

CLASS PROCEEDINGS

IN THE

PENSION AND BENEFITS CONTEXT

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INTRODUCTION

A class action “is a procedural mechanism to provide an efficient means to achieve redress for widespread harm or injury by allowing one or more persons to bring the action on behalf of the many.”¹ When that definition is considered, it is clear why individuals with pension and benefit claims will view the class proceeding as a particularly effective and efficient means by which to pursue their claim.

In British Columbia, class proceedings legislation² was introduced on August 1, 1995. Class proceedings legislation was subsequently introduced in Saskatchewan on January 1, 2002; in Manitoba on July 25, 2002; and in Alberta on April 11, 2004. Since class proceedings legislation has been available for a relatively short period of time in Western Canada, it is not known how effective this process will be for the resolution of pension and benefits claims. However, in light of the success that has been achieved in the use of class proceedings legislation to advance group claims generally, it is likely that class proceedings will continue to be increasingly viewed as a preferred way in which to advance claims by groups of individuals.

The introduction of class proceedings legislation comes at a time when the courts have increasingly expanded the nature of the duties and obligations, employers, pension plan administrators and others who are involved in pensions. Pension plan administration and the governance of pension plans will be the subject of scrutiny and possible class proceedings by those who wish to challenge decisions for their validity and correctness. In the past, those decisions were less likely to be challenged for various reasons including the state of the law, the nature of the litigation process and the significant burden of an individual pursuing such a claim. Although a process for a “representative proceeding” was available under the Rules of Court before the introduction of class proceedings legislation, the difficulty associated with administering a large group of claimants meant that such proceedings were infrequently pursued.

In some Canadian jurisdictions, legal costs, jurisdiction issues and other process issues are significant obstacles to the effective use of class proceedings legislation to resolve disputes. As a result, the law in this area continues to develop and the full extent to which class proceedings will be utilized in the area of pension and benefits is not known at this time. Nevertheless, the availability of the class action as a means of resolving disputes needs to be reflected in how employers and

¹ Report of the Attorney General’s Advisory Committee On Class Action Reform (1990), at page 15 as cited in *Carom v Bre-X Minerals Ltd.* (2000), 51 O.R. (3rd) 236 (C.A.)

² The reference in this paper to “Acts” or “Legislation” refer to the class action statutes in each province.

pension plans manage and administer funds and satisfy their obligations in connection with the use of those funds.

This paper will review the use of class proceedings legislation to pursue pension and benefit claims, identifying the nature of success achieved by plaintiffs to date and the nature of issues and defences raised. In this way, we hope that our paper will assist employers, pension plans and others involved in the pension area to avoid class action litigation.

OBJECTIVES OF THE LEGISLATION

The Three Objectives

It is helpful to first understand the objectives that underlie class actions legislation. Courts have identified three objectives of the legislation, and consistently applied these objectives in determining if an action should proceed by way of class proceeding. The Supreme Court of Canada in *Hollick v. Toronto (City)*³ described these objectives as follows⁴:

... class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

These objectives are usually easily met in the context of a pension class action, and demonstrate how well suited a class action is for pursuing a pension and benefits claim.

Class Actions in the Pension Context

(a) *Judicial Economy*

The beneficiaries under a pension are usually in the same or a similar position. The majority of pension actions focus on the unilateral actions of the sponsoring employer, plan administrator,

³ [2001] 3 S.C.R. 158, 2001 SCC 68 at para. 14 [*Hollick*]

⁴ See also *Western Canada Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 at paras. 27-29, [*Dutton*]

trustee or plan actuary. As a result, the factual and legal issues that need to be determined are likely to be the same for all beneficiaries. Certification ensures that these issues are resolved for all beneficiaries in one proceeding, which frees judicial resources and reduces the litigation costs of both the plaintiff and, at least theoretically, the defendant. It has also been noted that economies are achieved because class actions encourage global or multi-jurisdictional settlement.⁵

(b) Access to Justice

Pension class actions make it possible for beneficiaries to pursue claims that previously were not pursued because of the amount of the claim and expense of pursuing the claim. Pension claims often involve complex legal issues regarding contract, tort and fiduciary duties. This type of claim often raises factual issues that require expert actuarial evidence. This makes the claim costly to litigate. At the same time, the recovery for the individual plaintiff may be modest. Class actions enable plaintiffs to spread the cost of litigating the action across all class members, making it feasible to pursue the claim. Class proceedings legislation also provides that plaintiffs will not be liable for cost awards, a barrier that a plaintiff pursuing an individual action would usually face⁶.

