages for constructive dismissal.

Implications

This case is a succinct decision for the proposition that a failure to make pension contributions does not result in a constructive dismissal, but is a matter that can be resolved through compensation for the missed contributions. The decision, however, is likely to be limited in its application and ought not be relied upon to support a position that a failure to provide a pension as promised or that a reduction in the value of a pension for further service can never ground as constructive dismissal claim.

CREDITING SERP SERVICE ON TERMINATION

***HEPBURN* V. *JANNOCK LIMITED ET AL.*, 2008 CANLII 429 (ONT. S.C.J.)**

Facts

Mr. Hepburn was a senior executive with Jannock Limited ("Jannock") for 21½ years. He started with Jannock in 1977 and became president of the Brick Group in 1985, an operating division of Jannock. In 1987, Jannock established a supplementary employment retirement plan (the "SERP") for its executives to top-up the pension generated by the registered pension plan.

At the relevant time, the SERP benefit was secured by way of a letter of credit but was required to be fully funded in the event of a change in control of Jannock.

In 1988, Mr. Hepburn entered into a "golden parachute" agreement with Jannock, which provided that in the event of a change of control of Jannock, he would be entitled to 36 months of additional pension accrual under the SERP. In 1999, but prior to Jannock's sale of the Brick Group, Mr. Hepburn entered into a new "golden parachute" agreement called the "Letter Agreement", which would apply if the Brick Group was sold and if, as a result of the sale, Mr. Hepburn's employment with Jannock was terminated. The Letter Agreement was designed to provide the same projections to Mr. Hepburn as the 1988 golden parachute in connection with the sale of the Brick Group. The Letter Agreement also provided that Mr. Hepburn's supplementary pension would be based on actual service plus an additional 36 months of pension accrual if the parachute was triggered. Importantly, the Letter Agreement clearly states that the additional 36 months of SERP pension accrual only applies if Mr. Hepburn does not accept employment with the purchaser.

Mr. Hepburn signed the Letter Agreement despite receiving legal advice that it did not provide for the additional 356 months of SERP pension accrual if he accepted employment with the purchaser of the Brick Group. He gave evidence that he did so only after confirming with senior management of Jannock that the interim was for the accrual to be provided even in the event he took a position with the purchaser. Upon receiving assurance that he would receive the additional 36 month accrual in that case, he signed the documentation. The key executives at Jannock gave evidence that they intended that the 36 month accrual whether Mr. Hepburn obtained employment with the purchaser or otherwise.

In 1999, Jannock sold the Brick Group to Hanson and Mr. Hepburn's employment with Jannock was terminated. However, Mr. Hepburn immediately accepted employment with the purchaser, Hanson.

After the Brick Group was sold, Jannock's actuaries provided pension illustrations to Mr. Hepburn that were based on his receiving the additional 36 months of pension accrual. When there was a change of control of Jannock a year later which triggered SERP funding obligations, Jannock paid to the trustee an amount to fully fund all SERP entitlements, including the 36 additional months of pension accrual for Mr. Hepburn. However, the company that acquired Jannock sent Mr. Hepburn a notice denying him the additional 36 months.

The relevant provision of the Letter Agreement stated:

> In the event that a Sale of the Business is concluded and you do not accept employment with the purchaser(s), with Jannock or any of its affiliates and your employment is terminated by Jannock, you will receive
>
> (a) …
>
> (b)... . The pension benefit shall be calculated and paid out as if accrual continued for a 36-month period following termination, regardless of whether new employment is obtained. The accrual of retirement benefits will be based upon compensation in effect at the time of termination of employment. Vacation accrual will cease as of the date of termination of employment.
>
> [emphasis added]

Decision

Mr. Hepburn submitted that the impugned provision of the Letter Agreement was ambiguous and should therefore be interpreted using extrinsic evidence. The court disagreed and determined that the paragraph was clear -- it was designed to provide additional credited service in the event that Mr. Hepburn did not accept employment with the purchaser.

However, the court did determine that equitable relief would be appropriate since there was no doubt from the evidence that Mr. Hepburn's understanding of his entitlements was supported by the senior management of Jannock. As noted above, Jannock's CEO and Vice-President of Human Resources had met with Mr. Hepburn prior to signing the Letter Agreement and confirmed his understanding that he would be entitled to 36 additional months of pension accrual in the event of a sale of the business even if he accepted employment with the purchaser. The court found that the intention of the parties was clear, and was supported by Jannock's act of providing funding for the additional 36 months of pension accrual after the change of control.

Therefore, the court found that it would not be fair or equitable to deprive Hepburn of the additional service and applied the equitable doctrine of rectification to the Letter Agreement since: 1) the oral evidence of all parties was confirmed by the conduct of Jannock after the execution of the agreement; and 2) this remedy was not unjust to the defendant since the amount to fund the additional 36 months of pension accrual had already been provided to the trustee by Jannock on the change of control. The court also noted that Jannock's VP of Human Resources ought to have known that the relevant paragraph did not accurately convey the intent of the parties.

Implications

Notwithstanding clear terms in a contract, courts are willing to apply principles of equity and look beyond the provisions where situations warrant.

FIDUCIARY DUTIES AND INVESTMENT

***MACKINNON* V. *ONTARIO MUNICIPAL EMPLOYEES RETIREMENT BOARD* (2007), 88 O.R. (3D) 269 (C.A.)**

Facts

In 2001, Ontario Municipal Employees Retirement System ("OMERS") acquired a 27% ownership interest in Borealis Capital Corporation ("BCC"). At around the same time two individuals (Collier and Nobrega) left employment with OMERS to hold high-level management positions at BCC. In 2002, Borealis Real Estate Management Inc. ("BREMI") was incorporated as a subsidy of BCC to assume the real estate management functions of the OMERS real estate assets. The OMERS Board and BREMI executed a five-year Management Agreement which provided that BREMI would be the exclusive provider of management services for OMERS' real estate assets. Coincident with this deal, Latimer, who was Managing Director of OMERS realty corporation, left OMERS to become an officer, director and shareholder of BCC. In 2003, OMERS terminated the Management Agreement and paid significant costs to do so, including buy-out settlements to the individuals.

The plaintiff, Wyman MacKinnon, brought an action on behalf of the members of OMERS alleging that the OMERS Board (as administrator of OMERS), BCC, BREMI and certain individuals (Collier, Nobrega and Latimer) had committed acts of maladministration, including breaches of trust and fiduciary duty, in conjunction with the Management Agreement. Generally, the claim was that: 1) pursuant to this Management Agreement, BREMI paid a grossly understated value to obtain this business while OMERS paid BREMI or BCC an exorbitant amount in management fees, far exceeding what they had paid to their previous manager, and 2) the three above noted individuals in management positions at BCC received excessive salaries.

The defendants brought a motion under Rule 21 of the *Rules of Civil Procedure* to have the statement of claim struck because it did not disclose a reasonable cause of action. The motion judge was unable to determine whether or not there was a reasonable cause of action, and as a result he granted leave to the plaintiff to file an amended statement of claim, which was done. After the defendants renewed their Rule 21 motion, the motions judge struck a number of the claims (i.e. concluded that the claims would not proceed to trial because the facts as pleaded disclosed no cause of action at law), but significantly did not strike out any of the claims against the OMERS Board.

Mr. MacKinnon appealed the motion judge's decisions striking the various claims against BCC, BREMI and the three individuals. Various cost orders were also appealed.

Decision

As discussed in more detail below, the Court of Appeal reinstated many of the claims which were dismissed by the motions judge. This decision is not determinative of the merits of any of the claims – the decision simply allows the claims to proceed to trial to be determined on a full evidentiary record.

The Court of Appeal first considered the breach of fiduciary obligation claims. The breach of fiduciary duty claims were examined under: 1) common law principles, 2) section 22 of the Ontario *Pension Benefits Act* ("PBA"), and 3) the Federal Investment Regulations ("FIR") related party rules. The Court of Appeal agreed with the motions judge that the facts as pleaded did not support a finding that BCC, BREMI, or the individuals Collier and Nobrega, owed a fiduciary duty to the Plan members at common law. However the Court of Appeal held that it was possible that the term "agent" in section 22(5) of the PBA could extend to encompass BCC in respect of the performance of the Management Agreement. Therefore, the Court held that the fiduciary claim against BCC relating to the performance of the Management Agreement should not be struck. Turning to BREMI, the Court agreed with the motions judge that facts were pleaded to support the claim that BREMI was an agent within the meaning of section 22 of the PBA in relation to the performance of the property management services. With regards to the individual defendants, Collier and Nobrega were held not to be agents under the PBA since they were not employed by the administrator of the pension plan. The claim against Latimer was allowed to proceed both at common law and pursuant to section 22 of the PBA. On the FIR analysis, the Court of Appeal held that BCC, Collier and Nobrega could not fall within the meaning of "related parties" due to their relationship with OMERS. The claims were, however, allowed to proceed against BREMI and Latimer based on the related party provisions of FIR.

Turning next to trust law claims (i.e. the “knowing receipt of trust property claim”, the “knowing assistance claims” and the unjust enrichment claims), the Court held that facts were pleaded to support each element of these claims in relation to BCC, BREMI and the three individuals. Thus, all of these claims can proceed vis-à-vis all of the defendants.

The issue of costs was also under appeal. The Court of Appeal held that the motions judge erred in not awarding the plaintiff costs of the motions from the pension fund on a full indemnity basis, relying on the recent decision in *Kerry (Canada) Inc.* v. *DCA Employees Pension Committee* (2007), 86 O.R. (3d) 1. The *Kerry* decision held that costs should be awarded from a pension trust fund where 1) the action is brought to ensure the due administration of the pension trust fund; or 2) where the proceedings are taken for the benefit of all of the beneficiaries. The Court of Appeal held that this action falls within both categories. The Court of Appeal awarded the plaintiff costs of the Rule 10 motion on a full indemnity basis (the Rule 10 motion was the initial court proceeding under which McKinnon was appointed as a representative for all beneficiaries of the OMERS Plan). The Court of Appeal also awarded the plaintiff his costs relating to the initial summary judgment motions (the Rule 21 motions) and the appeal partially from the pension fund and partially payable by the respondents - the respondents were not responsible for all of the costs relating to the original motion because it resulted in the plaintiff amending his statement of claim.

Implications

Although this decision was only a motion for summary judgment (in which the defendants were trying to strike Mr. MacKinnon’s claim), some interesting issues were raised regarding the scope of fiduciary duties and trust responsibilities in the context of pension plan administration and investment. For example, the Court of Appeal found that it was not “plain and obvious” that a company managing real estate assets was not an agent of a pension plan administrator under section 22(5) of the PBA. The scope of the meaning of agent under section 22(5) of the PBA is an important legal issue that has not yet been fully explored by the courts. The final decision of the court regarding the substantive issues raised in this case (after the matter is brought to trial) will be of interest to plan administrators and service providers, particularly investment managers.

LIABILITY OF INVESTMENT ADVISORS

DYER v. *CUNNINGHAM & ASSOCIATES FINANCIAL SERVICES, 2007 SKQB 395*

Facts

In 1999, SaskTel offered a number of employees an early retirement package in connection with a downsizing. To prepare departing employees for retirement, SaskTel sponsored workshops on investing one's pension, and recommended to employees that they seek advice from a financial advisor prior to retirement. The defendant, Ms. Cunningham, was one of the consultants hired to conduct workshops, offer advice, and discuss options with departing employees.

The plaintiff, Mr. Dyer, was offered and accepted an early retirement package from SaskTel. He was 59 years old at the time. Mr. Dyer attended the offices of Ms. Cunningham's firm, and met with one of Ms. Cunningham's associates to discuss a financial plan and investment strategy for his existing RRSP and the commuted value of SaskTel pension funds he was about to receive. Mr. Dyer's existing RRSP portfolio was already weighted toward mid-to-high risk equity investments

Mr. Dyer signed Ms. Cunningham's new plan application form, which included a one page "know your client" ("KYC") questionnaire. The KYC questionnaire consisted of four questions aimed at ascertaining the client's investment knowledge, objectives and risk tolerance. Mr. Dyer completed the KYC questionnaire indicating that he had good investment knowledge, that his objective was to retire, and that he had a medium risk tolerance. Mr. Dyer's account was subsequently transferred from the associate to Ms. Cunningham herself. Ms. Cunningham did not "refresh" Mr. Dyer's KYC questionnaire.

Mr. Dyer and Ms. Cunningham met 5 or 6 times for several hours in the aggregate. Over this time, Ms. Cunningham suggested more than once that Mr. Dyer rebalance his portfolio to include more conservative asset classes, such as fixed income and guaranteed investments. Ms. Cunningham suggested that a realistic rate of return would be 8%, rather than the 20% Mr. Dyer sought.

Mr. Dyer challenged Ms. Cunningham as to why her recommendations had not included certain "Best in Class" funds which had been profiled in Maclean's magazine. Many of these funds were high-risk funds that invested in emerging markets. In the end, Mr. Dyer decided to invest his RRSP and pension monies aggressively. Nine of the 15 funds in Mr. Dyer's portfolio were categorized as aggressive, including several of the funds profiled in the Maclean's article.

Mr. Dyer's investments lost 15% of their value in connection with the burst of the technology bubble of 2000/2001. Mr. Dyer brought a claim against Ms. Cunningham alleging she had negligently provided investment advice and breached her fiduciary duty to him.

Decision

The court rejected Mr. Dyer's claim that he was an un-knowledgeable and naïve investor who relied solely on Ms. Cunningham's advice. The court held that the KYC questionnaire is simply one element in the due diligence process by which an investment advisor must get to know his or her client's investor profile. Ms. Cunningham's failure to refresh Mr. Dyer's KYC questionnaire was improper and the subject of a finding of professional misconduct; the Court held that the 5 or 6 meetings between Mr. Dyer and Ms. Cunningham were more than adequate to have allowed Ms. Cunningham to evaluate Mr. Dyer's needs.

The court held that Mr. Dyer was the author of his own misfortune. Mr. Dyer understood the risks associated with investing his money in equities. Ms. Cunningham had no obligation to override Mr. Dyer's investment decisions, or to act as the guarantor of Mr. Dyer's investments.

Implications

The employee did not bring a claim against his former employer, SaskTel, for negligently selecting the defendant financial advisor to provide workshops and advise departing employees. Nevertheless, this case serves as a reminder of the risks associated with engaging third party financial advisors to provide investment advice to pension plan members.

A plan sponsor contemplating the engagement of a financial advisor to provide advice to current or former employees should ensure that any financial advisors to whom employees are referred have appropriate enrolment procedures in place (including but not limited to a robust KYC process). Plan sponsors should also advise employees of their right to retain a financial advisor of their own choice, and obtain the appropriate indemnities from any financial advisors to whom employees are referred.

EMPLOYER V. ADMINISTRATOR ROLES

***LLOYD* V. *IMPERIAL OIL LIMITED*, 2008 ABQB 379**

Facts

This case involves a class action brought by former Alberta-based employees (the “Alberta Plaintiffs”) of Imperial Oil Limited or one of its subsidiaries (“Imperial”) as a result of an amendment Imperial made to its pension plans (the “Plans”). The Plans are registered in Ontario.

