Canadian court decisions of 2013:

top seven cases about pensions and benefits you should know about

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1. REDUCTION OF RETIREE HEALTH & WELFARE BENEFITS

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

O'Neill worked at General Motors of Canada Ltd. ("GM") for more than 40 years. In 2007, several years into his retirement, GM reduced his retiree health care benefits and cut his retiree life insurance from approximately $100,000 to $20,000.

O'Neill commenced a class action on behalf of more than 3,000 salaried retirees (representing 98% of the class) and executive retirees in May 2010. The class action received its certification order, which incorporated a settlement agreement with respect to certification, in October 2011. The order and settlement agreement confined the class action to six common issues that were to be decided on the basis that the terms of the contract between class members and GM regarding post-retirement benefits are set out in a series of identified documents common to the class. The parties brought cross-motions for summary judgment on four of the six common issues and the class sought to determine, as a core issue, whether GM was contractually entitled to reduce post-retirement benefits after the employees had retired.

In making its determination, the Court separated its analysis between the promises made to the salaried retirees and promises made to the executive retirees. The Court reviewed in detail many documents, including letters and other communications provided by GM to employees over the years in question (1960s onwards), and focused on five kinds of benefits summary booklets/brochures. The Court found as a fact that the representations and reassurances set out in the documents provided the salaried employees a reasonable expectation that they could "plan for and rely on a core of health care and life insurance post-retirement benefits that would continue unchanged for the remainder of their life". It was found that the benefits were provided as deferred compensation for services rendered and not gratuitously.

For the salaried employees the Court divided the benefits documents into two categories: before and after 1994. Prior to 1994, the benefit documents contained inconsistent reservation of rights ("ROR") clauses expressing the employer's right to modify benefits. After 1994, GM added an ROR clause to many documents reserving the right to amend, modify, suspend, or terminate any of its programs (including benefits). The ROR clause largely in effect after 1994 stated:

> "General Motors reserves the right to amend, modify, suspend or terminate any of its programs (including benefits)…".

After the lawsuit was commenced, GM revised its ROR clause in 2010 to add the words “including retirees”, and in 2012 to explicitly authorize changes after retirement. The 2012 ROR clause stated:

> “[GM] reserves the right to amend, modify, suspend or terminate any of its programs (including benefits) and policies covering employees and former employees, including retirees, at any time, including after employees’ retirements.”

Counsel for the plaintiffs acknowledged that if the 2012 ROR clause had been in place over the years in question, the employees would have no basis for their claim. The question was whether the versions of the ROR clauses in place prior to the 2010 change entitled GM to reduce retirement benefits after the salaried employees had retired.

The Court found that the identified documents (prior to the introduction of the 2010 and 2012 ROR clauses) were not clear or unambiguous. The Court considered the recent decision in *Lacey v. Weyerhaeuser* (described below) to similarly apply *contra proferentem* with respect to ROR clauses against the interests of the drafter.

The Court found in favour of the plaintiffs on the core and four common issues that GM was not entitled to reduce the benefits and insurance for post-retirement salaried employees. The Court found that:

a) the ROR clauses (pre-2010) were not clear and unambiguous;

b) *contra proferentem* was applicable;

c) interpretation was guided by policy goals to recognize that in the absence of clear language,employment contracts should be interpreted to protect employees;

d) a good faith interpretation favours the plaintiffs; and

e) GM’s subsequent conduct in amending the ROR clause in 2010 and 2012 was relevant; it indicated that GM knew how to draft a clear and unambiguous ROR clause; GM’s failure to use that clear language prior to 2010 was held against it in that context.

The Court then summarized its findings regarding the executive retirees finding that GM was not in breach of contract in reducing their post-retirement benefits. The relevant ROR clauses contained in executive retiree documents was much clearer and provided a reasonable expectation that the benefits were not guaranteed and could be reduced or eliminated even after retirement.

GM has appealed the decision.

***Lacey v. Weyerhaeuser Co.*, 2013 BCCA 252**

Five retired employees brought a successful action against their former employer, Weyehaeuser Company, for breach of contract pertaining to their employer’s contribution to premiums that funded their retirement health benefits.

