

RECENT DEVELOPMENTS IN PENSION CLASS ACTIONS: AN OBVIOUS TREND

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As Canada's baby-boomers reach retirement age, Canadian Courts have been increasingly called upon to examine issues particular to an aging population such as mandatory retirement ages and access to health care, to name just two recent examples. Given the mammoth value of retirement funds, as well as their crucial importance to beneficiaries, litigation over retirement benefits is poised to be a significant future battleground. Much of this battle will be fought through class actions.

Class actions, which allow groups of similarly situated people to sue a common wrongdoer, are uniquely suited to protect retirees, and their savings, from loss. Securities class actions, such as the Nortel, Molson Coors, Royal Group and IMAX cases, can help investors recoup losses wrongfully incurred. While securities class actions are an established tool (particularly in the United States) that investors can utilize to protect retirement savings, pension class actions are a somewhat newer phenomena (especially in Canada).

When pension trustees abuse the fund – by improperly using surpluses, taking improper contribution holidays, failing to fund the plan in accordance with their contractual obligations or other irregularities – each individual beneficiary may have a cause of action as well as significant losses, but due to financial or other circumstances may be unable or unwilling to shoulder the cost of litigating the matter. Additionally, such litigation is stymied by a "free-rider" problem: each pension beneficiary has a strong incentive not to sue. If another beneficiary sues first, he or she can obtain the benefit of that suit at a relatively low cost. Pension litigation, which can require experts in accounting and actuarial science, can be quite expensive, which gives further incentive for free-rider behaviour.

Class proceedings address these problems, and lower the plaintiffs/pension beneficiaries bar to access the Courts. Most class actions proceed by way of contingency fee – the plaintiff class pays only if the action is successful, usually on a percentage-of-recovery basis. Further, cost recovery against the plaintiff class should the action fail is relatively rare. As class actions are brought on behalf of the entire class of injured people, the costs of the litigation are spread among the entire class, eliminating the free-rider problem.

Pension class actions have come a long way since *Rivett v. Hospitals of Ontario Pension Plan*,¹ the first such action in Ontario. Several recent cases indicate the importance that pension class actions will have, not only for pensioners, but for the companies that sponsor the plans. These recent cases indicate that pension class actions will rarely fail to be certified as class actions, and thus represent a powerful tool for pensioners to safeguard their interests.

The objectives of the class proceedings regime are access to the courts, judicial economy and behaviour modification of potential wrongdoers. Pension litigation often presents close to the ideal class action fact scenario: Such cases often present a large well funded plan sponsor who is alleged to have denied retirement benefits to a diverse group of retirees, sometimes with modest incomes. Where the pension beneficiaries are numerous the class damages can be very large. As will be seen below, Courts are well aware that absent class actions (or another collective process, such as grievance arbitration) the pension beneficiaries will likely be unable to bring individual claims, and thus will be denied recovery.

One situation in which certification will be denied is lack of jurisdiction. In a recent case, discussed below, the Supreme Court carved out pensions incorporated into collective agreements from class actions legislation.

¹ (1995), 9 C.C.P.B. 284

The failure to properly manage funds can lead to potentially massive litigation. Class action counsel, who generally stand to profit only when they are victorious, will fight tenaciously to protect the retirement of plan members. Since certification is likely, and will only strengthen the plaintiffs' position, the best course of action for the defence, failing, of course, properly managing the fund in the first place, may sometimes be settlement prior to certification.

Certification: The low bar

While the law has changed substantially since the introduction of the *Class Proceedings Act, 1992* ("CPA")², one of the major hurdles in a class action is certification. In order for a class action to properly begin, it must be certified by the Court, if this step fails each member of the proposed class who seeks recovery must bring an individual claim. The test for certification is set out in the CPA. In some types of class actions certification can be difficult. In misrepresentation cases, for example, it may be difficult to show the requisite commonality where the question of individual reliance is critical.

The CPA mandates a five part test for certification. The plaintiff must show that

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,

² S.O. 1992, c. 6

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.³

In *Gregg v. Freightliner Ltd. (c.o.b. Western Star Trucks)*⁴ a pension class action was adjourned pending the appointment of a representative plaintiff for a subclass. The court indicated that the class action would be certified after the subclasses were adjusted and properly represented. The plaintiffs sued their previous employer (the plan sponsor) and the Trust company which administered the plan for a share of a potential surplus upon the windup of the fund as well as an accounting for losses connected to the alleged mismanagement of the fund.