Following its acquisition of Texaco Canada in 1989 Imperial initiated a workforce reduction. When its voluntary downsizing program failed to meet its workforce reduction target, Imperial announced in 1991 that it would initiate an involuntary termination program. Imperial did not commence involuntary terminations immediately.

Effective August 1, 1991, Imperial amended a provision of the Plans that provides for an enhanced early retirement annuity (the “Enhanced Early Annuity”). Prior to the amendment, a Plan member qualified for an Enhanced Early Annuity if he or she had 10 or more years of service and was terminated by Imperial for efficiency reasons. Following the amendment the Plan further required that a Plan member had to be within 5 years of early retirement on his or her date of termination to qualify for an Enhanced Early Annuity (i.e., over age 50).

Between February 1992 and July 1995 Imperial terminated nearly 800 employees in Alberta, including the Alberta Plaintiffs. But for the amendment the Alberta Plaintiffs would have qualified for an Enhanced Early Annuity.

In the spring of 1992, a group of Plan members whose employment had been terminated by Imperial, including a number of the Alberta Plaintiffs, formed a group called “Entitlement 55” to explore recourse in respect of the amendment. One individual wrote to the Alberta Superintendent of Pensions to express the view that the amendment violated subsection 56(1) of the Alberta *Employment Pension Plans Act* (“EPPA”), which prohibits any pension plan amendment that purports to reduce accrued benefits. The Alberta Superintendent of Pensions wrote to his Ontario counterpart in support of this view, and recommended that the amendment be refused registration in Ontario.

Entitlement 55 retained legal counsel in Ontario, who wrote to the Pension Commission of Ontario (“PCO”) and expressed his clients’ view that the amendment violated subsection 14(1)(c) of the Ontario *Pension Benefits Act* (“PBA”). Subsection 14(1)(c) of the PBA renders void any amendment that purports to reduce the amount or commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements. Counsel for Entitlement 55 also expressed the view that Imperial breached its statutory fiduciary duty as administrator of the Plans to exercise due care, diligence and skill in administering the Plans.

Entitlement 55's counsel did not make submissions to the PCO regarding Imperial's common law fiduciary duties, its statutory fiduciary duties as Plan administrator under the EPPA, or subsection 56(1) of the EPPA.

Despite the submissions of Entitlement 55's counsel, the Ontario Superintendent of Pensions registered the amendment on July 13, 1994.

Entitlement 55 challenged the Ontario Superintendent's decision to register the amendment before a 3-member panel of the PCO. The PCO heard the matter in May 1995 and held that, since none of the Alberta Plaintiffs had been terminated for efficiency reasons prior to the date of the amendment, they did not qualify for the Enhanced Early Annuity. Therefore, the amendment had not reduced any ancillary benefit for which any Alberta Plaintiff had met all eligibility requirements contrary to subsection 14(1)(c) of the PBA. The PCO further held that, since Imperial was not acting in its capacity as administrator of the Plans in making the amendment, the statutory fiduciary duty under the PBA did not apply. Entitlement 55 did not pursue its right under the PBA to appeal the PCO's decision.

Following the Ontario proceedings, the Alberta Plaintiffs commenced an action in Alberta in 1997 for a determination of the following questions under Alberta law: 1) Did Imperial breach the terms of the Plans in making the amendment? 2) Did Imperial breach the provisions of the EPPA in making the amendment? 3) Did Imperial as administrator and/or trustee of the Plans owe a fiduciary duty to members and, if so, did Imperial breach that duty?

Imperial brought a number of preliminary motions, including a motion, to stay the plaintiffs' action in Alberta entirely on the basis that the action in Ontario before the PCO had already adjudicated the matter. Both the Alberta lower court and the Alberta Court of Appeal dismissed Imperial's preliminary motion to stay the action.

This decision addresses whether the claims can be heard by the Alberta court given the PCO decision as well as whether Imperial breached the terms of the Plan, the EPPA, fiduciary duties or the duty of good faith as employer.

Decision

The Alberta Court of Queen's Bench reviewed recent Supreme Court of Canada cases that suggest:

> [T]hat there is a strong preference for parties to avail themselves of the administrative process, particularly in the context of pensions, which are subject to a complex regulatory scheme and fall within the jurisdiction of highly expert tribunals.

Within this context, the court considered whether the matters before it were *res judicata* such that the Alberta court ought not proceed to hear the claim. In order for the claims to be *res judicata*, the following criteria must be met: 1) the same questions had been decided; 2) the prior decision on the same issues was final; and 3) the same parties were involved in the prior action.

Regarding the question of whether the same questions had already been decided by the PCO, the court dismissed the Alberta Plaintiff's argument that the PCO had not addressed the arguments based on the EPPA. The court held that because Entitlement 55 had not argued this and had chosen not to avail itself of its right to appeal the decision of the PCO, it could not now raise those issues before the Alberta Court of Queen's Bench. The court dismissed the Alberta Plaintiffs' argument that Imperial had breached its common law fiduciary duty in making the amendment, because the common law fiduciary duty is indistinguishable from the statutory fiduciary duty under the PBA (in respect of which the PCO had already made a decision).

With respect to whether the decision of the PCO was final, the court noted that, while Entitlement 55 (which included some of the Alberta Plaintiffs) had the right to appeal the PCO decision to the Ontario Divisional Court, it chose not to avail itself of that right. As such, the decision of the PCO was considered "final" for purposes of determining whether the matter before the Alberta Court of Queen's Bench was *res judicata*.

With respect to whether the same parties were involved in the prior action, the court noted that many of the Alberta Plaintiffs had been involved in the proceedings before the PCO. All Plan members including the Alberta Plaintiffs had received prior notice from the PCO regarding the PCO hearing, and had been invited by the PCO to make submissions. It was open to the Alberta Plaintiffs to make submissions to the PCO based on the plan terms or the EPPA. The court therefore that the Alberta Plaintiffs had a privity of interest in the outcome of the Ontario proceedings, even if they were not all directly involved in earlier those proceedings.

The court concluded that the claims were *res judicata* on the basis of the PCO decision. However, in the event it decided the issue of *res judicata* incorrectly, the court went on to consider the merits of the parties' arguments.

The Alberta Plaintiffs agreed that the amendment breached the Plaintiff's amendment power on the basis that the Enhanced Early Annuity was an "accrued" benefit. Based on the actuarial evidence presented and established jurisprudence, the court determined that the amendment to change the eligibility conditions to receive an Enhanced Early Annuity was permitted as this was not an accrued benefit.

The Alberta Plaintiffs also argued that the amendment breached the EPPA on the basis that an amendment could not affect Plan members' qualification for an ancillary benefit even if the conditions for receipt of the ancillary benefit have not been satisfied. The court dismissed this argument holding instead that an amendment could not disqualify a Plan member from receiving an ancillary benefit for which he or she had already satisfied all eligibility requirements prior to the amendment but was permitted in respect of ancillary benefits in respect of which eligibility conditions were not satisfied.

Regarding the Alberta Plaintiffs' argument that Imperial had breached its fiduciary duty to them in making the amendment, the court confirmed the principle that a company can wear "two hats" in relation to its pension plan – the "employer" hat and the "administrator" hat. Since Imperial was acting as employer when it amended the Plans to add an additional qualification for an Enhanced Early Annuity, it did not owe Plan members a fiduciary duty to act in their best interests.

Finally, the Alberta Plaintiffs argued that, even if Imperial did not owe the administrator's fiduciary duty to Plan members in making the amendment, it owed them a "duty of good faith" as employer. In this regard, the court held that as long as an employer is acting in a manner consistent with the purpose of the pension plan, the employer can act in its own self interest without breaching any such duty of good faith. Even if Imperial was motivated by financial self-interest, there was no evidence that it acted in an underhanded manner or for some collateral purpose inconsistent with the purpose of the Plans.

Implications

This case confirms that, when a pension plan sponsor amends its pension plan, it is acting in its capacity as "employer" of the plan members, rather than as administrator of the pension plan. Therefore, the plan sponsor does not owe plan members a fiduciary duty to act in their best interests when amending its pension plan.

This case also confirms the notion that, as long as an employer is acting in a manner consistent with the purpose of the pension plan, the employer can act in its own self interest when amending its pension plan without breaching any duty of good faith. A plan amendment motivated by an employer's financial self-interests does not *per se* breach any such duty of good faith. Rather, this decision suggests that plan members must provide evidence that the employer acted in an underhanded fashion, or was motivated by some purpose collateral to the purpose of the plan, in order to render a plan amendment void.

This case also builds upon the Supreme Court of Canada's decision in *Buschau* v. *Rogers Communications Inc.* [2006] 1 S.C.R. 973, in which the Court held that members could not seek to obtain relief through a court action at common law where an established regulatory process was available to them under pension standards legislation. *Lloyd* v. *Imperial Oil Limited* supports the notion that a decision of a pension regulator within the core of its expertise ought to be paid a significant degree of deference.

LIABILITY OF OFFICERS AND DIRECTORS

SLATER STEEL INC. (RE) *(2008), 291 D.L.R. (4TH) 314 (ONT. C.A.)*

Facts

This Court of Appeal decision relates to two wound up pension plans (the "Plans") formerly administered and sponsored by Slater Steel Corp. ("Slater") Slater was granted protection under the *Companies Creditors Arrangement Act*, ("CCAA") on June 2, 2003. Prior to that date, Slater's actuary had filed and the Superintendent of Financial Services (the "Superintendent") had refused to approve actuarial valuations relating to the Plans. The Superintendent took the position that the valuation reports did not comply with the *Pension Benefits Act* ("PBA"). Slater requested a hearing in respect of the Superintendent's refusal to approve the valuation reports but, before the hearing could take place, Slater entered CCAA protection.

Subsequently, the Superintendent appointed an administrator to carry out a wind up of the Plans in the place of Slater. The administrator filed revised actuarial valuation reports that revealed significant solvency deficiencies in the Plans. The administrator then initiated a civil action for damages equal to the solvency deficiencies of approximately $18 million against the actuarial firm (and the individual actuary) that had prepared the valuation reports that the Superintendent had refused to approve on the basis that the actuarial reports had overstated the assets of the Plans which had the effect of hiding the true funded status of the Plans.

In the context of the civil litigation, the defendant actuarial firm and individual actuary brought a motion in the commercial court that had supervised the Slater CCAA proceedings seeking to bring a third party claim against certain directors and officers (referred to as the "Slater Personnel") of Slater who had served on Slater's Audit Committee. The Slater board of directors had delegated authority to the Audit Committee for managing and administering the Plans. The proposed claim alleged that the Slater Personnel, as administrators, acted negligently and in breach of their fiduciary duties, among other claims, when they minimized the contributions into the Plans pursuant to the actuarial valuations filed with (but not approved by) the Superintendent. The proposed third party claim alleged that the Slater Personnel knew or ought to have known that Slater was in financial difficulty at the time they allegedly directed the actuary to prepare the valuations according to an asset smoothing methodology that eliminated what would otherwise have been a substantial solvency deficiency and contribution obligation under each Plan.

The Slater Personnel maintained that a third party claim against them was barred because a Termination Order made pursuant to the CCAA prevented claims from being brought against them as directors and officers of the corporation. The Termination Order purported to terminate the CCAA proceedings involving Slater and provided for a release of the directors and officers from certain claims being brought.

The motions court dismissed the motion on the basis that a proper cause of action was not disclosed. It did not address whether any protection was afforded by the Termination Order. That decision was appealed to the Court of Appeal.

Decision

The Court of Appeal overturned the motions court ruling. The Court of Appeal found, first, that there was a reasonable cause of action against the Slater Personnel. The Court of Appeal then turned to look at whether the Termination Order was a bar to the proceeding. The Court of Appeal noted that the Slater Personnel were not being sued in the proposed claim in their capacities as directors and officers of Slater. Instead, the claims were made against them as individuals, in their capacity as agents and employees of Slater, the administrator. While the Slater Personnel argued that they served on the Audit Committee in their capacities of directors and officers, the Court of Appeal noted:

> The Audit Committee had to decide how much money Slater would contribute to the Plans annually. If the Slater

> Personnel, in the guise of the Audit Committee, made that decision in their capacity as directors and officers of Slater, they did so while owing a duty to Slater. Given the financial difficulties that Slater faced, that duty would have led them to minimize the amount that Slater contributed to the Plans.
>
> However, when the Audit Committee made decisions on the quantum of Slater's contribution to the Plans, it did so in order to fulfill Slater's obligations as administrator of the Plans. An administrator owes a fiduciary duty to the members of the Plans. The Audit Committee "stood in the shoes" of Slater, qua administrator when making the decision; therefore, it owed a fiduciary duty to the Plans' members. Fulfillment of that duty would have led to maximizing the contributions that Slater would make to the Plans as that would best protect the Plans' members pensions.

Without resolving the conflict outlined above, the Court of Appeal held that the clause in the Termination Order that prevented claims against directors and officers could not be relied upon to bar the third party action. Leave to appeal the Slater decision to the Supreme Court of Canada was denied.

Implications

The Court of Appeal did not make new law when commenting on the duties of the members of the Audit Committee. However, the case can be seen as an acknowledgement of the different duties and sometimes inherent conflict of interest that exists when officers and directors, who must act in the best interest of the corporation, also act as the administrator of a pension plan (or its agents or employees), whereby they are obliged to act in the best interests of the plan beneficiaries. The Court of Appeal acknowledged that officers and directors serving as the administrator of a pension plan are required to wear two very different separate and distinct hats.

The Court of Appeal was not making a final determination on the duties and obligations of the Slater Personnel involved in the administration of the Plan in this case. It was simply determining whether the defendants had the right to bring a third party claim to raise those issues. The Court of Appeal itself made it clear (at paragraph 37 of the Reasons) that its comments were not determinative of the issue which remains to be determined at some future date.

ABILITY OF TRUSTEES TO SUE FOR DEFAMATION

***FERGUSON* V. *TRUSTEES OF THE CITY OF SAINT JOHN EMPLOYEES PENSION PLAN*, 2008 NBCA 24**

Facts

Following the public disclosure in 2004 of an actuarial valuation on the financial position of the Saint John Employee Pension Plan (the "Plan") showing an unfunded liability of approximately forty-three million dollars, Mr. John Ferguson, a member of the Saint John Common Council, made a series of presentations dealing with various aspects of the administration of the pension fund to the City Council. In addition, Mr. Ferguson wrote a commentary about the Plan's administration which was published in the local newspaper. During those presentations and in his commentary, he questioned a number of management decisions made by the Plan's Board of Trustees (the "Trustees") affecting the pension fund, particularly with respect to the early retirement program, stressed the inaccuracy of the financial statements and generally the financial information provided to the City Council and the public, and argued for the need of an independent review. Mr. Ferguson went so far as to state that the Trustees knew that some of their actions were illegal and they were "laughing" at the City's taxpayers.