Each of the plaintiffs was employed by MacMillan Bloedel Ltd. over periods commencing in various years from 1951 to 1973. MacMillan was acquired by Weyerhaeuser in 1999 and there was no dispute that it assumed all contractual obligations at issue in the action. In 2009, Weyerhaeuser advised its salaried retirees that it was freezing the employer’s contribution to premiums for health benefits at 50% of current premiums and that any future premium increases would be borne solely by the retirees.

The trial judge found that the plaintiffs did not have written employment contracts; therefore, the terms of the employment contract were to be determined by examining the parties' communications and conduct. The benefits originated in 1973 when Weyerhaeuser introduced fully-funded retirement health benefits as part of its benefits package. The plaintiffs claimed that their fully-funded retirement health benefits vested during the course of and as a term of their employment. Weyerhaeuser argued that it provided any and all forms of retirement health benefits at its sole discretion; Weyerhaeuser's position was that there were no contractual rights to the benefits, nor were they rights which vested. The trial judge determined that only through an examination of the evidence could it be determined whether such benefits are to be construed as having been a form of compensation for their employment services, or in the nature of a gratuitous, unenforceable promise.

The evidence demonstrated that Weyerhaeuser circulated several documents over the years in question explaining the benefits and retirement plans; it also held several seminars for salaried and retiring employees to review the benefits described in the documents. The trial judge reviewed those communications to employees, as well as internal company documents, and concluded that the employer's conduct established that the retirement health benefits were offered as deferred compensation for labour, they were an enforceable contractual term, and they created "a common understanding amongst the employees that benefits would be provided for life". The judge ordered Weyerhaeuser to pay damages in the amount of the health insurance costs each retiree paid, from the date Weyerhaeuser reduced its contribution to premiums, and ordered declaratory relief that the plaintiffs were entitled to continuing lifetime company-paid retirement health benefits and premiums.

Weyerhaeuser appealed.

The Court of Appeal found that there was contractual certainty in the wording used in the communications. The words were explicit and purposeful, effectively indicating to the employees if they continue to work until retirement, part of their compensation would be lifetime health benefits paid by the employer. Upon retirement, each plaintiff had earned those benefits and was entitled to receive them in accordance with Weyerhaeuser's contractual commitment. The Court of Appeal did not consider vesting to be a separate issue as the retirees had proven a contractual entitlement. Ultimately the appeal was allowed in part.

The Court of Appeal upheld the order for damages, finding that it was the only remedy at issue. The declaratory relief was struck as it was not claimed in the plaintiff's pleadings at trial, and the plaintiffs (respondents) represented only five of a much larger number of retirees affected by the 2009 reduction of contributions, which the Court noted is being pursued as a class action.

Leave to appeal to the SCC was dismissed on November 21, 2013.

2. PROVING ENTITLEMENT TO A PENSION WHEN RECORDS ARE NOT AVAILABLE

***Hunte v. Ontario*, 2013 ONFST 11**

Mr. Hunte was employed by Crown Life Insurance Company (the "company"), which is now owned by The Canada Life Assurance Company for two periods of time: from 1970 to 1975, and again from 1975 to 1982. For a brief period in 1975 he worked for another insurance company. Mr. Hunte claimed that upon his return to the company in 1975, the company agreed that he would be treated for pension purposes as if he never left the Plan.

Thirty years after his employment with the company terminated, he approached the company and claimed that he was entitled to a deferred pension based on 12 years of service, and did not take his contributions out of the Plan when he left the company. The only payment he received when he left the company, he claimed, was a refund of additional voluntary contributions ("AVCs"). Further, Mr. Hunte claimed that he could not have been entitled to a contribution refund because his benefits would have been locked-in under the Plan terms. In the alternative, Mr. Hunte argued that if the payment he received was for his basic contributions and not his AVCs, then the company had breached its fiduciary duty to properly administer the pension plan and inform him of his rights.

The Superintendent of Financial Services did not support Mr. Hunte's claim. Mr. Hunte requested a hearing before the Ontario Financial Services Tribunal.

Mr. Hunte had no documentary evidence to support his claim; however, he relied on his own testimony, as well as calling seven witnesses, who were all former employees of the company and testified to various aspects of company personnel and pension practices.