(c) Behaviour Modification

By ensuring that individuals will pursue claims that would not otherwise be economical, pension class actions also ensure that pension sponsors, administrators, trustees and professional advisors are held accountable. In this regard, it has been noted:

... pension and benefits class actions ideally have resulted, and will continue to result, in changes to the way employers, administrators, trustees, actuaries, investment managers and other professionals behave with respect to plans and their administration. ... Fiduciaries and professional service providers must act properly or they may be named as defendants in a proceeding, which is something to be avoided.⁷

As class proceedings legislation is to be “construed generously to give full effect to it benefits”⁸, the foregoing three objectives often influence the courts’ determination of whether or not a class action should be certified.

⁵ *Ruddell v. B.C. Rail Ltd*, 2005 BCSC 1504 rev'd 2007 BCCA 269, citing *Dalhuisen (Guardian ad litem of) v. Maxim's Bakery.*, 2002 BCSC 528

⁶ Craig A.B. Ferris, *Current Trends in Pension and Benefits Class Actions* (CLE, 2006) at 4.1.3

⁷ *Pensions, Benefits and Canadian Class Action Experience*, (2003) 45 *Employee Benefit Issues, The Multiplier Perspective* 35

⁸ *Hollick*, *supra*,

History of Class Proceedings

In recent years the resources pension funds are dedicating to litigation defence have increased.⁹ By far, the majority of these actions have been commenced in British Columbia and Ontario. However, a review of case decisions reveals that pension class actions have been filed in all of the western provinces.

The rise of pension class actions is largely due to the nature of pension arrangements, and the disputes that arise under them. The nature of a pension arrangement is such that many disputes are almost predisposed to meeting the base criteria necessary for certification. For example, in *Ormrod v. Etobicoke (City) Hydro-Electric Commission*¹⁰, Winkler J. stated, “[t]his is a case where the advantages of a class proceeding are so apparent as to be uncontrovertible.”

Overview of the Legislation

Quebec was the first Canadian province to enact class proceedings legislation in 1978. Similar legislation has since been adopted by most provinces, including the western provinces: British Columbia¹¹, Alberta¹², Saskatchewan¹³ and Manitoba¹⁴. Where legislation has not been enacted, the procedural advantages conferred by the legislation are still available to plaintiffs, as they have been “read into” rules respecting representative actions.¹⁵ What follows is a brief summary of some of the main features of class proceedings legislation. Where there are material differences in the legislation between the provinces, these differences are noted.

A Focus on Procedure

At the outset, it is important to note that the legislation provide plaintiffs with a *procedure* for bringing class actions, and does not create new substantive legal rights or remedies.

⁹ Murray Campbell, *Class Action Suits Are Changing the Pension and Benefits Landscape in Canada*, Benefits & Compensation, Vol 14, No. 12 at 1

¹⁰ [2001] 3 C.P.C. (5th) 253 at 270

¹¹ *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the “BC Act”)

¹² *Class Proceedings Act*, S.A. 2003, c. C-16.5 (the “Alberta Act”)

¹³ *Class Actions Act*, S.S. 2001, c. 12.01 (the “Saskatchewan Act”)

¹⁴ *Class Proceedings Act*, C.C.S.M. c. C130 (the “Manitoba Act”)

¹⁵ *Dutton*, supra

Certification

The legislation provides that one member of a class may commence a proceeding on behalf of all members of that class¹⁶. Within a prescribed period, that person will be required to certify the action, and become the representative plaintiff¹⁷. Although much less common, a defendant may also make an application to certify the proceeding as a class proceeding.¹⁸

At the certification stage, the Court determines if a class proceeding is appropriate. It does not consider the merits of the action¹⁹. Upon certification, class members are deemed to be part of the claim, unless they “opt-out”. If not certified, each plaintiff must proceed with an individual claim. Certification itself often disposes of the action altogether, as the vast majority of certified actions are settled before trial²⁰. For this reason, certification is considered to be the most significant stage of a class proceeding.