The Trustees brought an action for defamation against Mr. Ferguson alleging that he had "embarked upon a systematic and sustained course of action to maliciously and recklessly defame" the Trustees, both by direct statements and innuendo. The Trustees alleged that Mr. Ferguson knew or should have known that many of the statements he was making were false, the statements were meant and understood to mean that the Trustees were derelict in their duties and were attempting to deceive members of the City Council, employees under the Plan, and the public, and finally the words were calculated to disparage the reputation and character of the Trustees. In his defence, Mr. Ferguson alleged the Trustees were not defamed by his comments, and he denied making most of the statements attributed to him. Mr. Ferguson also advanced three grounds of defence with respect to specific allegations by specifically pleading justification, qualified privilege and fair comment.

On a motion for summary judgement, the motions judge granted judgment in favour of Mr. Ferguson holding that the defence of qualified privilege was so strong in this case that the Trustees' action for defamation was clearly without merit. The Trustees appealed that decision.

Decision

The Court of Appeal found that the motions judge erred by automatically finding that Mr. Ferguson was protected by qualified privilege simply because he made the statements in his role as City councillor. The Court of Appeal held that it was necessary to review whether the defence of qualified privilege was exceeded or defeated by statements made in malice or if the statements exceeded Mr. Ferguson's duty as a City councillor. As well, the Court of Appeal noted that the commentary to the newspaper was made outside of Mr. Ferguson's role as councillor and would not likely attract the defence of qualified privilege.

The Court of Appeal went on to find that there were genuine issues for trial. Certainly, if the Trustees were able to prove that Mr. Ferguson's statements to City Council were dishonest, that would likely substantiate a finding of malice and defeat any qualified privilege protecting Mr. Ferguson's statements. In conclusion, the Court of Appeal allowed the appeal, permitting the Trustees' case to proceed.

The Supreme Court of Canada denied leave to appeal on June 19, 2008.

Implications

Boards of trustees may be able to rely upon this decision should similar circumstances ever arise.

BANKRUPTCY AND INSOLVENCY ISSUES

LASALLE BUSINESS CREDIT, A DIVISION OF ABN AMRO BANK N.V. CANADA BRANCH **V.** ***GENFAST MANUFACTURING CO.,*** **2007 CANLII 50276 (ONT. S.C.J.)**

Facts

The United Steelworkers Union (the "Union") sought to recover $8 million in unpaid wages for employees of Genfast Manufacturing Company ("Genfast"), plus unpaid pension and benefit contributions. However, all claims against Genfast had been stayed pursuant to bankruptcy and receivership orders. The Union then sought to recover the unpaid amounts from three companies purportedly related to Genfast by applying to the Ontario Labour Relations Board ("OLRB") for a "common employer" declaration against Genfast and the three other companies. The OLRB could not hear the application because Genfast could not appear as a party before the OLRB given the stay.

The Union applied to Court to lift the stay. Two of the three companies purportedly related to Genfast (the “Foreign Companies”) opposed the Union’s application on the grounds that, as companies foreign to Ontario, the OLRB has no jurisdiction over them.

Decision

The court noted a 2006 decision in which the Supreme Court of Canada granted leave to a union to advance a successor employer application against a receiver under the *Bankruptcy and Insolvency Act*, on the basis that the OLRB has exclusive jurisdiction to make such a determination.

The court held that the OLRB is a specialized tribunal and is best positioned to determine the common employer issue, including the issue of whether the Foreign Companies are to be regarded as present in Ontario for the purposes of the common employer issue.

The court lifted the stay against Genfast to the extent necessary to permit the Union to apply to the OLRB for a common employer declaration in respect of Genfast and the other companies.

Implications

Where an insolvent company has unpaid wages and pension and benefit contributions and is subject to a stay of proceedings against it, related companies may not be able to rely on the stay in respect of the insolvent company to bar an application to the OLRB for a “common employer” declaration.

KEY DEVELOPMENTS IN BENEFITS ISSUES

DISCRIMINATION IN BENEFITS COVERAGE

ATTORNEY GENERAL OF CANADA **V.** ***BUFFETT AND THE CANADIAN HUMAN RIGHTS TRIBUNAL,*** **2007 FC 1061**

Facts

Terry Buffett ("Mr. Buffett") was a member of the Canadian Forces (the "CF"). The issue in this case was whether CF could deny coverage for the male infertility treatments sought by Mr. Buffett who was infertile. However, through a combined procedure of *in vitro* fertilization ("IVF") for his wife and *intra*-cytoplasmic sperm injection ("ICSI") for himself, it was possible for them to conceive a child. While generally health care was a provincial matter, the *Canada Health Act* ("CHA") provided that members of the CF were not eligible to receive health care coverage under any of the provincial health plans. Instead, the CF was required to provide its members medical care at public expense. The CF insured health care that is comparable with, and possibly better, than coverage available under a provincial plan. The CF's premise was that they would cover the same procedures that any of the provinces would cover.

Ontario was the only province that funded IVF to its female residents and only did so if the infertility was the result of double fallopian tube obstruction. No province had ever funded male ICSI treatment. In 1997, the CF began funding IVF treatment following a successful grievance by a member whose infertility was as a result of double fallopian tube obstruction. This funding was available to all women of the CF, regardless in which province she resided.

After the successful grievance for IVF funding, Mr. Buffett requested funding for his ICSI treatment. However, the CF refused to fund the procedure and Mr. Buffett claimed he was denied an employment benefit in breach of the *Canadian Human Rights Act* ("*Act*"), comparing himself to female members of the CF afflicted with certain infertility problems who were entitled to IVF funding. The matter worked its way through the CF grievance process to the Canadian Human Rights Commission and then to the Canadian Human Rights Tribunal (the "Tribunal").

Decision

The Tribunal determined that Mr. Buffett had established a *prima facie* case for discrimination of an employment benefit. Subsection 7(b) of the *Act* states, generally, that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination (such as sex, marital status or disability). An adverse comparison was made between Mr. Buffett and his female CF colleagues on the basis of sex and disability (male-factor infertility). Since the Tribunal did not accept the CF's arguments that the provision of this benefit imposed undue hardship on them, the Tribunal ordered the CF to pay for the cost of the ISCI treatments (up to a maximum of three times, in keeping with medical recommendation and the number of times IVF would be funded). The Tribunal also ordered the CF to pay Mr. Buffett $7500 for pain and suffering, and to amend its policy for funding of IVF treatments so that members with male-factor infertility receive substantially equal benefits as members with double fallopian tube obstruction, or all female members, as the case may be.

The application for judicial review by the Attorney General of Canada raised a number of issues. Among them was whether the health services of the CF constituted an employment benefit within the meaning of section 7 of the *Act* and whether the Tribunal erred in finding that the CF offered benefits in a discriminatory manner. The Federal Court determined that the provision of health services by the CF was an employment benefit since it was a condition of Mr. Buffet's employment that he be deprived of access to provincial health care plans. Therefore, the health care provided by the CF could only be considered as a benefit provided in the course of employment.

The court further determined that Mr. Buffett had been discriminated against within the meaning of section 7 of the *Act* since the CF, having decided to give female members the benefit of IVF, could not deny male members funding for ICSI.

Implications

This case is a clear example for employers to be aware of when determining which benefits to provide to male and female employees experiencing similar afflictions. If an employer covers female reproductive treatments, similar benefits may be required to be made available to male employees who may also experience reproductive problems.

PROVIDING BENEFITS TO EMPLOYEES AFTER AGE 65

CITY OF LONDON AND CUPE, LOCAL 101 (2008), 169 L.A.C. (4TH) 134 (BRANDT)

Facts

The union filed a policy grievance and two individual grievances alleging that the termination of benefits to employees over the age of 65 was a violation of the collective agreement. As a result of the enactment of Bill 211, which abolished mandatory retirement, employees could continue working for the City past age 65. Two such employees were informed prior to the 65th birthday that their group benefits coverage would no longer be available once they turned 65 years old. The employees maintained the ability to accrue and use sick pay credits, but Extended Health Benefits (including prescription drug coverage), Dental Plan, Vision Care Plan, Life Insurance, Accidental Death and Dismemberment and Short-term and Long-term Disability Benefits were no longer provided.

The relevant article of the collective agreement provided for Medical, Sick Leave, Pensions and Group Insurance. The agreement specifically obligated the City to pay 100% of the premiums for certain listed benefits – OHIP, Extended Health Care Benefits, and Dental Care. The same provision provided that the City would provide and administer a Vision Care Plan. The collective agreement also stated that the City was to provide a Group Life Insurance Plan under which the life of each employee covered by the collective agreement would be insured. Similarly, the Accidental Death and Dismemberment Plan was applicable to each employee covered by the collective agreement. The collective agreement also provided that employees would be insured under a Short-Term Disability Plan.

Regarding Long-Term Disability benefits, the collective agreement provided that all active employees would be eligible to receive benefits until age 65. The collective agreement also stated that an employee shall retire from the City no later than the end of the month in which the employee's 65th birthday occurs. Finally, the article stated that all of the insurance referenced in the article shall be as described and set forth in the respective policies.

Insurance policies were entered into with Manulife and Great West Life. The Manulife policy defined employees as those persons working on a permanent, active full-time basis and specified that coverage would terminate on the day on which the employee attains age 65. The Great West Life policy indicated that the coverage would terminate on the date the employee retires. That policy also provided for the waiver of premiums on disability for life insurance and accidental death and dismemberment insurance up to age 65. The parties agreed that subject to any changes resulting from Bill 211, the provisions in the insurance policies constituted standard insurance language.

The union conceded that no claim could be made in respect of the Long-Term Disability Plan as that clause in the collective agreement clearly provided that such benefits cease upon an employee reaching age 65. In respect of all other benefits, the union claimed that so long as a person remains an employee subject to the collective agreement, they are entitled to the benefits provided for in the agreement regardless of age.

Decision

The union argued that provisions in insurance policies cannot undermine entitlements to benefit otherwise provided for in the collective agreement. In other words, whatever is provided for in the insurance policies must be consistent with the collective agreement. Therefore, the union argued that the City cannot purchase insurance coverage that provides benefits for employees who are under the age of 65 but denies benefit to those over age 65 because the collective agreement requires that all employees be entitled to certain benefits. As well, the union argued that the fact that the policies contained standard insurance provisions, this could not defeat entitlements set out in the collective agreement. Furthermore, what was considered standard insurance language prior to the enactment of Bill 211 cannot be assumed to apply under a legal regime in which employees are permitted to work after age 65.

The union also noted that since the Ontario government announced that it was seeking input on the possibility of ending mandatory retirement in 2004 and the collective agreement was ratified in early 2005, it cannot be said that the City was unable to take steps to address by the proposed change in the law. As the City did not take steps to deal with the subject of ongoing benefit entitlement after the end of mandatory retirement insofar as the collective agreement was not amended to reflect the change in the law, the matter must be disposed of according to the clear terms of the agreement.

The City's position was that, prior to Bill 211, it was in compliance with its obligations under the collective agreement and that the standard insurance language in the insurance policies expressed the extent of those obligations. Specifically regarding the effect of the Bill 211, the City argued that the Bill itself made clear that although employers could no longer discriminate because of age, that was to have no impact on employee benefit, pension or group insurance plans. To this end, the City relied on a number of documents produced by the Ontario government expressing that the status quo regarding employee benefits was permitted to be maintained.

Arbitrator Brandt upheld the grievances. He found that there was no question that the collective agreement conferred an entitlement to enjoy benefits to those persons who are employees of the City. The individual grievors, he found, were prima facie entitled to the benefits by virtue of being employees of the City, regardless of their age.

Arbitrator Brandt found that the jurisprudence was clear that absent some other provision in the collective agreement, if an employer purchases an insurance policy that does not provide for the benefits it has contracted to provide in the collective agreement, it will be found to have breached the collective agreement. The Arbitrator rejected an argument by the City that the plans were incorporated into the collective agreement and therefore the language in the policies limiting eligibility to employees under age 65 was also a part of the agreement. He also stressed that there was no agreement between the parties that the language remained standard insurance language in the post Bill 211 era.

Regarding the argument that Bill 211 maintained the status quo with respect to employee benefits, Arbitrator Brandt found that this argument did not assist the City. Arbitrator Brandt agreed with the union that the status quo that was maintained was the status of the benefits provided in the collective agreement – a regime under which all employees irrespective of age were entitled to various benefits. He declined to decide whether the amended provisions of the *Human Rights Code* could be used to protect from challenge a collective agreement which on its face discriminates on the basis of age as it was not the matter before him.

Implications

This decision is one of the first decisions since the end of mandatory retirement to challenge a benefits plan that denied coverage to employees over age 65. However, the analysis that was applied was the standard contractual analysis and did not involve a human rights challenge to the current state of the *Employment Standards Act* and *Human Rights Code* in Ontario which allows employers to distinguish between live and lost age 65 employees..

Employers should review their insurance policies to ensure that they continue to provide the benefits promised in their collective agreements. Where there is a difference, employers should seek advice as to whether it is necessary to change the terms of their insurance policy.

ACCRUING SICK LEAVE DURING LTD

GRAND ERIE DISTRICT SCHOOL BOARD AND ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION, **2008 CANLII 3535 (KNOPF)**

Facts

The union brought a grievance related to the accumulation of sick leave credits while in receipt of Long Term Disability ("LTD") benefits. Both an individual grievance as well as a policy grievance were filed because the issue had implications for all teachers within the bargaining unit. The union asserted that the collective agreement supported its position that sick leave credits continued to accumulate during LTD. Conversely, the School Board asserted that the collective agreement did not require sick leave credits to accumulate while a teacher was on LTD and that if there was any ambiguity in the contract, the past practice was not to provide accruals.

Under the collective agreement, each full-time teacher was credited with 20 sick leave day credits on September 1 of each year. Those days are available to teachers to draw upon in the event of sickness and provided a full day's pay. If the days were not used in that school year, they may be "banked" and used in the event of illness in future years. Upon retirement, a maximum of 200 unused sick days could be paid out as a retirement gratuity.

The issue before the arbitrator was whether a full-time teacher who is absent from the workplace and in receipt of LTD benefits was entitled to the 20 days of sick leave credit on September 1 of each school year to teachers who were actually at work. The issue arose when a long serving teacher was preparing for his retirement. At the time, he was absent from work due to illness and was in receipt of LTD. He requested and received a statement of his sick leave credits from the School Board and discovered that the School Board was not crediting any additional sick leave credits while he was not "actively at work". He immediately grieved the School Board's actions and the policy grievance followed.

Decision

The arbitrator first addressed whether the evidence of the School Board's past practice was of any assistance. She noted that the fundamental principle of contract interpretation is that the document should speak for itself and that extrinsic evidence can and should only be considered when there is patent or latent ambiguity or where it can establish that the equitable principle of estoppel should be applied. On that basis, she noted that the past practice in this case was only useful to reveal that the School Board had a consistent practice, that the union was simply unaware of.

The arbitrator reviewed the relevant article of the collective agreement, noting that it granted the entitlement of 20 sick leave credits to "each full-time teacher". Standing on its own, given that the Grievor and teachers like him who are absent due to long-term illness still retain their full-time status, the union's position had some merit. However, when the sick leave provision had to be interpreted in the context of whole article, the article went on to specify that a teacher employed less than full time had their entitlement pro-rated during the term of that employment.