Canada Life acknowledged that Mr. Hunt was a member of the pension plan for the second period of employment, from 1975 to 1982, but denied that he was a member for the first phase of employment. Further, Canada Life argued that the company did not bridge broken periods of employment, and there was no agreement to credit Mr. Hunt with a pension service date back to 1970. When Mr. Hunte left the company in 1982, Canada Life claimed that the payment he received was a refund of employee contributions, which left him with no further claim on the Plan. At that time, it was company policy to destroy personnel and pension records seven years after termination from employment, unless there was a deferred pension obligation. Therefore Canada Life had fairly sparse documentary evidence. However, the limited evidence that was available accorded with Canada Life's theory of the situation.

The Tribunal held that the fundamental burden of proof that an applicant has an entitlement from a pension plan is on that applicant, and that the burden does not shift irrespective of whether the company destroyed their records or not. However, it was possible that the burden may shift if the applicant raises a *prima facie* case that must be answered. In this situation, Mr. Hunte had failed to adduce evidence sufficiently persuasive to shift the evidentiary burden. As such, no adverse inference was taken from Canada Life's failure to produce complete records from the 1970s and 1980s.

The Tribunal accepted Canada Life's proposed version of the facts, holding that there was no agreement to bridge Mr. Hunte's two periods of employment. The Tribunal held that the payment received by Mr. Hunt was likely a refund of his basic contributions plus interest, and that Mr. Hunte was not subject to the locking-in provisions of the plan because he did not satisfy the vesting requirements. The Tribunal also found that the employer had not breached its fiduciary duty: the company had a protocol which it followed for terminations, and it was probable that this protocol was followed for Mr. Hunte. The record keeping practices at that time were both reasonable and consistently applied.

3. AMENDED SURPLUS-SHARING AGREEMENT REJECTED BY COURT

***Kidd v. The Canada Life Assurance Company*, 2013 ONSC 1868**

Canada Life and several groups of pension plan claimants reached a settlement agreement in January 2012 regarding a surplus-sharing deal and resolution of claims regarding expenses that had been charged to plan assets. The settlement agreement was approved by the Ontario Superior Court under the *Class Proceedings Act, 1992.* Under the court-approved settlement, Canada Life would receive 30.34% of the surplus, and the remainder would go to certain plan members.

Unfortunately, even though the investment of the applicable assets had been “somewhat immunized”, the amount of surplus available for distribution plummeted. When affected members were told of their estimated share of surplus, the estimated amount was $54 million. In less than a year, the estaimed amount fell to less than $10 million. There were two reasons for the very bad news: first, discount rates fell, such that the cost of settling basic benefits under the plan was far higher than estimated; second, a higher number of members elected the annuity option for their basic benefit than had been assumed.

A group of the affected members moved to enjoin Canada Life from acting unilaterally to implement the court-approved settlement. They then negotiated with Canada Life an amended settlement, with the assistance of an experienced mediator. The amended settlement gave them a chance to participate in a second distribution of surplus, re-calculated as at December 31, 2014, by which time the amount of the surplus may have recovered. The amount of the surplus that could be given to the members in the second distribution was capped at $15 million. No cap was applied to the (second) surplus share that Canada Life was eligible to receive in the second distribution; the Court held that this was “a disguised way for Canada Life to increase its share of the surplus from the 30.34 per cent originally allocated to it.”

There was fierce opposition from 90 members to the proposed amendment to the settlement. The Court gave considerable weight to the views of the objectors, and held that while the original court-approved settlement was no longer fair, it remained a binding agreement. The amended settlement was substantively, procedurally, circumstantially, and institutionally unfair; the Court refused to approve of it. The proponents of the amendment settlement should have paid for a lawyer to represent the 90 members who objected to the amendments, said the Court. To approve of the amended settlement in these circumstances would be contrary to both the letter and spirit of the class proceedings legislation, even though it was marginally better than the court-approved settlement. The Court refused to approve an unfair (amended) settlement simply because it was the better of two unfair choices.

Class action experts agree that this is an unprecedented situation that illustrates the complexity of class action pension settlements, and the willingness of the court to take an active role in scrutinizing a settlement.