The legislation provides guidance on what actions should be certified. It sets out what factors a court should consider in certifying an action²¹ and what matters cannot, alone, lead a court to refuse certification²². It also provides that where members have claims that raise common issues that are not shared by all class members of the action, those members can be certified as a subclass, upon certain requirements being met²³. The legislation provides that a certification order must include information pertaining to the description of the class, the representative plaintiff, the nature of the claims the class asserts, the relief that is sought by the class and the common issues that will be determined in the class proceeding²⁴.

Notice

The Acts also provide that the representative plaintiff must provide adequate notice to class members, both with respect to certification and the determination of common issues²⁵. The legislation sets out what the notice should include, but permits the court some latitude, by providing

¹⁶ The BC Act, s. 2(1); Alberta Act, s. 2(1); Saskatchewan Act, s. 4(1); Manitoba Act, s. 2(1)

¹⁷ The BC Act, s. 2(2); Alberta Act, s. 2(2); Saskatchewan Act s. 4(2)(3); Manitoba Act s. 2(2);

¹⁸ The BC Act, s. 3; Alberta Act, s. 3; Saskatchewan Act s. 5; Manitoba Act s. 3

¹⁹ *Hollick*, supra at para. 16

²⁰ C.E. Jones, *Theory of Class Actions* (Irwin Law Inc., 2003) at 118

²¹ The BC Act, s. 4(2); Alberta Act, s. 5(2)

²² The BC Act, s. 7; Alberta Act, s. 8; Saskatchewan Act s. 9; Manitoba Act, s. 7

²³ The BC Act, s. 6(1); Alberta Act, s. 7(1); Saskatchewan Act s. 8(1); Manitoba Act s. 6(1)

²⁴ The BC Act, s. 8(1); Alberta Act, s. 9(1); Saskatchewan Act s. 10(1); Manitoba Act, s. 8(1)

that the court may dispense with notice or require that the defendant disseminate notice in appropriate circumstances.

Opt-in/Opt-out

All the Acts provide “opt-out” provisions, while some provinces have legislation permitting non-residents to “opt-in”. Where an individual falls within the definition of a class, that person is presumed to be a member of the class, and therefore, bound by the court’s determination of the common issues. The Acts provide that an individual can “opt-out” where the individual does not want to participate in the litigation.²⁶ Upon opting out, that individual will not share in any judgment or settlement, but is free to pursue an individual claim and action. Under the British Columbia, Alberta and Saskatchewan Acts, provision is made for class members to “opt-in”. Under these Acts, non-residents are not automatically included in the class. It is therefore necessary for them to provide notice of their intention to “opt in” to the class proceeding. The Manitoba Act does not make residency a requirement, and therefore does not contain a similar “opt-in” provision.

Stages of the Proceeding

The Acts set out how the action is to proceed upon certification²⁷. They indicate that the trial will proceed first with the determination of common issues. Following the common issues trial, which determines the liability of the defendant, individual issues, such as damages awards, will be resolved. The Acts require that a procedure be established for assessing individual claims²⁸. They permit the court to adopt the least expensive and most expeditious method that still ensures that justice is served for both class members and the parties.

Aggregate Damages

In some situations, it may be appropriate for the court to assess damages in the aggregate. This is provided for in the legislation, and allows for damages to be awarded as an aggregate award where it is relatively easy to determine the monetary claim of each individual²⁹. To assist in

²⁵ The BC Act, ss. 19 and 20; Alberta Act, ss. 20 and 21; Saskatchewan Act ss, 21 and 23; Manitoba Act, ss. 19 and 20

²⁶ The BC Act, s. 16; Alberta Act, s. 17; Saskatchewan Act s. 18; Manitoba Act s. 16

²⁷ The BC Act, s. 11; Alberta Act, s. 12; Saskatchewan Act s. 13; Manitoba Act s. 25

²⁸ The BC Act, s. 27; Alberta Act, s. 28; Saskatchewan Act s. 29; Manitoba Acts s. 27

²⁹ The BC Act, s. 29; Alberta Act, s. 30; Saskatchewan Act s. 31; Manitoba Act s. 29

determining how such an award should be distributed, some Acts specify that statistical evidence is admissible.³⁰

Settlement, Discontinuance or Dismissal

The settlement, discontinuance or dismissal of class action is only permitted if approved by the court³¹. The settlement is then binding on all class members.