The arbitrator stated that if the union's argument was correct, then a teacher who is absent 100% of the time would receive the full allocation of sick leave credits, while the teacher who was actively working part of the time would have their credits reduced on a pro-rated basis. Further, the collective agreement articulated a list of the absences that were without loss of sick leave credit. LTD was not one of those absences. The arbitrator also noted that the collective agreement also articulated situations where sick leave will specifically not accumulate, such as for Provincial Executive Leaves. LTD was not mentioned there either. From the provisions, the arbitrator determined that the parties could and did specify the situations in which they wanted to ensure that sick leave credits continued to accumulate, and they failed to do so for situations of teachers absent on LTD.

Looking to other aspects of the collective agreement, it was clear that the agreement took into consideration situations of those employees nearing retirement. The collective agreement ensured that a teacher who was on LTD at the point of retirement would have their retirement gratuity calculated on the basis of 100% of their annual salary factored together with the unused cumulative sick leave. Ultimately, the arbitrator found that when viewed as a whole, the collective agreement had a general approach of sick leave credits accumulating as an earned benefit related to a teacher's performance of service, not simply based on the status of being an employee. She noted that this was consistent with other arbitral decisions involving the accumulation of sick leave credits for teachers, in which the purpose of sick leave credits were viewed as serving as a form of insurance for illness, as well as a retirement bonus. It had been consistently held in theses cases that sick leave credits were earned through attendance at work.

In the result, the arbitrator dismissed the grievance, finding that the School Board was acting appropriately by denying the accumulation of further sick leave credits while a teacher was on LTD.

Implications
This case reaffirms the general understanding that sick leave credits are an earned benefit. As in all cases, the language of the collective agreement will govern. If a collective agreement contains language providing employees with a right to accrue sick leave credits without active work (based on the status as an employee), then the parties will be held to that language. Otherwise, the general approach of providing for sick leave accrual only for those actively at work continues to apply.

ENROLMENT FORMS – PRIVACY OF EMPLOYEES

***ONA AND HAMILTON HEALTH SCIENCES HOSPITAL*, UNREPORTED (OCTOBER 5, 2007, SURDYKOWSKI)**

Facts
Hamilton Health Sciences Hospital outsourced the administration of its short-term disability ("STD") plan to a private sector firm. All employees, including those represented by different unions, were required to complete the firm's Medical Certificate of Disability form when applying for STD benefits. The employees represented by the Ontario Nurses' Association ("ONA") were covered by two different versions of the STD plan, the 1980 Hospitals of Ontario Disability Income Plan ("HOODIP") and the 1992 HOODIP plan, depending on whether the employees were hired before or after January 1, 2006.

Section B of the form sought broad consents from the employees to release medical information in the following terms:

> I authorize any party involved in my treatment including my health care professional, the WSIB or the Automobile Insurer to provide our Medical Service Provider, Cowan Wright Beauchamp (CWB), all information and documents requested concerning any medical condition relative to this claim for the purpose of facilitating the delivery of the best medical care and the assessment of my ability to work. All information will be treated in a highly confidential manner, however, information regarding restrictions or limitations

affecting my ability to Return to Work could be shared in a report to Supervisors and when applicable, WSIB, the Automobile Insurer and the Long Term Disability Insurer. A photocopy or other reproduction of this authorization is as valid as the original. The employer will reimburse up to a maximum of $35.00 for appropriate completion of this form upon presentation of an original receipt.

Section C of the form was to be completed by the employee's physician. This portion of the form required detailed information with respect to: 1) diagnosis; 2) history; 3) current findings; 4) treatment; and 5) prognosis.

ONA filed a policy grievance claiming that the firm's Medical Certificate of Disability violated the collective agreement and the employees' statutory privacy rights. ONA alleged the form violated the *Occupational Health and Safety Act* ("OHSA") which prevents an employer from seeking access to workers' health records in the absence of consent or the order of a tribunal or court. ONA also claimed that the form violated the *Personal Health Information Protection Act* ("PHIPA") which provides that consent must be informed and cannot be coerced and that personal health information shall be collected, used or disclosed only to the extent reasonably necessary to serve the particular purpose. ONA claimed the Hospital used coercion in obtaining consent as the forms were accompanied by a covering letter which informed the employees that a failure to complete the forms could result in a denial of benefits. ONA also contested that an employee may be reimbursed up to only $35, as the collective agreement provided for full reimbursement of the cost of obtaining support for STD entitlement.

The Hospital contended that the form was very similar to the form previously used by the Hospital before it outsourced the administration of STD benefits to the third party firm. ONA did not consent the previous form.

Decision

The arbitrator upheld the grievance, finding that the form was overly broad and sought more information than was necessary to establish entitlement to STD benefits. The arbitrator emphasized that the issue before him was limited to what consent and medical information the Hospital can require every employee who seeks STD benefits to provide as a matter of course in the first instance, failing which benefits will be denied. The arbitrator noted that an employer has a right to an employee's confidential medical information, but only to the extent that legislation or a collective agreement or other contract specifically permits, or where it is demonstrably required by law for the particular purpose. Any administration of STD benefits must fit within the mandatory limits of PHIPA and the OHSA, neither of which parties can contract out of through collective bargaining or otherwise.

The arbitrator found that for the purposes of establishing entitlement to STD benefits, a document from a qualified medical doctor certifying that an employee is unable to work for a specified period due to illness or injury is sufficient proof to justify the absence and to establish entitlement to STD benefits. An employer is only permitted to know the reason for the absence in the general form of a statement of the nature of the illness and that the employee has a course of treatment and is following it. An employer is also permitted to know when the employee may return and any work restrictions. However an employer is not permitted to know the diagnosis, symptoms, treatment plan, prognosis or general medical history of the employee, unless the employee provides specific consent to the release of such information.

At the first instance of a claim for STD benefits, the employer has no entitlement to additional information. An employee cannot be required to release more confidential personal medical information than is required for sick leave justification or benefits purposes. Moreover, the consent must be focused on the particular purpose and limited to the particular medical professional, such that a separate consent is required for every contact and the employee cannot be asked to give prospective permission for future contacts. Essentially, consent cannot be obtained in blanket form.

In all cases, the general principles outlined above are subject to any additional requirements in the parties' collective agreement, provided they do not violate the PHIPA or the OHSA. In the present case, the 1980 HOODIP plan provided for no greater employer access to personal medical information than that which was required under general principles set out above. However, the 1992 HOODIP plan contained an additional requirement of proof that the employee was under the active, continuous and medically appropriate care of a medical professional and was following the treatment prescribed. The arbitrator found that this provision entitled the employer to make its own assessment of the medical appropriateness of care, which in turn entitled it to a description of the treatment plan.

Applying these principles, the arbitrator concluded that Section B of the form overreaches in various respects. Specifically, the form was overly broad and inappropriate 1) by purporting to apply to more than one medical professional, whereas a separate consent is required for each; 2) by including references to automobile insurer and WSIB claims for which there was no prima facie basis; 3) by adopting the improper purpose of facilitating the delivery of the best medical care and assessment of the employee's ability to work, an obligation which fell to the employee's physician and not the insurance administrator; 4) by requiring the employee to consent to disclosure of information to which the employer was not entitled; 5) by purporting to authorize direct contact by the employer or its agent with an employee's physician, which was prohibited; and 6) by violating the collective agreement provision which provided that the Hospital would pay the full cost of obtaining a medical certificate.

As well, Section C of the form was required to be significantly revised in accordance with the Award. The arbitrator suggested that separate forms be developed with respect to the two versions of HOODIP that applied to bargaining unit members, reflecting the different information an employer is entitled to under the two versions. The arbitrator also noted that any additional information sought could be requested in a separate form or page making it very clear that the employee was not obliged to make the disclosure and providing a separate consent for each parcel of confidential personal medical information. However, the arbitrator noted that if the employer had reasonable cause to suspect the genuineness or accuracy of the information initially provided, it was entitled to seek additional information that is specific to and reasonably necessary to address its concerns.

Finally, the arbitrator observed that the fact that ONA might in the past have voluntarily permitted broader access to medical information did not mean that it was required to continue to do so. In fact, he noted that consent can be revoked at any time.

Implications

This case has implications both for employers in the health sector and generally. The comments the arbitrator made regarding the application and limits inherent in the OHSA and PHIPA affect all employers requiring employees' consent to more information than is necessary to establish entitlement to STD benefits. All employers should ensure that their administration forms adhere to the statutory requirements regarding employee consent to the release of personal medical information.

In the health sector specifically, the award makes interesting findings regarding the information an employer is able to require under the two different HOODIP plans.

OFFSETS UNDER LTD PLANS

***RUFFOLO* V. *SUN LIFE ASSURANCE CO. OF CANADA* (2008), 64 C.P.P.B. 277 (ONT. S.C.J.)**

Facts

The plaintiff, Mr. Ruffolo, was employed by Royal Plastics Ltd. in an executive position when he became totally disabled as a result of a serious brain injury suffered in a car accident in November 1991. According to the terms of a group life and health insurance policy that his employer had with a predecessor of Sun Life Assurance Company of Canada (the “Policy”), Mr. Ruffolo was eligible for long-term disability (“LTD”) benefits as of March 1992. Starting in November 1991, he also commenced receiving Canada Pension Plan (“CPP”) disability benefits, and his two children also received CPP benefits for children of disabled pensioners.

Mr. Ruffolo's LTD entitlement was $2,222.33 per month. His monthly CPP disability benefit was $682.66. His children, together, received $226.28 a month from CPP, which was paid to him directly since the children were minors. Sun Life offset both Mr. Ruffolo’s and his children's CPP benefits, with the result that he received $1,313.39 each month from the insurer and $908.94 from CPP (total disability and children’s benefits), for a combined total of $2,222.33.

Sun Life's deduction of all the CPP benefits from its payments to Mr. Ruffolo was based on the terms of the Policy with Royal Plastics. The Policy provided that “the scheduled monthly benefit of an insured employee will be reduced by any of the following sources applicable on the basis of the integration method specified in the master application: (a) disability benefits paid or which may become payable under any plan or arrangement which is either sponsored or provided by any governmental or regulatory body, including the Canada Pension Plan, the Quebec Pension Plan, any Workers' Compensation Act, and the Unemployment Insurance Act, 1971...." The "master application" to which this clause referred was the employer's original application for group insurance coverage. Under the application, which was incorporated by reference into the Policy, the employer had a choice of options as to what other benefits from outside sources would be subject to offset. Royal Plastics chose the broadest and most comprehensive offset provision, which provided for an offset of "all sources specified in the group policy."

Alleging that it was inappropriate for Sun Life to reduce its payments to him by the amount of his children's CPP benefits because those benefits belonged to them and not to him, Mr. Ruffolo initiated an action against Sun

Life in December 2003. A co-plaintiff in a similar situation joined in the action. She also was a recipient of LTD benefits insured by Sun Life and also objected to the offset of her children's CPP benefits. The decision applies to both claims.

Decision

Mr. Ruffolo argued that the insurance contract between Sun Life and Royal Plastics did not permit the deductions of his children's CPP benefits from the LTD payments to him. Mr. Ruffolo argued that the CPP children's benefit was not a proper offset because it was not payable to a disabled contributor. Mr. Ruffolo also argued that it was unfair that Sun Life could pay him less than the $2,222.33 to which he was entitled under the Policy, simply because of the number of children that he had and that the offset provision was contrary to public policy because the CPP children's benefit was intended to reduce poverty by directing payments to the children of a disabled parent, and the offset provision negated this purpose.

The court found that Royal Plastics elected to offset 'all sources specified in the group policy'. The 'sources specified in the group policy' specifically included any disability benefits paid or which may become payable under any plan provided by any governmental or regulatory body, including the CPP. The court went on to find that a disability pension and children's benefits are paid and provided by the CPP. Accordingly, the monthly benefit of an insured under the Policy is reduced by the amount of the disability pension and the amount of the disabled contributor's child's benefit.

The court determined that this case was distinguishable from the *Mugford* v. *Canadian Industries Limited,* [1980] N.J. No. 86 (S.C.) decision on which Mr. Ruffolo relied, in which the court ruled that the children's CPP benefit could not be offset because it was not payable to the disabled employee. The court found that case distinguishable based on the comparable provision in the policies.

The court also rejected Mr. Ruffolo's argument that it was unfair for Sun Life to benefit financially by paying him less because of the number of children he had. Specifically, the court accepted that there was nothing untoward about the offsets. Royal Plastics was free to contract for LTD benefits without offsets, with fewer offsets or with the greatest amounts of offsets permissible. The court noted that if Royal Plastics contracted for fewer offsets its employees would have paid higher premiums.

The court also rejected the public policy argument, holding that the scope of the Policy does not affect the scope of the CPP benefits which, if eligible, a disabled contributor and his dependants would receive. CPP is a first payer of benefits, and the CPP benefits are not affected by the availability of private insurance. Nor does the CPP prohibit the offset of disability benefits or children's benefits from private insurance benefits. Finally, the court found that a disabled contributor's child's benefit is the property of the child (even where paid to the contributor if the child is a minor), and the child always gets the benefit of the CPP benefit. What is lessened by offsets is the amount paid in LTD benefits to the disabled employee under the private insurance plan.

Having completed the analysis of the main issues in the action, the court also ruled that the claim was statute-barred because it was initiated many years after the one-year time limitation imposed by the *Insurance Act*.

Implications

This decision is helpful for employers who provide LTD plans with offsets built in as it reaffirms an employer's right to contract to provide a plan with variable levels of offsets. It is important to ensure that the language of the plan and applicable policy are clear. If an employer wishes to provide a plan with a broad set of offsets, including children's CPP benefits, the language must be clearly drafted to enable such offsets.

MANUGE **V.** ***CANADA,*** **2008 FC 624**

Facts

The plaintiff, Dennis Manuge, was a member of the Canadian Forces until he was released on medical grounds on December 29, 2003. In 2002, Mr. Manuge was awarded a disability pension under the federal *Pension Act*, payable in the monthly amount of $386.28 (the "VAC benefit"). The VAC benefit was in addition to his Canadian Forces salary of $3,942.00 per month. Upon his release from active service, Mr. Manuge was approved to receive long-term disability benefits under the Canadian Forces' disability plan (the "SISIP Plan"). In accordance with Article 24 of the SISIP Plan, the monthly disability benefit payable to Mr. Manuge was reduced by the monthly VAC benefit he receives. The offset of the VAC benefit left Mr. Manuge with monthly disability income at a level of 75% of his gross employment income, which was approximately 59% of his total pre-release income (base salary and VAC income).