4. SETTLEMENT OF DISPUTE OVER DEMUTUALIZATION PROCEEDS

***Toronto Transit Commission v. Signorile*, 2013 ONSC 6377**
From 1988 to 1997, the Toronto Transit Commission (the “TTC”) made group life insurance coverage available to its eligible employees and retirees. The TTC was the policy holder for three group life insurance policies. In the late 90’s, the insurer converted from a mutual insurance company to a corporation with a share capital. As part of this demutualization, the TTC’s ownership interest in the insurer, as holder of the policies, was converted into shares of the demutualized company. The TTC later sold these shares. The proceeds of sale, plus interest and dividends, were held by the TTC and invested. The total value of the investments amounted to just over $5.6 million (the “Proceeds”).

Both the TTC and its employees claimed that they were entitled to the Proceeds: the TTC based on its ownership of the shares, and the employees based on the premiums they had paid in respect of the policies. Ultimately, successful negotiations resulted in a Memorandum of Understanding (“MOU”) which set out how the Proceeds were to be shared between the TTC and its employees/retirees.

The MOU provided that approximately 60% of the Proceeds would be distributed to the eligible employees/retirees, and approximately 40% distributed to the TTC. The costs of distribution would first be deducted from the Proceeds, and an amount would also be set aside as a contingency reserve. Proceeds would be allocated among the eligible employees/retirees, proportionate to the level of insurance coverage that the employee/retiree had under the Policy on the demutualization date.

Given that there was no assurance that continued litigation would yield more for the class members than they were receiving under the settlement, Justice Conway of the Ontario Superior Court approved the proposed settlement. The terms of the class action settlement were fair, reasonable, and in the best interests of the class members.

5. QUEBEC-REGISTERED PLAN: RESPONSIBILITIES OF EMPLOYER VS PENSION COMMITTEE

***Assoc. des retraités de l'École polytechnique c. Corp. de l'École polytechnique* [*Rousselet*]**
2013 CarswellQue 427, 2013 QCCA 130
In *Rousselet,* the Quebec Court of Appeal upheld a decision by the Quebec Superior Court to dismiss a motion to start a class action against an employer who sponsored a Quebec-registered defined benefit pension plan (the "Plan"). The class action sought, on behalf of Plan members, to reject amendments adopted by the Corporation de l'École polytechnique (the employer) in 2003 and 2006. The Association des retraités de l'École Polytechnique and Rousselet attempted to recover pension increases that they claim members ought to have received in 2007 and subsequent years.

The first set of amendments (the "2003 Amendments") were intended to automatically grant supplementary pension increases on January 1st of every year, subject to (i) a specified reserve being met, and (ii) the Plan not having a solvency deficiency. The 2003 Amendments were recommended to the Plan members by the pension committee (the "Committee") and approved by the employer. The second set of amendments (the "2006 Amendments") were introduced after the claimants expressed concerns about the indexation rate approved by the employer – benefits were to be indexed at 50% of CPI with the remaining 50% granted as supplementary increases. The 2006 Amendments entitled the Plan members to retroactive pension increases but also gave the employer the right to take contribution holidays equivalent to the amount of special solvency payments made to the Plan. The Plan had a solvency deficiency in 2007-2008 and was therefore not authorized to award supplementary increases.

The claimants alleged that the Plan members had not been properly advised on the proposed amendments and that the 2003 and 2006 amendments had not been approved by a vote of the members of the Plan. The Court of Appeal disagreed and stated that the evidence clearly showed that the Plan members had been adequately informed of all changes to the Plan.

The most useful part of this case for pension practitioners who advise on Quebec-registered pension plans is that the Court confirmed what we all know: a pension committee that is the registered administrator of the Plan (required by Quebec pension benefits legislation) is a separate legal entity from the employer, and the employer cannot automatically be held liable for the pensions committee's actions or omissions. Any alleged fault of the pension committee in failing to adequately explain what was happening could not be deemed to be committed by the employer, under the facts of this case. It is a good starting point for analyzing liability of Quebec pension committees and plan sponsors.

The employer had the sole authority to award pension increases and did not require Plan members' approval. In any event, the Court concluded that the action was statute-barred because damages had crystalized over three years prior to trial, when the amendments were first made.