Fees

The Acts also set out the requirements for fees³². Some anticipate, and others expressly provide, that fees can be paid on a contingency basis, whereby the plaintiff pays a fee only if the action is successful.

Cost Awards

The British Columbia, Saskatchewan and Manitoba Acts also include a “no-cost” rule. That rule provides that neither party to the action can be found liable for the costs of the other party³³. The Acts relax this requirement to some extent, by providing that the court has discretion to make cost awards prior to certification where a party’s conduct is vexatious, frivolous or abusive.

Certification

The stages in the class proceeding are as follows:

- (1) Filing;
- (2) Certification;
- (3) Determination of the common issues at trial; and
- (4) Determination of the individual issues.

³⁰ The BC Act, s. 30; Saskatchewan Act s. 32; Manitoba Act, s. 30;

³¹ The BC Act, s. 35; Alberta Act, s. 35; Saskatchewan Act s. 38; Manitoba Act s. 35

³² The BC Act, s. 38; Alberta Act, ss. 38 and 39; Saskatchewan Act. s. 41; Manitoba Act, s. 38

³³ The BC Act, s. 37; Saskatchewan Act s. s. 40; Manitoba Act, s. 37

The focus of a class proceeding is at the certification stage, making it significant to a discussion of possible strategies to defend such claims. Under class proceedings legislation in the western provinces, the court must certify a proceeding as a class proceeding on an application if:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues; and
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who fairly and adequately represents the interests of the class members, proposes a workable method of notifying and proceeding on behalf of the class members and does not have an interest in conflict with the interests of other class members³⁴.

A Cause of Action

It is rare that a class action proceeding will be defeated on the basis that it does not disclose a cause of action. The threshold required is low: certification will not be ordered if it is plain and obvious that the plaintiff cannot succeed.³⁵

An Identifiable Class

The second requirement for certification is that there exist an identifiable class of 2 or more persons. The class should be defined with reference to objective criteria, it should be clear that the class is defined (i.e. not unlimited) and a person's membership in a class should be unrelated to the merits of the action.³⁶

In the pension context, issues concerning the class definition have arisen where there is an apparent conflict of interest between those paying into the fund, and those drawing out of it.³⁷

³⁴ The BC Act, s. 4(1); Alberta Act, s. 5(1); Saskatchewan Act s. s, 6; Manitoba Act, s. 4

³⁵ *Elms v Lautential Bank of Canada* (2001), 90 B.C.L.R. (3d) 195, 2001 BCCA 429

³⁶ *Hollick*, supra at para. 17; In this case, the court was referencing Ontario *Class Proceedings Act*, however the language is virtually identical in other jurisdictions, so the same principles should apply.

³⁷ *Williams v. College Pension Board of Trustees*, 2005 BCSC 788 rev'd on other grounds 2007 BCCA 19

Generally, where issues such as conflict arise, the court is willing to deal with them by creating “sub-classes”. In the above example, there would be a sub-class created for those paying into the pension, and another for those retired persons who are drawing out of it. However, where there is merely *potential* for conflict in the future, the court seems reluctant to split up the classes during the certification procedure³⁸. However, there are also cases where the conflicts between class members are too severe to be solved even by creating sub-classes³⁹. Where the court concludes that the classes are not defined with the requisite precision, it is open to them to redefine them.⁴⁰

Common Issues

The third requirement for certification is that the claims raise common issues. The Acts specify that under this consideration, the Court need not determine whether common issues predominate over individual ones. Rather, “a common issue is sufficient if it is an issue of fact or law common to all claims, and that its resolution in favour of the plaintiff’s will advance the interests of the class, leaving individual issues to be litigated later in separate trials, if necessary”.⁴¹

Preferable Procedure

The requirement that a class proceeding be the preferable procedure is the key consideration of the certification test. The Acts specify that the following factors should be considered by the Court in making this determination:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient; and

³⁸ *Williams, supra* at para 136

³⁹ *Boucher v. Public Service Alliance of Canada*, 2005 O.J. No. 2693

⁴⁰ *Gregg v. Freightliner Ltd. (c.o.b.) Western Start Trucks*, 2003 BCSC 241

⁴¹ *Endean v. Canadian Red Cross Society*, [1997] B.C.J. No. 1209 at para. 35

- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.⁴²

A Representative Plaintiff

The fifth consideration with respect to whether a class action should be certified concerns whether the plaintiff proposed is representative of the interests of the class. The focus of this determination is to ensure that the representative plaintiff is the appropriate individual to pursue the claim on behalf of others.