Mr. Manuge sought to have a class, specifically "all former members of the Canadian Forces whose long-term disability benefits under S.I.S.I.P. Policy No. 901102 were reduced by the amount of their VAC Disability benefits received pursuant to the *Pension Act* (the "Class") from April 17, 1985 to date," certified to challenge the Crown's practice of offsetting VAC benefits from SISIP income. Mr. Manuge alleged that Article 24 of the SISIP Plan is unlawful, *ultra vires* and contrary to the *Pension Act*, and that the Article also breaches his equality rights under section 15(1) of the Canadian *Charter of Rights and Freedoms* (the "Charter"). Mr. Manuge further alleged that the Crown has breached public law and fiduciary obligations owed to Mr. Manuge and that it has otherwise acted in bad faith and has been unjustly enriched by its conduct. Mr. Manuge sought relief in the form of various declarations, reimbursement of the monies deducted from his SISIP income, general, punitive, exemplary and aggravated damages, interest, and costs.

The Crown objected to the motion for certification and argued that the "offset" was nothing more than a legitimate attempt to rationalize or coordinate benefits very much in keeping with the contractual models for long term disability insurance that apply in the public and private sectors. Further, the Crown emphasized that since the actions were the decisions of a government body, the decision first had to be subject to judicial review. Only if the judicial review was successful, the Crown contended, could Mr. Manuge bring a class action.

Decision

The court rejected the Crown's argument that Mr. Manuge's claims were solely based on a decision of a federal board or tribunal. Instead, the court found that while Article 24(a)(iv) of the SISIP Plan emanates from a decision that was made by the Chief of Defence Staff, what Mr. Manuge's claim challenges is the lawfulness of the government's policy and by the corresponding action to reduce his monthly SISIP income by the amount received by him under the *Pension Act*. The court noted that if the opposite finding were made Mr. Manuge and others in his situation would be required to seek leave to challenge the validity of a policy decision apparently made many years before their claims to long-term disability compensation even arose.

Nevertheless, the court acknowledged that Mr. Manuge was seeking declaratory relief against the Crown claiming that the offset is unlawful, *ultra vires*, discriminatory and in breach of public and fiduciary duties. Mr. Manuge did not assert a cause of action against the Crown framed either in contract or in tort. Thus, the claim would appear to be caught by the judicial review provisions of the *Federal Court Act*. However, the court differentiated Mr. Manuge's claim from other cases in which judicial review was required prior to commencing an action on the basis that on each and every occasion that Mr. Manuge and the other proposed class members are subject to the offset of VAC benefits from their SISIP income, they have a fresh claim to relief and a corresponding right to judicially attack the lawfulness of the policy giving rise to the reduction in benefits.

Moving to the analysis of whether Mr. Manuge's proposed action could be certified as a class proceeding, the court noted that the Crown did not dispute that the proposed class action raises questions of law common to all prospective class members or that the proposed class is identifiable. The Crown also accepted that Mr. Manuge is an appropriate representative plaintiff and that he had created a workable litigation plan. However, the Crown opposed the certification motion principally on the basis that the common issues could be more efficiently managed and resolved within the context of a single application for judicial review which would then bind the Crown with respect to the other affected members. The Crown also contended that there would be no judicial economy realized from a class proceeding in any form.

The court found that the only issues raised in Mr. Manuge's claim which were arguably untenable as reasonable causes of action were his pleadings of unjust enrichment and breach of fiduciary duty. On the other hand, the court found that the allegations of unlawfulness, *ultra vires* and a breach of section 15(1) of the *Charter* easily meet the legal threshold of a reasonable cause of action. Further, the court saw the allegation of a breach of a public law duty as an alternative plea to those that assert that the impugned SISIP provision was unlawful and contrary to the *Pension Act*. The court also found that the allegation of bad faith could be sustained as it was linked to the further allegations of unlawful and discriminatory conduct and breach of fiduciary duty, and was made in support of the claim to general, punitive, exemplary and aggravated damages. The court noted that whether bad faith could be established on the evidence was to be seen, but would not strike out the claim prematurely. The court agreed with the Crown that the claims of unjust enrichment and breach of fiduciary duty are inherently difficult to establish against the Crown. Despite this, the court held that the claims asserted met the required threshold.

In its conclusion, the court stated that this proceeding seemed to be ideally suited to certification as a class action. There were no apparent competing interests, indemnity claims or subclasses. The questions of law and liability raised in the pleadings appeared to be common throughout the class and the only individual questions related to the identification of loss, which the court opined should be amenable to simple mathematical calculation. Ultimately, the court certified the proposed class.

The Crown has sought leave to appeal from this decision and a hearing is set for December 16, 2008.

Implications

This decision exemplifies the courts' willingness to certify proposed class actions in pension and benefits cases. Here, the amount of the offset, and therefore the potential loss, was small enough for members of the proposed class that the courts saw the class proceeding as the optimal vehicle for enabling access to justice.

On the specific circumstances of this case, the decision is also of interest to governmental bodies that are also employers. The court appears willing to entertain an action instead of judicial review, especially in cases where the facts stretch back a number of years.

CHANGING EMPLOYEE BENEFITS

***WRONKO* V. *WESTERN INVENTORY SERVICE LTD.* (2008), 90 O.R. (3D) 547 (C.A.)**

Facts

The employer Western Inventory Service Ltd. sought to have the plaintiff, Mr. Wronko, sign a new employment contract. The new contract would have reduced his severance entitlement from two years to a payment of only 30 weeks' pay in the event of termination. Mr. Wronko refused to sign this new contract. In response, the employer wrote to Mr. Wronko, purporting to give him notice that the new contract – including the new termination provision – would come into effect in two years time. Mr. Wronko continued to object to the proposed change over the two year period. When two years had passed, the employer wrote to Mr. Wronko, enclosing the amended contract with the new termination provision, asking Mr. Wronko to sign the contract, and advised him that the contract was in effect. The letter indicated "If you do not wish to accept the new terms and conditions of employment as outlined, then we do not have a job for you." Mr. Wronko replied in writing the next day that he understood his contract had been terminated, and demanded payment of two years of pay in lieu of notice as contemplated by the termination provisions of the original employment contract.

Decision

The Court of Appeal found that Western Inventory repudiated the employment contract when it presented Mr. Wronko with the amended contract which included the new severance provision. At that point, Mr. Wronko had three choices: 1) accept the change, and continue employment under the new contractual terms; 2) reject the change and sue for damages; or 3) make clear he rejected the new terms of employment.

In the third situation, the Court of Appeal ruled that, the employer "may respond to this rejection by terminating the employee with proper notice and offering re-employment on new terms". However, if the employer does not terminate the employee, but instead allows the employee to continue to work, the employee is entitled to insist that the employer comply with the terms of the original contract.

The Court of Appeal found that the present case fell into the third category – Mr. Wronko had responded to Western Inventory's unilateral change to the contract by making his objection known while continuing to work and Western Inventory allowed him to do so, with the result that Mr. Wronko was entitled to enforce the terms of the original contract. He was awarded two years of pay in lieu of notice, less what he earned during the two year notice period from other employment.

Implications

This case suggests that employers must be specific about the consequences to the employment relationship in the event an employee does not accept proposed fundamental changes to the employment contract. The decision indicates that an employer ought to effect the change by giving notice of termination of employment in accordance with the contract and offering re-employment on the amended terms and conditions. However, it is not clear that this requirement will apply in all situations where an employee seeks to make broad-based amendments to benefit and pension plans that may be considered to be fundamental to the employment relationship. Furthermore, the case does not specifically address how the employee's obligation to mitigate his damages operates in these circumstances . Despite the lack of certainty, in the event an employee objects to fundamental changes to the employment contract, it is unadvisable to simply allow that employee to continue to work without clearly communicating that, notwithstanding the objection, the employer intends to implement the new terms and conditions. This case does not address non-fundamental changes to terms and conditions of employment.

STOCK OPTIONS ON TERMINATION OF EMPLOYMENT

BAILEY V. *CINTAS CORPORATION,* 2008 CANLII 12704 (ONT. S.C.J.)

Facts

Two former employees of Cintas, Mr. Bailey and Mr. McGregor (the "Employees"), brought an action for damages as a result of their inability to exercise stock options granted to them by Cintas during their employment. Several years after their resignations, the Employees attempted to exercise their stock options. Cintas advised them that, in accordance with the terms and conditions of the stock option plan, their stock options had terminated at the time they left their employment with Cintas. The Employees alleged that they were unaware of any such term of the plan, having never been provided with a copy of the stock option plan document and that they were not advised of such a term during the discussions leading up to their departures from Cintas.

The plaintiffs brought an action claiming breach of contract, negligent misrepresentation, and breach of fiduciary duty (this latter claim was not argued at trial). In particular, the plaintiffs alleged that Cintas was in breach of its duty to them of full and fair disclosure of the terms of the stock option plan.

The actual provision in the plan was not being challenged. The provision clearly stated that "upon termination for reasons other than cause, the then-exercisable portion of any option will terminate on the 60th day after the date of termination" and the "portion not exercisable will terminate on the date of termination of employment." The date of termination of employment was the plaintiffs date of resignation.

Decision

The court analyzed the plaintiffs' claim for breach of contract, arising from their contract of employment. The core of their argument was that by not providing them with a copy of the stock option plan at anytime during the course of their employment, Cintas breached an implied duty to make full and fair disclosure to them of all documents relating to the stock option plan. Cintas, in response, did not dispute the obligation existed, but contended that its practice was to always provide a copy of the plan and relevant policies at the time of an employee's first grant of options.

On the evidence, the court found that Cintas did not provide either plaintiff with a copy of the plan during the course of their employment. However, the court also found that the failure was not intentional, but was purely a matter of inadvertence. In any event, the court found that Cintas was not in breach of its obligation to the plaintiffs because neither plaintiff could have reasonably believed that the information provided comprised the whole of the plan's terms. In other words, the court found that the plaintiffs had a responsibility to seek further information from Cintas. As well, the court found that the information provided was sufficient to satisfy Cintas' duty of full and fair disclosure, especially in the case of one plaintiff who received a letter stating that a plan document existed. The fact that Cintas failed to provide an actual copy of the plan document through inadvertence was not found to amount to a breach of its obligation to provide full and fair disclosure. Accordingly, the claim for breach of contract was dismissed.

Regarding the claim for negligent misrepresentation, the court reviewed whether Cintas' failure to tell the plaintiffs during the course of the discussions prior to their resignations that their options would terminate constituted a negligent misrepresentation. The court easily found that a special relationship existed between the plaintiffs and Cintas, as their employer. Therefore, there was a duty of care on Cintas to ensure that any representations were accurate and not misleading. As to whether the silence of Cintas was a misrepresentation, the court found that none of the stock option plan documents provided to the plaintiffs indicated that the options would continue beyond the termination of employment. Nor were the plaintiffs ever told the options would continue past termination of employment and therefore there was nothing untoward in not specifically advising the Employees of the fact that the options would terminate at the date of their resignation from employment. Further, the court noted that the options' vesting schedule meant that the options would not vest until well beyond the dates on which the plaintiffs resigned their employment.

The court therefore found that Cintas was not acting negligently by failing to inform the plaintiffs at the time they resigned that their stock options would terminate. This silence was neither inaccurate or misleading in the context of the information the plaintiffs did have in their possession regarding the stock option plan. On the same basis, the court found that because Cintas believed the plaintiffs knew of the forfeiture condition, it was not highly relevant information requiring disclosure.

One of the plaintiffs argued he relied on the misrepresentation by failing to discuss compensation for the options in his severance package. The other plaintiff did not indicate that he would have done anything differently at the time of his resignation. The court found that the plaintiffs' reasons for departing were such that it was unlikely that forfeiture of stock options would have impacted on their decisions to leave. Finally, the court found that the plaintiffs did not suffer any damages. For all of the above reasons, the court dismissed the claim for negligent misrepresentation.

Implications

Stock option plans must be specific regarding an employee's entitlement at the time of termination. This decision is beneficial for employer as it accepted that an employer does not have to expressly inform employees that options will terminate on resignation, if the documents provided to the employees do not provide conflicting information. While employers should be wary of the decision's finding that the employees ought to have known that further and fuller information regarding the plan's terms existed, it is helpful to see a decision in which the court places some responsibility on the employees to ensure they have adequate information. Despite this decision, it is recommended to consistently make the legal plan document available to employees and to provide a summary of the key terms of the plan.

KEY DEVELOPMENTS IN THE TAXATION OF EMPLOYEE BENEFITS

TAXATION OF SCHOLARSHIPS

***DIMARIA* V. *THE QUEEN,* 2008 TCC 114**
***BARTLEY* V. *THE QUEEN,* 2008 TCC 141**
***OKONSKI* V. *THE QUEEN,* 2008 TCC 142**

Facts

DIMARIA AND BARTLEY CASES

The *Dimaria* and *Bartley* cases both involved appeals by two Dow Chemical Canada Inc. ("Dow") employees. At issue were payments received by the appellants pursuant to a Dow administered program under which eligible children were entitled to awards of up to $3,000 as reimbursements for post-secondary tuition. The Dow program imposed a number of eligibility criteria, which included the requirement that children attend an approved institution, and have an average of at least 70% in the graduating year of high school. A maximum of 100 awards were available per year.

When the Dow program was established, tuition awards were treated as income to the recipient children. However, the Canada Revenue Agency ("CRA") included as a taxable benefit to the appellants the amounts awarded to the appellants' children in 2004. At around the same time, and as a result of a CRA audit, Dow changed its practice and commenced treating tuition awards as a taxable employee benefit.

OKONSKI CASE

Okonski also involved a tuition award program, but the employer in this case was the University of Western Ontario ("UWO"). Unlike the Dow tuition award program in *Dimaria* and *Bartley*, UWO's program had been collectively bargained as part of the employees' overall compensation package. The case was also distinguishable on the basis that the award was paid directly to the employee as opposed to the child. As in *Dimaria* and *Bartley*, the Court concluded that the tuition award was scholarship income of the appellant's child pursuant to paragraph 56(1)(n) of the *Income Tax Act* ("ITA").

Decisions

In the *Dimaria* and *Bartley* appeals, CRA maintained its position that the tuition awards were income to the appellants pursuant to paragraph 6(1)(a) of the ITA as benefits received or enjoyed in respect of, in the course of, or by virtue of the appellants' employment with Dow. The Court stated that while there was no doubt that the appellants' children were awarded a benefit, the key issue was whether it was a benefit received or enjoyed by the appellants.

In both cases the Court concluded that the tuition awards were not benefits received or enjoyed by the appellant employees. Justice Rossiter's reasons are as follows:

- The employee was not enriched by $3,000, since the payment of the tuition award was made directly to his son, the employee had no legal obligation to support his adult son or to pay for his post-secondary education.
- The employee had no legal right to receive any money from the tuition award or to compel Dow to pay the amount to him instead of paying it to his son; and he had no right to recover the amount of the tuition award from his son.
- The employee did not negotiate with his employer to have the tuition award included as an employment benefit. He did not assume extra responsibilities or forego other benefits in order for his son to receive the award.
- The only person who is economically enriched is the recipient son. It is his application for the scholarship and it is his education and his qualifications which make him eligible for the tuition award.
- Expenses incurred by the son in pursuing his post-secondary education are not expenses of the employee or the employee's family. Tax is imposed on the individual person, not the family.