6. ENTITLEMENT TO A DISABILITY PENSION AFFECTS CLAIM FOR DAMAGES

***O'Farrell v. Canada (Attorney General)*, 2013 ONSC 6987**
O'Farrell alleged that while she was a member of the RCMP's Musical Ride her colleagues in the RCMP assaulted her, sexually assaulted her and harassed her on multiple occasions. She claimed damages for battery, assault, sexual assault, intentional infliction of mental suffering, breach of contract, misfeasance in public office and breach of *Charter* rights. She alleged that the RCMP failed to take appropriate action when she complained about the alleged abuse. As a consequence of the abuse, she alleged that she developed post-traumatic stress disorder.

The Attorney General of Canada brought a motion seeking an order staying the action for damages until (a) the plaintiff applied for a pension, pursuant to the *Pension Act* ("PA") in respect of the injuries for which she claims compensation, and (b) a decision respecting her entitlement to a pension was confirmed by the Veterans Review and Appeal Board.

The issue for the Court was whether O'Farrell's claim should be stayed on the basis of section 111 of the PA, which requires an analysis of whether her claim was barred by virtue of section 9 of the *Crown Liability and Proceedings Act* ("CLPA").

According to section 111(2) of the PA, an action that is not barred under section 9 of the CLPA, and is related to the "same disability" for which a pension could be paid, must be stayed until a pension application and a determination of entitlement is made. Section 9 of the CLPA bars any action against the Crown if a pension is payable in respect of the damage or loss being claimed.

The question became, whether a pension was payable "on the same basis as" the injury, damage or loss for which damages are claimed by O'Farrell in the action. O'Farrell argued that applying the purposive approach to the interpretation of section 9 of the CLPA, it would seem to be reasonable that the claim put forward by her was not what Parliament intended to be covered by section 9.

The Court concluded that the words of the statutes are unambiguous, and that O'Farrell's damages may entitle her to a pension. It was not for the Court to decide her entitlement to compensation pursuant to the PA.

The Court determined that the motion was allowed. O'Farrell's action for damages was stayed until her entitlement to a disability pension was decided.

The facts of this case are unique, and the applicable pension legislation has limited relevance; nevertheless, this is a fascinating reminder that unique points can be arise involving pensions.

7. POST-INDALEX CASES: GRANT FOREST PRODUCTS, AVEOS AND TIMMINCO

The Supreme Court of Canada in in its February 2013 *Indalex* decision[1] made a number of important findings. One of them, which surprised many practitioners in the pension and insolvency fields, was that when a company that administers a pension plan is not bankrupt, the deemed trust protection in Ontario pension benefits legislation[2] applies to the entire amount of a wind-up deficit. Previously it was thought that the Ontario deemed trust applied only to the amount of contributions that were due and unpaid, not the entire deficit. The Court's conclusion regarding the scope of the Ontario pension deemed trust was

[1] *Sun Indalex Finance, LLC v. United Steelworkers et al.,* 2013 SCC 6.
[2] Subsection 57(4) of the *Pension Benefits Act,* R.S.O. 1990, c. P.8.

obiter, but it sent shock waves across the country. *Indalex* did not provide clear guidance regarding the rights of secured lenders in the context of insolvency proceedings, where a pension deemed trust arises. Courts have only begun to attempt to answer this question.

In 2013 and 2014 the following three court decisions explored some of the questions about the priority status of pension claims in the context of insolvent companies. The questions are complicated in part because pension and personal property security legislation varies by province, and federally.

***Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, 2013 ONSC 5933**

This is a case involving defined benefit pension plans of an employer which sheltered under *CCAA* protection before winding up its pension plans. The issue under consideration was the priority of the claims of (a) secured creditors of the company, versus (b) the pension plans' wind-up administrator and the Ontario pension regulator (who claimed that the Ontario pension deemed trust with respect to the entire wind-up deficit of the plans applied to the company's assets). The company had accumulated proceeds from sales after filing under the *CCAA*, and the question was whether those company assets were subject to the pension deemed trust.

The secured creditors won. The Court held that the Ontario statutory deemed trust applicable to the entire wind-up deficit (thanks to *Indalex*) did not attach to the company's assets (the proceeds of sale which were being held in escrow), due to the fact that the pension plans had not been wound up at the time of the Initial Order under the *CCAA*. If no provincial pension deemed trust has arisen prior to the application of federal insolvency legislation, and the interests of secured (non-pension) creditors have been confirmed or protected as part of the federal insolvency proceeding, the secured creditors' interests will trump any pension deemed trust claim. The Court stated that "*Indalex* stands for the proposition that provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency regime applies."