Recent Developments

Jurisdiction

In *Lieberman v. Business Development Bank of Canada*, the Court dealt with the issue of whether British Columbia was the appropriate jurisdiction (or *forum conveniens*) for a class proceeding.⁴³

In that case, the Business Development Bank of Canada (the "BDC") was a federally owned and operated banking institution which administered a pension plan governed by the law of Quebec. The plaintiffs, retired members of the pension plans of BDC and its predecessor, filed a class action in British Columbia on the ground that BDC had breached its fiduciary duty to plan members. The BDC brought an interim motion-seeking an order that the plaintiffs' action be stayed on the grounds that British Columbia was not the *forum conveniens* for the action. The Court concluded that it should not decline jurisdiction.

Davies J. held that certain of the factors normally considered in determining the most appropriate forum for a given action should be given a reduced or neutral weight due to the importance of the *Pension Benefits Standards Act*⁴⁴ to the issues to be determined, the national scope of the plaintiff class, and the absence of parallel proceedings in Quebec. Specifically, the following factors were considered to be of reduced significance in determining the most appropriate forum: the residence of the parties, the relative costs of litigation as related to juridical advantage and disadvantage to the parties, and the application of the substantive law of British Columbia and Quebec to the subject-matter of the dispute.

⁴² The BC Act, s. 4(2); Alberta Act, s. 5(2); Manitoba Act

⁴³ 2005 BCSC 389 appeal dis'd 2006 BCCA 300

⁴⁴ R.S.C. 1985, c. 32 (2nd supp.)

The Court in *Lieberman* took into consideration that the BDC was a national institution created for the purpose of doing business nation-wide, which was actively carrying on business in all provinces, including British Columbia. Class members resided in multiple jurisdictions, and although many class members resided in Quebec, they did not form the majority of class members. The Court also considered the fact that no Quebec residents who would be members of the proposed plaintiff class had come forward to launch a class action suit. Davies J. held that in a case involving a national class and a national institution, the residence and place of business of the parties were relatively neutral considerations in determining the most appropriate forum for the class action.

The BDC also argued that the torts alleged by the plaintiffs were committed in Quebec, given that the plan administration and benefit payouts were based in Quebec, and as such, Quebec was clearly the more appropriate forum for the action. The Court held that given the national nature of BDC's undertaking, and taking into consideration the necessarily preliminary nature of any inquiry into the legal issues to be raised at trial, it would be inappropriate to make such a finding. The Court concluded that the BDC's arguments on the place of the cause of action did not operate to establish Quebec as a clearly more appropriate forum.

One issue here was the ability of the parties to recover their costs under the applicable class action legislation in Quebec and British Columbia. The Court accepted the plaintiffs' submission that the "no-cost" regime established by s. 37 of the British Columbia *Class Proceedings Act* gave them a juridical advantage in British Columbia that would be unavailable to them in Quebec.

BDC argued that it was subject to a juridical disadvantage because it lost the opportunity for possible recovery of some of its costs due to the absence of a class action proceedings fund in British Columbia, where one existed in Quebec. This was significant for the BDC because the plaintiffs had the ability to apply under the Quebec class action legislation for funding to pay part of their legal costs and disbursements, and as a consequence, the BDC might potentially recover some of its own costs. The Court held that the absence of similar provisions in the British Columbia class action regime did not create a juridical disadvantage to the BDC given that such recovery would be minimal.

The BDC argued that it would be subject to increased cost and inconvenience if the British Columbia action were allowed to proceed. Again, given the national nature of BDC's undertaking,

the Court agreed with the plaintiffs' submission that it would be within the usual nature of BDC's business to fly any witnesses or other representatives to British Columbia to participate in the litigation.

The BDC submitted that the plaintiffs would face no increased cost or inconvenience resulting in having the action moved to Quebec, in part because Mr. Lieberman could be replaced as a representative plaintiff. The Court held that the submissions by the BDC ignored the plaintiff's personal interest in the litigation and Mr. Lieberman's unique knowledge of and involvement in the history of the evolution of the BDC Plan. Again, the Court took into account the fact that although there was a possibility of finding a new representative plaintiff in Quebec, none had come forward at the time of Mr. Lieberman's application. The Court held that the plaintiffs' desire to have its dispute heard in a court of competent jurisdiction should not be defeated by the possibility that no one willing or appropriately qualified would come forward to take on the responsibility of being the class representative.