The Court also concluded that the amount of the award was properly characterized as a "scholarship" and included in the income of the children pursuant to paragraph 56(1)(n) of the ITA, rejecting the position that CRA had taken that the amounts were not scholarships since, generally, they were awarded to every child who applied provided they met minimal criteria.

Despite the factual differences between the *Dimaria*, *Bartley* and *Okonski* cases, none of the distinguishing facts were viewed as requiring a different result in the *Okonski* case. With respect to the negotiated benefit issue, the Court concluded that the employee herself did not receive or enjoy anything in relation to the scholarship award. As for the fact that the award was paid directly to the employee, the Court concluded that the award was subject to a resulting trust since it was the intention of all parties that the amount of the award be enjoyed by the appellant's daughter.

Implications

The CRA stated verbally that it disagrees with the Tax Court's decisions and that it will soon be issuing a policy statement to this effect. This leaves some uncertainty, but unless *Dimaria*, *Bartley* or *Okonski* is successfully appealed, the cases may persuade CRA to modify its general approach to the taxation of tuition related amounts awarded to the adult children of employees. Leave to appeal has been sought in all three cases and hearings in *Dimaria* and *Bartley* are scheduled for December 2008.

If CRA chooses to maintain its position that such awards are taxable employee benefits, this will likely lead to further challenges. As a result, employers that sponsor tuition benefit programs will wish to examine whether amounts that are awarded under such arrangements are properly treated for tax purposes as scholarship income, and whether any changes should be made to the way that such programs/awards are currently administered and/or reported for tax purposes. In this regard, it is noted that the court's decisions in *Dimaria*, *Bartley* and *Okonski* do not suggest that a tuition benefit will be excluded from taxation as an employee benefit in all cases. For example, it is not clear whether an employer-paid tuition benefit that is awarded in respect of younger children (i.e., under the age of 16) – for whom attendance at school is an obligation of a parent/guardian – might be properly included in the income of the employee who is the parent or guardian. These and other situations may arise in which the linkage between an award and a benefit to an employee is more demonstrable, or where characterization of the award as a scholarship is not supportable.

TAXATION OF SHARES RECEIVED IN THE COURSE OF EMPLOYMENT

***ATTORNEY GENERAL OF CANADA* V. *HENLEY,* 2007 FCA 370**

Facts

In 1997, Canaccord Capital Corporation ("Canaccord") arranged financing for Unique Broadband Systems ("UBS"). As consideration, UBS agreed to pay a cash fee and to issue warrants to purchase 2,970,767 of its common shares to Canaccord. Christopher Henley ("Mr. Henley") was employed with Canaccord and worked on the UBS financing deal. In May 1998 Canaccord agreed to allocate 742,692 UBS warrants to Mr. Henley for working on and concluding the UBS financing. Canaccord received the UBS warrants in September 1998, and fulfilled its commitment to Mr. Henley at that time.

In 2000, Mr. Henley instructed Canaccord to exercise all 742,692 of his UBS warrants and to immediately sell the UBS shares that were received as a result. Mr. Henley received $967,480 in connection with the exercise and sale. Henley's income tax assessment for 2000 listed this money as employment income in that year. He objected to this assessment on the basis that the amount should be taxed as a capital gain in connection with the disposition of UBS shares. The Minister confirmed the assessment and Mr. Henley appealed to the Tax Court of Canada.

The Tax Court of Canada allowed the appeal, concluding that a taxable employment benefit pursuant to paragraph 6(1)(a) of the *Income Tax Act* was received in September 1998, in connection with the receipt of UBS warrants, and that the net proceeds of the sale of the UBS warrants constituted a capital gain in 2000. The Crown appealed this decision to the Federal Court of Appeal.

Decision

The Federal Court of Appeal considered whether Mr. Henley's receipt of UBS warrants gave rise to a taxable benefit in 1998, the year that they were received, or in 2000 when they were exercised.

In Mr. Henley's case, two conditions had to be met for him to receive UBS warrants. First, the UBS financing had to be completed, and second, UBS warrants had to be received by Canaccord. The Federal Court of Appeal concluded that the benefit crystallized and became taxable as income when these conditions were fulfilled in September 1998, and therefore upheld the conclusion of the Tax Court.

The valuation of the benefit that was taxable in 1998 was not an issue before the Federal Court of Appeal, and they declined to opine on the valuation methodology that had been applied by the Tax Court.

Implications

The decision demonstrates that a conditional employment related reward or benefit is taxable as income from employment in the year that the condition for receiving the benefit is satisfied.

TAXATION OF PENSION INCOME OF NON-RESIDENTS

***SOLOMON V HER MAJESTY THE QUEEN,* 2007 TCC 654**

Facts

This case involves the appeal of the 2001, 2002 and 2003 income tax assessments of Sulam Solomon ("Mr. Solomon"). Throughout these years Mr. Solomon was a non-resident of Canada, and he collected pension income from the University of Waterloo, and social security income under the *Old Age Security Act* and *Canada Pension Plan.*

Mr. Solomon provided evidence that he had informed the University of Waterloo of his non-resident status and of its obligation to withhold tax from his pension income at the applicable rate. Mr. Solomon also provided evidence that the Canada Revenue Agency ("CRA") had advised Human Resources and Social Development Canada ("HRSDC") to withhold applicable non-resident tax from his social security payments. Neither the University of Waterloo nor the HRSDC withheld the appropriate tax and Mr. Solomon submitted that the University of Waterloo and HRSDC should be liable for the tax that was owing, and for the applicable interest.

Decision

In its analysis, the Tax Court of Canada considered subsection 215(6) of the *Income Tax Act* ("ITA"), which states that:

> Where a person has failed to deduct or withhold any amount as required by this section from an amount paid or credited or deemed to have been paid or credited to a non-resident person, that person is liable to pay as tax under this Part on behalf of the non-resident person the whole of the amount that should have been deducted or withheld, and is entitled to deduct or withhold from any amount paid or credited by that person to the non-resident person or otherwise recover from the non-resident person any amount paid by that person as tax under this Part on behalf thereof.

Applied to the facts in this case, the Court concluded that the University of Waterloo and HRSDC were liable for the tax that they failed to deduct, but that this did not aid Mr. Solomon as subsection 215(6) allows both entities to recover the taxes from him. Referring to subsections 227(8.1) and 227(8.3) of the ITA, the court also held that Mr. Solomon was jointly and severally liable for any interest.

Notwithstanding this determination, the Court clearly sympathized with Mr. Solomon's situation. Specifically, the court noted that this was an instance where the Minister of National revenue ought to exercise its discretion to waive the interest for the years that the University of Waterloo and HRSDC were made aware of Mr. Solomon's non-resident status and in respect of which they should have withheld taxes. The court recommended that relief from interest be provided to Mr. Solomon under the fairness provisions of the ITA.

Implications

The decision demonstrates that an employer who pays amounts to a non-resident taxpayer is responsible to withhold tax and can be held liable for any failure to do so, but that ultimately it is the non-resident taxpayer that bears the tax burden.

This case also shows that relief from interest might be recommended if the taxpayer has relied on the payer to withhold tax and has taken reasonable steps to ensure that this is done.

TAXATION OF EMPLOYEES SECONDED TO FOREIGN AFFILIATES

***IBM CANADA* V. *ONTARIO (FINANCE)* (2008), 89 O.R. (3D) 641**

Facts

This case involved a question as to whether IBM Canada was liable to pay the Employer Health Tax ("EHT") for employees who were essentially seconded to foreign affiliates for lengthy periods of time (up to 5 years). While seconded, the employees lived and worked overseas. They were paid by IBM Canada, but IBM Canada was fully reimbursed for their wages by the foreign affiliates.

Decision

The Court of Appeal concluded that IBM Canada was liable for paying the EHT for these employees. The Court of Appeal found: during the period of the secondment, the employees remained employees of IBM Canada. IBM had agreed that despite the expatriates remaining employers of IBM, the EHT Act limits the determination of employment status to whether or not services were provided to IBM Canada. The Court of Appeal rejected this argument. The Court of Appeal went on to find that the money paid to the employees by IBM Canada was "remuneration paid" within the meaning of the statute. In this latter regard, the Court of Appeal stated:

> By imposing a tax based on 'remuneration paid' in the context of an employer/employee relationship, the Act looks to the nature of the payment as between the employer and the employee and not to the source of the funds or to any arrangement which may exist between a third party and the employer for reimbursement.

Implications

Ontario employers with employees seconded to foreign affiliates should be aware of this decision, as it affirms employers' continuing obligation to pay the EHT in respect of such remuneration. On October 9, 2008, the Supreme Court of Canada denied leave to appeal from the Court of Appeal's decision and therefore the decision is final.

CLAIMING INPUT TAX CREDITS

GENERAL MOTORS OF CANADA LIMITED V. *THE QUEEN*, 2008 TCC 117

Facts

The main issue in this case is whether General Motors of Canada Limited ("GMCL") is entitled to claim input tax credits ("ITCs") in respect of Goods and Services Tax ("GST") paid to investment managers who provide investment management services in relation to pension plans sponsored by GMCL for its salaried and hourly workforces (the "Salaried Plan" and "Hourly Plan", respectively). A second issue is whether the investment management services provided to the Plans were an exempt "financial service" for GST purposes such that GMCL is entitled to a rebate of GST paid in error on those services.

The Salaried Plan is a contributory defined benefit ("DB") pension plan funded primarily by employer contributions, and the Hourly Plan is a non-contributory DB pension plan. The Salaried Plan and Hourly Plan are pooled and collectively invested through a unitized pooled fund trust structure ("Master Trust"). In the aggregate, approximately $8 billion of pension assets were invested through the Master Trust.

GMCL entered into Investment Management Agreements with various investment managers. The investment managers invoiced GMCL for their services and GMCL directed the trustee for the Master Trust to pay the invoices from the pension assets. GMCL had sought an advance tax ruling ("ATR") confirming that it was entitled to claim ITCs in respect of the GST paid on investment management services, but was denied.

Decision

In order for GMCL to be eligible to claim an ITC in respect of GST payable on the investment management services, it must satisfy three conditions: (1) GMCL must have acquired the investment management services; (2) the GST on the services must be paid or payable by GMCL; and (3) GMCL must have acquired the services for consumption or use in the course of its commercial activity.

The *Excise Tax Act* (the "Act", i.e., the GST legislation) deems acts performed by a trustee to be acts of the trust. On the first condition, the Crown argued that the pension trusts had acquired the investment management services, not GMCL itself, because GMCL was acting as a "trustee" on behalf of the pension plans when it obtained the investment management services.

The Court rejected this argument, interpreting the word "trustee" narrowly to mean one who, having legal title to property, holds it for the benefit of another. The Court noted that Royal Trust, the custodian of the pension funds, was the trustee and that GMCL was merely the administrator under the *Pension Benefits Act*. The Court concluded that GMCL had "acquired" the investment management services for GST purposes.

On the second condition, the Act provides that GST is payable by the "recipient" of a supply of goods or services, and that the tax is payable by the recipient on the day consideration for the supply becomes due. The Crown argued that GMCL had merely approved payment of the investment managers' invoices from the pension funds, and that the GST was not payable by GMCL itself.

The Court focused on the fact that GMCL was contractually liable to pay the investment managers' invoices, rather than the fact that the invoices were paid from the pension funds and that the pension plans ultimately received the benefit of the services. The Court held that GST was payable by GMCL.

The third condition for GMCL's eligibility for an ITC in respect of the investment management services is that GMCL must have acquired the investment management services for consumption or use in *the course of its commercial activities*. The Court observed that GMCL maintains a compensation package (including pension benefits) in order to attract and retain qualified employees and to compete in its market. The Court rejected the argument that the custodial trustee consumed the investment management services, because ultimately GMCL "backstopped" the pension plans' funding – the custodial trustee bore no funding risk for the pension plans. The Court therefore held that GMCL acquired the investment management services in the course of its commercial activities.

Since GMCL met all three conditions, the Court held that GMCL is entitled to an ITC in respect of GST paid to the investment managers for the Salaried Plan and Hourly Plan.

Even though the Court held that GMCL was entitled to the ITC it had claimed, the Court went on to rule that the investment management services provided to the plans were not an exempt "financial service", and that GST is properly chargeable on those services. In its findings, the Court noted that the investment management services merely involve a supply of knowledge and expertise in investment choices and portfolio management, and do not fit within the exemptions set out in subsection 123(1) of the Act.

Implications

As a result of this decision, a pension plan sponsor can potentially claim ITCs in respect of GST paid on pension plan administrative expenses, even where those expenses are paid directly from the pension assets or where the sponsor is reimbursed for pension administrative expenses paid out of its own operating budget. The Crown has appealed the Tax Court of Canada's decision in this matter to the Federal Court of Appeal, which had not yet heard arguments at the time of publication.

KEY DEVELOPMENTS IN U.S. PENSION LAW

Although the following cases were decided under the *Employee Retirement Income Security Act* ("ERISA"), minimum standards pension legislation applicable in the United States, they are informative for Canadian purposes both because the subject matter may indicate litigation trends that will make their way to Canada and because ERISA and its safe harbour are widely considered to codify fiduciary principles and inform the standards that would likely be applied by Canadian decision-makers dealing with similar issues under the common law of Canada.

PLAN EXPENSES AND FEES ARRANGEMENTS

***HECKER* V. *JOHN DEERE & COMPANY,* NO. 06-C-719-S (W.D. WIS. JUNE 20, 2007)**

Facts

In this case, four employees alleged that John Deere and Fidelity, which acts as a trustee and record keeper for John Deere's 401(k) plan, offered investment options with "excessive and unreasonable fees and costs." The employees also alleged that John Deere and Fidelity did not disclose the fees to plan participants and, in particular, were silent about revenue-sharing arrangements under which Fidelity would share some of the fees it charged John Deere 401(k) participants with an affiliate company.

Decision

The court ruled that John Deere's fee disclosures were fully compliant with ERISA requirements. In fact, the court ruled that neither John Deere nor Fidelity had to disclose that the fund manager shared a portion of the fees with an affiliate under ERISA.

Further, the court held any claim based on the total amount of the fees was foreclosed by ERISA's safe harbour provisions with which John Deere had complied. One of the factors that the court relied upon in support of its finding that the safe harbour provision was triggered was that there was no statutory obligation to disclose revenue sharing, and any such disclosure would not in any event enhance participant investment decisions because, while fees affect investment return, the subsequent distribution or sharing of those fees with another party does not.

A key fact that likely influenced the decision was the design of the 401(k) plan itself. The participants had access to 20 core funds and more than 2,500 other funds through an open design. They had the ability to adjust their investment choices based on the relative costs of investment, and thus were responsible to the extent that they incurred excessive expenses by virtue of investing in the particular investment options at issue in the case.

Implications

While this decision is a positive one for plan sponsors, the specific facts of the case make it likely other plaintiffs will attempt to distinguish it. In any event, an appeal is anticipated.