Some observers have wondered whether the same result will occur in a future insolvency proceeding, if pension claimants object to the imposition of the federal regime at the outset of the insolvency proceedings.

***Aveos Fleet Performance Inc.*, 2013 QCCS 5762**

This case is about a federally-regulated defined benefit pension plan. It was litigated in Quebec, and provides helpful guidance on the effect of the deemed trust in the *Pension Benefits Standards Act* ("PBSA"). In order to understand the impact of this case, one should focus on the fact that it was determined under the federal legislation. The deemed trust provisions of the PBSA are very different from those of the Ontario pension benefits legislation. The PBSA states that there is a deemed trust in respect of unpaid contributions to a federally-registered pension plan, and those contributions include special payments due for the balance of a year in which the plan is terminated[3]. Unlike the Ontario pension benefits legislation, the PBSA has a provision that states that the statutory deemed trust protection does *not* apply to the entire wind-up deficit. The Indalex case has no application to federally-regulated pension plans on this point.

The issue in the *Aveos* case was whether unpaid special payments in the amount of $2.8 million were protected by the PBSA deemed trust, in the face of pre-existing security that was properly attached to assets of Aveos. The security interests were in place prior to Aveos becoming insolvent. Aveos was

[3] Subsection 8(2) of the *Pension Benefits Standards Act*, 1985, RSC 1985, c. 32.

current in all pension contributions prior to becoming insolvent. Aveos was under *CCAA* protection at the time of the litigation.

Aveos ceased making special payments to the pension plan when it filed for protection under the *CCAA.* The terms of the *CCAA* court orders permitted Aveos to suspend special payments, which is common. No one was attempting to argue that a deemed trust applied to the entire amount of the wind-up deficit.

The Court held in favour of the secured lenders. The PBSA deemed trust arose, said the Court, only when the special payments became due and were not paid. At that point, all of the assets of Aveos had already become encumbered by the security interest of the secured lenders. The lenders had properly attached and perfected their security interest in Aveos' assets, prior to Aveos ceasing to make the required pension contributions. The lenders' security interest was a fixed charge that could not be primed by a statutory deemed trust (the PBSA pension deemed trust). There were no assets of Aveos that could become subject to the PBSA deemed trust. The Court agreed with the lenders' argument that the analysis of the Supreme Court of Canada in the *Sparrow Electric* case[4] was applicable, and referred to the federal legislative amendments following the *Sparrow Electric* case to the effect that Parliament intended that statutory deemed trusts will arise in the context of *CCAA* and *BIA* proceedings[5], only if those statutory deemed trusts are expressly recognized in the *CCAA* or *BIA*.

***Timminco ltée (Arrangement relatif a)*, 2014 QCCS 174**

In January 2014 Mr. Justice Mongeon of the Quebec Superior Court issued a decision in the *CCAA* proceedings of Timminco Limited and Becancour Silicon Inc. The decision has been characterized as a reversal of Justice Mongeon's 2012 decision in *White Birch*[6]*,* in which he held that there is no deemed trust for pension claims under Quebec pension benefits legislation.

In his 2014 *Timminco* decision, Justice Mongeon held that the *Supplemental Pension Plans Act* of Quebec, in conjunction with the *Civil Code of Quebec*, create a deemed trust for pension claims, and such deemed trust ranks ahead of the claims of secured creditors in *CCAA* proceedings. The provincial pension deemed trust extends to unpaid special payment contributions; not the entire deficit.

The decision is notable because it deals with the survival of provincial pension deemed trust claims in *CCAA* proceedings, and comes to a conclusion somewhat different from the finding in the Quebec *Aveos* case described above. Even though there are relatively limited protections for pension claims in a *CCAA* proceeding, Justice Mongeon held that the paramountcy of federal legislation was not relevant.

The *Timminco* decision is under appeal.

[4] *Royal Bank v. Sparrow Electric Corp.,* [1997] 1 S.C.R. 411.
[5] *Bankruptcy and Insolvency Act*.
[6] *White Birch Paper Holding Co.*, 2012 QCCS 1679.