Lieberman is significant to class actions arising out of pension plan administration because it changes the way jurisdictional issues are dealt with in the context of federally registered pension plans and funds created for national institutions. In the context of class action litigation arising out of a pension plan that has members nationwide, class members will exist in every province and territory. This means that there will be multiple possible fora in which the action may be heard, and courts will be required to make the determination of which of these fora are more appropriate. *Lieberman* alters the way in which the established test for determination of jurisdiction is applied.

In the preponderance of cases in which the determination of jurisdiction is an issue, the place of cause of action, and the residence or place of business of the parties are often factors that heavily influence the ultimate decision of the court. The decision in *Lieberman* reduces the weight that can be given to these factors in similar cases in the future. This makes it more difficult for an applicant seeking to prove another forum as clearly being more appropriate. *Lieberman* has the effect of significantly reducing the arguments available to an applicant in a pension class action context who is seeking to establish the clear appropriateness of one forum over that of another.

Arbitration

A second issue that has recently emerged in pension class actions is the effect the availability of arbitration proceedings can have on class action proceedings. Two cases have recently dealt with this issue. In *Bisaillon v Concordia University*, the presence of an arbitration clause led the

court to conclude that it did not have the jurisdiction to hear the matter.⁴⁵ In *Ruddell v. B.C. Rail Ltd*, the presence of an arbitration clause factored in the court's consideration of whether a class action was the preferable procedure, and should therefore be certified.⁴⁶

(a) *Bisailon v Concordia University*

A union employee of the university, applied to the university to institute a class action to contest a decision made respecting the administration of the university's pension fund. Another union contested the application on the grounds that the court lacked the jurisdiction to hear the claim.

At issue was whether a class action was available to resolve pension management issues that fell within the purview of a collective agreement. The agreement provided that disputes would be resolved through arbitration.

The majority of the Supreme Court of Canada held that jurisdiction lay with the arbitrator. The Court concluded that the changes to the pension plan in question were matters of "interpretation, application, performance or violation of the collective agreement". As such, they fell within the exclusive jurisdiction of grievance arbitrators appointed under the applicable collective agreements. To seek to proceed outside that process would, the Court concluded, be outside of the collective agreement, and therefore, contrary to the *Labour Code*.

(b) *Ruddell v. B.C. Rail Ltd.*

The plaintiff was a retired employee of B.C. Rail and a member of the BC Rail Pension Plan. It was alleged that the plan had inequitably allocated an actuarial surplus. The defendant sought to stay the action on the basis that the pension plan contained an arbitration provision, which was required to be included in pension plans under section 62 of the *Pension Benefits Standards Act*⁴⁷ ("*PBSA*"). At issue was whether the plaintiff should be required to resolve the dispute through arbitration.

By way of background, under section 15 of the *Commercial Arbitration Act*⁴⁸ court actions are stayed in favour of arbitration unless the arbitration clause is "void, inoperative or incapable of being performed". In the context of class proceeding certification, this creates a conflict. On the one hand,

⁴⁵ [2006] 1 S.C.R. 666, 2006 SCC 19

⁴⁶ *Ruddell*, supra

⁴⁷ R.S.B.C. 1996, c. 352

⁴⁸ R.S.B.C. 1996, c. 55

the court is required to determine if proceeding by way of class action is the preferable procedure, taking into consideration the factors delineated under the class proceedings, whereas on the other, the arbitration legislation requires that the court stay all proceedings in favour of arbitration.

A recent trend among cases was to resolve this conflict in favour of the class proceedings.⁴⁹ This stemmed in large part from the decision in *MacKinnon v. National Money Mart Co.*⁵⁰, where the Court held that an arbitration clause will be rendered inoperative where a Court finds, based on the considerations under the Act, that a class action is preferable.

In *Ruddell*, the clause in issue was somewhat different. Unlike in *MacKinnon*, where the clause was simply a contractual provision, in *Ruddell*, the clause was required to be included in the pension plan pursuant to the *PBSA*. This distinction did not, however, prevent Holmes J. from following *MacKinnon*. He therefore concluded that the action should be certified.