There are currently outstanding claims alleging breaches of fiduciary duties in relation to investment fees under 401(k) plans in the United States against: Boeing, Caterpillar, Exelon (stayed pending appeal in John Deere), General Dynamics, Kraft Foods, Lockheed Martin, and Northrop Grumman, among others. One plaintiff-side firm, alone, has commenced 13 class actions alleging fees-based violations.

EMPLOYER STOCK DROP CASES

EDGAR **V.** ***AVAYA,*** **2007 WL 2781847 (3D CIR. SEPT. 26, 2007)**

Facts

The plaintiff, Ms. Edgar, was a participant in her employer's 401(k) plan, which included the option of investing in the stock of the employer, Avaya. In April 2005, when the employer announced it would not meet its forecasted earnings goals because of problems with integrating an acquisition and implementing a new delivery system, its stock price dropped 25 percent—from $10.69 to $8.01 per share.

The plaintiff filed a class action, claiming the company and some of its officers breached their fiduciary duty under ERISA. The plaintiff argued the company artificially inflated the stock price with inaccurate earnings forecasts and that the plan's fiduciaries should have removed the company stock from the plan when they realized the price would drop. Further, it was alleged that the fiduciaries should have warned plan participants that a negative earnings announcement was imminent.

Decision

The plaintiff's claims were dismissed at the district court level. The court ruled that the plaintiff failed to prove a breach of the defendant's fiduciary duties. The plaintiff appealed.

The Third Circuit also held in favour of the employer Avaya, finding that the terms of the plan required the fiduciaries to offer company stock and that the company's financial circumstances were not dire enough to warrant withdrawing Avaya stock as an investment option. The language of the plan, which provided for the particular investment option, was a key factor in the decision. ERISA requires fiduciaries to respect the terms of a plan, as long as doing so is a prudent course of action. The decision reaffirmed that employees, under plans requiring investments in company stock to be made available, must establish that the fiduciaries abused their discretion in offering the stock as an option before a breach of fiduciary duty can be found to exist.

Further, the court rejected the claims that the company should have disclosed the company's financial problems to plan participants – as this may have been a violation of securities laws. The court found that the defendants met their disclosure requirements by warning participants in the plan description that the value of their investments would fluctuate with the company's performance and that investing in a non-diversified single stock fund carries more risk than investing in a diversified fund.

Implications

The key distinction made apparent by this decision and other stock drop cases is that offering employer stock is not necessarily a breach of fiduciary duty but an imprudent selection of employer stock can constitute a breach. Employers should also pay heed to the decision's discussion of proper disclosures to employees regarding the potential risks associated with their investments. In other stock drop cases, the disclosures to the employees are important factors in determining whether the employer satisfied its fiduciary duty, even if the stock was selected prudently.

AMERICAN PLAN CONVERSIONS: DB TO CASH BALANCE

IN RE: CITIGROUP PENSION PLAN ERISA LITIGATION, NO. 05 CIV. 5296 (S.D.N.Y., 2006)

Facts

The plaintiffs successfully challenged the discriminatory nature of a conversion to a cash balance plan. In 1999, Citigroup incorporated a cash balance plan into its pension plan. Participants received notice of the amendment in 1999, but did not receive any plan documentation until 2001. Plan participants commenced a class action lawsuit alleging that Citigroup violated ERISA by implementing an illegal accrual formula, failing to provide proper notice of the change, and by discriminating against participants on the basis of age.

The pension plan accrual formula was attacked on the grounds that it allowed back-loading of service accrual. Back-loading occurs when a plan's formula postpones the bulk of an employee's accrual to the later years of service, instead of providing for a gradual and uniform rate of accrual.

Decision

The court found that the crux of the age discrimination issue is the rate of an employee's benefit accrual. Plaintiffs contended that the phrase refers to an employee's retirement benefit. In the court's view, because of the conversion of the account balance to an age 65 annuity, younger employees are credited with more years to accumulate interest on their hypothetical accounts. The court stated that the formula provided a greater value to a younger employee's account than to an older employee's account.

The court stated that the plan's cash balance formula not only failed to guard against back-loading—it enabled back-loading. The court found Citigroup's formula ignored the statutory requirement that pension plans be able to test compliance with accrual rules in any given year.

On the matter of the notice provided to the plaintiffs, the court found the notices provided to the employees failed to mention the nature of the formula used by Citigroup to calculate accrual rates. By failing to disclose the formula used, the notices were inadequate and therefore the amendments were never legally effective.

Implications

This decision is contrary to a number of other decisions in which US courts found that cash balance plans were not discriminatory on the basis of age. Accordingly, the decision leaves open the possibility of future claims in this ground. Further, the court's ruling regarding notice indicates that plan participants must be given adequate information about actuarial assumptions that are used in calculating commuted values and other amounts.

AMARA V. *CIGNA CORP.,* NO. 3:01CV2361 (D. CT. FEB. 15, 2008)

Facts

This is the most recent cash balance conversion decision to be rendered. The decision focuses upon whether the conversion was discriminatory on the basis of age and whether it was a violation of ERISA's anti-back-loading provisions.

Plaintiffs' claims arise from CIGNA's conversion of its traditional defined benefit pension plan to cash balance pension plan. The conversion changed the method of calculating and accounting for annuity benefits by basing the amount of the annuity upon a hypothetical individual account balance. The plaintiffs challenged the conversion and contended that the cash balance plan failed to meet the requirements set forth in ERISA.

Specifically, the plaintiffs claimed that the conversion of the pension plan hinged receipt of further benefits under the provisions of the cash balance plan upon the acceptance of the plan sponsor's own valuation of the accrued benefit under the prior defined benefit plan. The initial account balance was based upon the present actuarial value of the annuity benefit due to the plaintiffs at normal retirement age, being sixty-five years of age. The plaintiffs would eventually be entitled to receive the greater of the cash balance of the account or an minimum guarantee benefit, as set out in the plan. The plaintiff argued that this violated the non-forfeiture rules under ERISA.

The plaintiffs also contended that the plan sponsor's summary plan description was misleading. As well, the plaintiffs argued that the cash balance plan discriminated on the basis of age in that it provides for decreasing benefits commensurate with increasing age.

Decision

In a lengthy decision, the court concluded that CIGNA's cash balance plan is not discriminatory on the basis of age and does not violate the non-forfeiture and anti-back-loading rules under ERISA. However, the court also found that

CIGNA failed to give a key notice to employees when undertaking the conversion to the cash balance plan, as required by ERISA and CIGNA's summary plan descriptions were inadequate under ERISA. CIGNA was found to have failed to provide employees with the information required to understand the conversion from the DB plan to the cash balance plan, and the eventual effect the conversion would have on the employees' retirement benefits.

The court rejected the plaintiffs' claims that the conversion resulted in a reduction to their accrued benefits. However, the court did find that CIGNA failed to provide notice to the employees of a significant reduction in the rate of future benefit accrual. More specifically, CIGNA failed to adequately disclose material alterations to the pension plan that might result in reductions or losses of benefits that a participant may otherwise expect to receive.

The court ordered the parties to provide further briefs no later than March 17, 2008 on the potential remedies available to the parties in light of the court's findings.

Implications

The decision contains a lengthy and well-reasoned analysis of all issued raised regarding the conversion. The plaintiffs' success regarding the issue of communications and disclosure is important for any plan sponsor that has undertaken a conversion from a defined benefit plan to a defined contribution plan. Failure to provide proper and fulsome disclosure creates a potential risk for plan sponsors who may face litigation in the future.

CLAIMS FOR INDIVIDUAL LOSS CAN BE BROUGHT

***LARUE* V. *DEWOLFF*, NO. 06–856 (U.S. SUPREME COURT)**

Facts

In this decision, Mr. LaRue, a participant in a 401(k) plan, commenced an action alleging that the plan administrator failed to follow Mr. LaRue's investment directions. The administrator's failure to follow the directions caused significant losses to Mr. LaRue's account, and Mr. LaRue alleged that the administrator breached its fiduciary duty to Mr. LaRue.

Both at the lower court and on appeal, Mr. LaRue was unsuccessful. Both levels of court found that ERISA in fact did not provide relief for individuals, but only for a plan as a whole. Mr. LaRue appealed to the Supreme Court of the United States.

Decision

The majority of the Supreme Court reversed the lower court decisions. The majority found that while ERISA does not provide remedies for individual losses as distinct from plan losses, it does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account. Further, the majority noted that ERISA provides for lawsuits concerning breaches of fiduciary duties that harm pension plans.

The majority of the court found that the actions of the administrator fell squarely within the very type of duty that ERISA statutorily mandates upon plan fiduciaries. The majority noted the inherent difference between defined benefit and defined contribution plans results in different risks that can result for participants in each type of pension plan. Under defined benefit plans, a breach of fiduciary duty by a plan's administrators will not affect an individual's entitlement to benefits without harming the plan as a whole. However, in defined contribution plans, a breach of fiduciary duties does not need to threaten the entire plan's solvency to reduce the benefits of participants below the amount the participants would be entitled to receive but for the breach of fiduciary duty. Ultimately, the Court found that whether a fiduciary breach reduces the plan assets payable to all participants or only to particular individual participants, such breaches create the very type of harm that ERISA is intended to prevent and resolve.

Implications

This decision is considered a landmark in the American jurisprudence, as prior court decisions consistently found that individual plan members could not bring claims for individual losses under defined contribution plans. However, the decision is not likely to have an impact on the types of cases brought in Canada. There is no Canadian legislation that restricts the ability of an individual to bring a claim for individual losses under a defined contribution plan, and participants have always had the capability to commence individual loss claims.

Despite the landmark nature of this case, it will not be determined on the merits as Mr. LaRue withdrew his claim in October 2008, claiming that he did not have sufficient funds to continue his legal battle.

KEY DEVELOPMENTS IN PENSION AND BENEFITS LEGISLATION

TAX-FREE SAVINGS ACCOUNTS

In the February 2008 Budget, the federal Minister of Finance announced a new initiative - tax free savings accounts ("TFSA").

Key Features of a TFSA

Canadian taxpayers will be allowed to contribute up to $5000 each year to a TFSA. The contribution limit is scheduled to increase over time based on yearly increases in inflation. Like a Registered Retirement Savings Plan ("RRSP"), contribution room can be carried forward to a following year. Unlike a RRSP, contributions will not be tax deductible.

All income earned on monies held in a TFSA, be it interest, capital gains, or dividends, will grow tax free in the account. Tax free withdrawals, from a TFSA can be made at any time. The amount of a withdrawal can be re contributed at a later date without affecting an individual's overall TFSA contribution room. Income earned in a TFSA, or withdrawals made from a TFSA, will not affect other income tested benefits and credits (such as the Canada Child Tax Benefit, the GST credit, the age credit, and Old Age Security and Guaranteed Income Supplement benefits).

Integration of TFSAs Into Existing Employee Savings and Retirement Programs

Employers may want to consider integrating a "group TFSA" (similar to a group RRSP) into their existing employee retirement and savings programs. For example, many employers now maintain retirement/savings programs that include both a registered component (e.g., a defined contribution registered pension plan or a group RRSP) and a non registered (non tax sheltered) component for "spill over" contributions (e.g., an employee profit sharing plan ("EPSP") or an employee benefit plan). Adding a TFSA component to such programs to replace or supplement the existing non registered component of the program may be beneficial to employees.

Most defined contribution retirement and savings plans are administered by third party service providers. It may take service providers some time before they are able to offer group TFSAs - recordkeeping systems will need to be reprogrammed in order to add TFSAs into existing retirement/savings programs. Further, integrating a group TFSA into an existing employee savings program will need to be carefully planned and implemented by an employer and its service provider. For example, plan design terms will need to be settled, employee communications and election forms will need to be prepared and distributed, and service provider contracts may need to be updated.

By maintaining a group TFSA, employers will likely be assuming additional fiduciary responsibilities similar to those applicable to existing pension or RRSP arrangements. Therefore, employers will want to ensure that they exercise the requisite level of diligence and skill when administering a group TFSA. Further, as group TFSAs will most likely be considered a capital accumulation plan ("CAP"), the plan sponsor will need to ensure that its duties and responsibilities under the CAP Guidelines are fulfilled.

SUPER-PRIORITY FOR PENSION CONTRIBUTIONS UNDER THE BANKRUPTCY AND INSOLVENCY ACT

In late 2005, the federal government passed Bill C-55, formally called An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts. Bill C-55 contained amendments to both the Bankruptcy and Insolvency Act ("BIA") and the Companies' Creditors Arrangement Act ("CCAA") to deal specifically with pension plan contributions on bankruptcy or insolvency. However, Bill C-55 was not proclaimed into force. In part, this was a result of concerns over flaws in the legislation which began to be addressed in June, 2007, when the House of Commons passed legislation (Bill C-62) to amend Bill C-55. Bill C-62, An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005 then died when the government prorogued the session of parliament before the Senate could conduct its intended hearings and consider the legislation.

In late 2007, the legislation was revived as Bill C-12 and was passed by the Senate. On July 7, 2008, the first portion of the amendments was proclaimed into force. Specifically, the BIA is now amended to provide a super-priority for unpaid wages and pension contributions in favour of employees. Unpaid pension contributions will now take priority over most other claims, as the outstanding payments will be secured by all the assets of the bankrupt company. It is notable that the amendments provide a secured status over current service pension payments only but do not extend to any special or solvency payments that may otherwise be required to be made to the pension plan at the point of bankruptcy or insurance.. In reality, it is often the substantial special payments that are required to correct a solvency deficiency that truly strain a company's resources if the company is already in financial turmoil.

While this provision providing super-priority is now in force, the vast majority of complementary amendments to the BIA and CCAA remain un-proclaimed and are not expected to be in force until the appropriate regulations are drafted and approved. When the remaining amendments do become law, the CCAA and BIA will provide that the court cannot authorize a plan of arrangement under the CCAA or Division 1 proposal under the BIA unless it provides for the payment of those same contributions, unless there is consent of the relevant pension regulator and the agreement of the relevant stakeholders.

Another amendment that is yet to be in force will provide clarification respecting the role of the pension regulator during BIA and CCAA proceedings. According to the amendments, a regulator, when not acting as a creditor, is not normally stayed from its actions as a regulator as a result of the stay provisions applicable in a CCAA or BIA proceeding. However, the court retains jurisdiction to order a stay of regulatory actions if necessary in the circumstances.

The forthcoming amendments will continue to provide greater guidance and certainty regarding pension contributions when a plan sponsor enters into bankruptcy protection or ultimately becomes bankrupt.

INTRODUCTION OF FEDERAL UNLOCKING RULES

The Federal Budget 2008 announced pending regulatory changes to provide three new options for unlocking funds from federally-regulated Life Income Funds ("LIF") and Locked-in Registered Retirement Savings Plans ("Locked-in RRSP"). The regulations implementing the changes took effect on May 8, 2008.

The regulations permit individuals, in the year they turn 55 or in any subsequent year, to unlock up to 50 per cent of their LIF holdings and transfer that amount into an unlocked tax-deferred saving vehicle. As well, individuals, in the year they turn 55 or in any subsequent year, with small holdings in federally regulated locked-in funds (total holdings of LIFs and Locked-in RRSPs of not more than $22,450) may wind up their accounts, with the option to transfer the funds to an unlocked tax-deferred savings vehicle. The regulations also addressed individuals experiencing financial hardship, permitting such individuals with the ability to unlock up to $22,450 in a given year from their LIFs or Locked-in RRSPs.