On appeal, *Ruddell* was reversed. The Court of Appeal concluded that the trial judge failed to recognize the force of the legislature's preference for arbitration. The Court held that *MacKinnon* could be distinguished, as in that case, the preference for arbitration was found in a standard form commercial contract, and not in a statute. In its reasons, the Court also endorsed arbitration processes more generally. To this end, it observed that under the *PBSA* any arbitrated result is binding on all parties affected by the decision, making it an efficient process in the circumstances; that arbitration is flexible and confers efficiencies in its own right; and that with respect to costs, an arbitrator has broad latitude.

It may be that both *Bisaillon* and *Ruddell* will have a limited effect on future class actions. On its facts, *Bisaillon* only applies where union employees have included their pension plan in the collective agreement and are disputing conduct that falls within the collective agreement.

Similarly, *Ruddell's* impact will be limited in other provinces, as British Columbia's pension legislation appears to be alone in its consideration of and provision for arbitration-based dispute resolution mechanisms for the resolution of issues stemming from pension plans.

Although *Bisaillon* and *Ruddell* clearly deal with different situations, they both indicate that the courts will give due consideration to arbitration clauses, where they are mandated by legislation. The

⁴⁹ *Frey v BCE Inc.*, 2006 SKQB 331 at para. 25

⁵⁰ 2004 BCCA 473

decisions also indicate that the benefits associated with a class proceeding should not be overly emphasized where arbitration may be efficient and cost effective way to pursue a claim.

The Saskatchewan *Pension Benefits Act, 1992*⁵¹ does not contain any arbitration or dispute resolution provisions. It does provide in s. 12 that where an employer is the administrator of a pension plan it may establish a pension advisory committee, and must do so if the plan has 50 or more members who request that the employer establish such a committee. The duties of a pension advisory committee are stated in s. 12(3) to include advising the administrator with respect to matters of concern to the members and former members of the plan, however there is no process set out for the resolution of such concerns. The provisions in the Saskatchewan legislation for dealing with the mandatory and optional requirements for the content of pension plans do not refer to the resolution of disputes arising from the plan.

The Alberta *Employment Pension Plans Act*⁵² includes a provision in s. 27(5) deeming certain specified provisions to exist in any registered plan. None of the stated requirements subject to the deeming provision deal with the resolution of disputes.

The Manitoba *Pension Benefits Act*⁵³ is the only western pension legislation that makes provision for a dispute resolution mechanism, however, the application of this mechanism has a limited scope. Section 18(2.1) states that any pension plan submitted for registration by an employer after June 24, 1992 must, in the plan document, provide for a mechanism for resolving disputes between plan members and the employer respecting the disposition of surplus assets of the plan. Beyond this, the Manitoba legislation does not deal with the resolution of disputes arising from the plan.

CONCLUSION

Class actions appear to be well-suited for resolving pension disputes. Potential defendants should therefore be alive to the fact that their decisions and conduct generally will be subject to greater scrutiny.

As a result of the decision at the BC Court of Appeal in *Ruddell*, commercial arbitration provisions will be the first line of defence to a class proceeding by members of a pension plan.

⁵¹ S.S. 1992, c.p-6.001

⁵² R.S.A. 2000, c. E-8

⁵³ C.C.S.M. c. P-32

Provincial regulators in Alberta, Saskatchewan and Manitoba are likely considering whether pension and benefits legislation in those jurisdictions ought to be amended to clarify that pension plans must include an arbitration dispute mechanism in order to avoid pension disputes becoming the subject matter of litigation in the courts, and specifically class proceedings. Although commercial arbitration agreements, costs concerns and jurisdictional issues will continue to be raised in defending pension benefit claims, there is no doubt that class proceedings legislation will continue to be an attractive means for pension and benefits claims to be pursued. Depending upon the nature of the claims and the disputes, the class proceeding may be an effective means by which those claims may be pursued. The recent decision of the BC Court of Appeal in *Bennett v. British Columbia*,⁵⁴ allowing an appeal in part to permit a class action claim by union and non-union retirees for benefits that they claim were promised to them, is a clear signal that class proceedings will be increasingly used in this area.

⁵⁴ 2007 BCCA 5

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