The changes will not directly affect sponsors of registered pension plans. However, they are beneficial for former members who have transferred their benefits out of a registered pension plan to a locked-in vehicle. Individuals can take advantage of the new rules as soon as financial institutions are able to make the necessary adjustments to provide the new LIF and Locked-in RRSP contracts to clients with federally-regulated locked-in accounts.

JURISDICTIONS WITH PHASED RETIREMENT

The Federal Budget 2007 proposed changes to income tax rules to allow an employee to receive pension benefits from a defined benefit pension plan and simultaneously accrue further benefits, subject to certain constraints, a mechanism that is called “phased retirement”. While the Budget changed the rules in the *Income Tax Act*, most jurisdictions in Canada required amendments to their minimum standards pension legislation before plan sponsors could offer phased retirement to employees. To that end, the Budget indicated that changes would be made to the federal *Pension Benefits Standards Act* (“PBSA”) to accommodate phased retirement in federally regulated pension plans.

Under the proposed tax rules, pension payments made as part of a phased retirement arrangement will be limited to a maximum of 60 per cent of an employee’s accrued pension. Eligibility will be restricted to members aged 55 or older who are entitled to an unreduced immediate pension benefit, or those aged 60 or older who are entitled to a reduced immediate pension benefit under the terms of their pension plan.

The proposed changes to the PBSA accommodate the tax changes and permit the payment of phased retirement benefits, subject to certain conditions, including that there be an agreement between the employer and member that evidences their consent to the payment of those benefits. Under the proposed amendments to the PBSA, employers are not required to offer a phased retirement option to employees, nor are employees required to enter a phased retirement arrangement. Where a plan sponsor or administrator wishes to offer phased retirement to members, the terms of the pension plan must be reviewed and may require amending to permit the payment of benefits in accordance with the phased retirement rules. The PBSA rules will also permit retirees to be rehired to take advantage of the phased retirement provisions.

The amendments to the PBSA dealing with phased retirement are not yet in force. Office of the Superintendent of Financial Institutions and the government are developing regulations respecting the information that plan administrators must provide to members who enter into a phased retirement arrangement. The changes will come into force on a day fixed by order of the Governor in Council. This is expected to take place sometime in 2008, close to the time when regulations supporting the changes will be finalized.

Several provinces have also amended their pension legislation to permit phased retirement. For example, Quebec amended the *Supplemental Pension Plans Act* ("SPPA") to permit plan members, subject to certain conditions, to receive a pension from a defined benefit plan or a benefit from a defined contribution plan while still employed. These provisions apply to pension plans in the private sector as well as to Crown corporations and universities. They apply to municipalities only if and when the municipal council adopts a resolution authorizing phased retirement.

Under a defined benefit plan, a member will be eligible for phased retirement in Quebec if he or she is at least age 60, or is at least age 55, entitled to an unreduced pension and has not reached age 65. In addition, an agreement with the employer is required. The benefit a member receives during phased retirement cannot be more than 60% of the member's annual pension that he or she would be entitled to receive if the member retirement on the date of the request. The phased retirement benefit ends on the earlier of the date the plan member reaches age 65 and the date the member's retirement pension begins or recommences. After age 65, the provisions concerning postponed retirement apply.

The SPPA was also amended to permit phased retirement under a defined contribution plan. Pension plans with a defined contribution component can provide for the payment of a benefit during the phased retirement period, but are not required to do so. To receive the benefit, plan members must be between age 55 and 65 and must enter into an agreement with the employer. The terms of the benefit calculation and payment are required to be stipulated in the agreement. However, the annual amount of the benefit cannot exceed 60 per cent of the ceiling on the life income the plan member could receive from a life income fund. The benefit amount is established each year. The benefit paid to the plan member during the phased retirement period reduces the balance of that plan member's defined contribution account.

Like under the PBSA, employers in Quebec must still ensure their plans permit phased retirement if they wish to offer it to their employees. In most cases, this will require a plan amendment.

British Columbia also introduced proposals to amend the *Pension Benefits Standards Act* to permit phased retirement in May 2008. The British Columbia proposals also mirrored the rules as set out by the Federal Budget. Alberta has already introduced provisions permitting a form of phased retirement. Manitoba has also indicated its intention to allow phased retirement. Saskatchewan will not be amending its legislation, but takes the position that the *Pension Benefits Act* already permits employers to introduce phased retirement based on the *Income Tax Act* provisions.

FUNDING VIA LETTERS OF CREDIT

A number of provinces have recently amended their pension legislation to permit the use of letters of credit to "fund" solvency deficiencies. Alberta, British Columbia and Quebec now permit the use of letters of credit to satisfy solvency deficiencies. However, in some cases, the amendments are temporally limited and specify a set period of time in which employers have the opportunity to take advantage of the use of letters of credit.

In November 2007, Alberta amended the *Employment Pension Plans Act* Regulations to permit the use of letters of credit for solvency funding. British Columbia followed suit in June 2008 with amendments to the *Pension Benefits Standards Act*. Also in June 2008, Quebec introduced temporary access to letters of credit for solvency funding, with the provisions ceasing to have effect on December 31, 2009.

Generally, where letters of credit are permitted, the letters of credit must meet certain prescribed criteria. For example, the letter of credit must be an irrevocable and unconditional standby letter of credit that is issued in Canadian currency. The letter of credit must be made out to the benefit of a fund holder, in trust, for deposit into the pension fund. The issuer cannot be the employer or a company affiliated with the employer.

In Alberta and British Columbia, each letter of credit can only be used for up to one year. Upon expiration, the letter of credit can be renewed, replaced, or will expire without replacement. Typically, notification of any renewal, expiration, or termination of the letter of credit must be provided to the regulator before the expiration of the original letter of credit.

In Quebec, the amendment to the *Supplemental Pension Plans Act* states that once an employer provides the plan's pension committee with a letter of credit, both the employer's minimum contribution and solvency amortization payments can be reduced. However, the amount of the reduction cannot be more than 20% of the difference between the pension fund's assets and liabilities, determined on a solvency basis at the date of the last complete actuarial valuation. This reduction is roughly equivalent to the amount of one annual solvency deficiency payment.

The amendments in Alberta, British Columbia and Quebec are likely welcome news to plan sponsors experiencing financial uncertainty. The option to use letters of credit for solvency funding provides plan sponsors with additional flexibility when attempting to address growing solvency deficiencies.

MORE CHANGES TO QUEBEC LEGISLATION

The *Supplemental Pension Plans Act* ("SPPA") underwent another round of amendments this year. Several amendments were in direct response to court decisions that the regulator strongly objected to. For example, in *Multi-marques*, the Quebec Court of Appeal found that it was possible for a multi-employer pension plan ("MEPP") to reduce accrued benefits without violating the SPPA. The Régie des rentes du Québec ("Régie") had argued that the benefit reductions violated the SPPA provisions regarding full funding on termination of a Quebec pension plan. Immediately following the decision, the Régie announced that it would seek amendments to the SPPA to clarify its position, negating the effect of the court decision.

Bill 68, includes a provision which that pension plans with a defined benefit component cannot reduce the crediting of service, the accumulation of benefits or the amount or value of benefits accrued regarding service prior to a given valuation conditional on exterior factors, unless expressly permitted by the SPPA. In addition, the SPPA was amended to provide that a defined benefit plan cannot be amended to reduce an employer's obligations to plan members due to the employer's withdrawal from the plan or the termination of the plan.

These provisions are stated to be declaratory, such that they clarify the funding rules contained in the SPPA, and the Régie will likely take the position that they apply to all pension plans, including Multi-marques'.

The SPPA was also amended to create a disclosure obligation where a union or association represents the plan's members. As well, pension committees, if they receive a request from a union for names and addresses of plan members, must send notice of the request to the members in the first pension statement (whether annual, termination, or retirement) that is sent out to members after the request is received. The SPPA requires the notice to be sent to all of the members the union or association claims to represent. The pension committee must then give the association the names and addresses of the persons who give their consent within the specified time.

CAPSA PROPOSAL FOR MULTI-JURISDICTIONAL AGREEMENT

On October 21, 2008, the Canadian Association of Pension Supervisory Authorities ("CAPSA") released the *Proposed Agreement Respecting Multi-Jurisdictional Pension Plans* (the "Proposed Agreement"), which aims to provide a clearer, more detailed framework for the administration and regulation of pension plans that have members in more than one Canadian jurisdiction ("multi-jurisdictional pension plans", or "MJPPs"). If adopted, the Proposed Agreement will replace the current *Memorandum of Reciprocal Agreement*, which was originally signed in 1968 (the "Current Memorandum"), as well as other bilateral federal-provincial agreements with respect to the regulation of pension plans.

Background

There are more than 3,000 MJPPs operating in Canada having approximately 2.3 million members in the aggregate. Although only 20% of all registered pension plans are MJPPs, MJPP members represent approximately 40% of all private pension plan members in the country.

In the absence of the Current Memorandum, MJPPs would need to be registered in each jurisdiction in which members are employed. This would result in a significant burden for the administrator of an MJPP. Under the Current Memorandum, the sponsor of an MJPP need only register the plan in the jurisdiction where the greatest number of members are employed. The jurisdiction of registration is referred to as the "major authority" and the other jurisdictions having members are "minor authorities". Generally, by convention, the major authority administers and applies its own legislation to issues relating to funding and investment. With respect to benefit entitlement issues, the major authority applies the legislation of the jurisdiction in which a particular member is employed.

Since the Current Memorandum was signed in 1968, pension standards legislation has evolved and differences have continued to evolve between the standards in Canadian jurisdictions' rules. In certain situations, the Current Memorandum has become difficult to apply (one example of the difficulty is in the application of various jurisdictions' funding rules to a MJPP).

Key Provisions of the Proposed Agreement

The key provisions of the Proposed Agreement include the following:

I. APPLICABLE LEGISLATION – PLAN MATTERS VS. ENTITLEMENT MATTERS

The Proposed Agreement codifies that the legislation of the jurisdiction of the major authority would apply to matters that affect the MJPP as a whole, including such things as funding, investment and plan registration. The legislation of the jurisdiction of the minor authorities would apply to matters that affect the entitlements of the particular members (e.g., vesting, locking-in, and surplus distribution).

Although generally the legislation of the major authority's jurisdiction would apply to funding issues, where the legislation of a minor authority's jurisdiction requires that a particular *benefit* be funded, that benefit would be required to be funded for plan members in the minor authority's jurisdiction, in a manner that is consistent with the funding rules of the major authority.

II. THE MAJOR AUTHORITY AND ITS ROLE

The Proposed Agreement clarifies that the major authority of an MJPP must supervise and regulate the MJPP on behalf of all the minor authorities. In this regard, the major authority is required to enforce certain rules of the Proposed Agreement that may not be part of any jurisdiction's pension legislation.

An organization's employee presence in various provinces will change over time, as its business operations evolve. As a result, the plurality of a pension plan's active membership may shift from one province to another, changing the major authority. The Proposed Agreement contains specific rules with respect to changes in the major authority, and sets out specific notification requirements for regulatory authorities and MJPP administrators upon the change of the major authority.

III. DECISION-MAKING PROCESS

The Proposed Agreement contains provisions regarding decision-making by regulatory bodies and any recourse from such decisions. The Proposed Agreement requires that the initial decision on any matter would be made by the major authority. If the decision relates to a matter that affects the MJPP as a whole, any recourse from the initial decision would be made in accordance with the major authority's legislation. If, on the other hand, the decision relates to a matter affecting benefit entitlements, it would instead be the minor authority's legislation that would be followed upon recourse from the initial decision.

IV. FINAL LOCATION METHOD FOR THE DETERMINATION OF BENEFITS

A long standing question with respect to the administration of MJPPs relates to the determination of the benefit entitlement of a member who has been employed in more than one jurisdiction. The question is whether the legislation of each jurisdiction in which the member was employed should be applied to the period of service in that jurisdiction (the "checkerboard" approach), or whether the legislation of the jurisdiction in which the member was employed at the date of determination applies to the member's entire period of service (the "final location" approach). The Proposed Agreement would require that all authorities apply the "final location" method of benefit determination, which is administratively simpler.

V. ALLOCATION OF ASSETS

The Proposed Agreement would establish new rules for the allocation of an MJPP's assets among various jurisdictions. The intended purpose of these proposed rules is to reduce uncertainty and delay in obtaining regulatory approval of asset splits where an MJPP undergoes an asset transfer or a partial or full wind up. Once assets are allocated among each applicable jurisdiction's members, allocation of assets to individual members would be determined in accordance with the pension standards legislation of the jurisdiction in which particular members are employed.

If adopted by the various governments, the Proposed Agreement has the potential to clarify some areas of uncertainty with respect to the administration and regulation of MJPPs. However, at this point, the Proposed Agreement does not represent the official position of any provincial or federal government. Legislative amendments may be required in some jurisdictions if the Proposed Agreement is to be ratified and implemented.

CAPSA has invited feedback from all stakeholders on the Proposed Agreement prior to its submission to governments. The deadline for such feedback is January 30, 2009. The Régie des rentes du Québec is conducting a separate consultation process.

UPDATE ON EXPERT COMMISSIONS

Over the past year, a number of provinces initiated reviews of their pension legislation. Ontario's Expert Commission on Pensions heard submissions from industry stakeholders in sessions throughout the province. The focus of the review is aimed at strengthening the viability of defined benefit plans in Ontario. Other important issues such as surplus rights and deficit obligations were repeatedly discussed. Administrative issues such as the division of pensions on marriage breakdown were also raised in the submissions of numerous parties, including employers, unions and pension administrators. The Expert Commission is expected to release its report in November 2008.

The governments of British Columbia and Alberta jointly appointed a six-member expert panel to conduct a joint review of Alberta's *Employment Pension Plans Act* and British Columbia's *Pension Benefits Standards Act*. The Joint Expert Panel on Pension Standards will consult with stakeholders and are expected to present their findings and recommendations to both provinces' finance ministers by mid November 2008. The panel is expected to focus on the role of pensions in attracting and retaining the future work force while ensuring fairness for both employees and employers; balancing risks and rewards; encouraging the establishment and maintenance of employee pension plans; changes that will continue making both provinces attractive jurisdictions for investment; and removing barriers to the creation and maintenance of pension plans.

Finally, Nova Scotia appointed a Pension Review Panel. The Panel released a preliminary discussion paper describing objectives and seeking input from the pension community on the issues contained in the paper. The discussion paper released by the panel indicates that the key objectives for the review are to review improvements to current standards that will allow pensions to be viable for both employers and employees; enhance the affordability of defined contribution and defined benefit pension plans for employers and employees; protect the viability of pension benefits; enhance disclosure to plan members; and eliminate unnecessary rules and regulations. As a follow up to the discussion paper, the Panel recently released a preliminary position paper and sought feedback from stakeholders by November 14, 2008.