The proposed common issues were:

- (a) Was the defendant required to wind up the plan?
- (b) If so, was there a surplus?
- (c) Who is entitled to the surplus?
- (d) Did the defendant improperly use funds from the Plan to fund its administration? If so, are Freightliner and the trust companies liable?
- (e) Did the defendant improperly remove funds from the plan? If so, are Freightliner and the trust companies liable?
- (f) Did Freightliner fail to implement certain policies, properly monitor them and revise them in connection with the wind up? If so are Freightliner and the trust companies liable?
- (g) Are the class members entitled to an accounting?

³ CPA, s. 5

⁴ [2003] B.C.J. No. 345 (B.C. S.C.) [hereinafter *Gregg*]

The British Columbia Court determined that the proposed common issues were, by and large, proper. The defence did not object to the majority of the common issues, and the Court agreed that the first and second common issues were improper – the plan was being wound up and there was no suggestion that it should continue, and the question of the existence of a surplus was truly a facet of entitlement. In addition, the Court added a series of common issues concerning limitations periods:

- (a) What limitations periods, if any, apply?
- (b) Do the doctrines of laches and acquiescence apply?
- (c) Have any of the limitation periods been postponed by virtue of the B.C. limitations act?

The major issues before the Court were twofold: whether a class action was a preferable procedure and the composition of the class.

The *Gregg* Court was clear that pension matters are properly dealt with as class actions:

The pension litigation would be prohibitively expensive for a single litigant to pursue. It is agreed that the litigation of the issues would take at least a four week trial. If the litigation is not certified, it is unlikely that any claim will be made on any pension plan surplus, yet if there is a surplus, Freightliner could receive a windfall of a significant amount if the plaintiff is correct in his analysis.

While the pension plan issues are complex, they are not unmanageable. It would be far more difficult for the system of justice to attempt to accommodate individual claims, even recognizing that some of these claims may devolve into individual claims.⁵

Pension cases will almost always be properly dealt with as class actions. Not only do they generally present clear common issues, but they also are often brought (at least in part) on

⁵ *Id.*, at paras. 92-3

behalf of retirees who may not have the financial wherewithal to bring the case independently, arousing the sympathy of the Court.

The only other issue the court dealt with at length was the composition of the class. The *Class Proceedings Act* allows for subclasses with a larger class action:

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.⁶

While the composition of the class may be simple where there is only one pension plan, *Gregg* presented a substantially more complex constellation of facts. The Court found that the proposed sub-classes were *too narrow* and exercised its discretion to expand them. The Court cautioned that:

As noted above, the pension claim in this case is complex. There were a number of different plans, with several different companies and numerous employees.

It is of utmost importance to properly define the class of those potentially affected by this litigation. This is the only way in which the defendants can properly defend any claims against the pension plan.

...

⁶ CPA, s. 5

I have concluded that the class needs to be broad enough to cover all of the potential claimants. “Current Plan Members” will form the main class. “Historical Plan Members” will form a subclass and one or more representative plaintiffs will need to be appointed to represent this class. “Defined Benefit Members” will be a subclass and Mr. Gregg may represent this subclass. A subclass will need to be created for “Out of Province Members” and a representative plaintiff appointed for this class. This subclass may divide further, depending on who opts into the litigation.

I have also concluded that there should be a subclass for “Defined Contribution Members”, at least to litigate their entitlement. I am not prepared to exclude them from the litigation at this point without proper argument [as to whether they are entitled to a share of the surplus].⁷

The Court held off certification pending the appointment of representative plaintiffs for the new subclasses. One of the strengths of a class proceeding is its flexibility. Courts have the jurisdiction to control their own process and can be quite accommodating in crafting class definitions.⁸

This case makes it clear that in litigating the final disposition of a pension fund, all potential claimants must be represented. This is not usually problematic for the plaintiffs. Plaintiffs' counsel have an interest in ensuring that the class is as large as possible: this ensures that there are no other class actions, allowing undiluted bargaining power and usually maximizes the potential damages award, and thus defendant's incentives for settlement. The primary concern with regard to the formulation of sub-classes is conflict of interest, discussed below.

Certification was also granted in *Givogue v. Burke*.⁹ In that case, the plaintiffs alleged that upon termination, the assets of the plan were insufficient to fund their accrued benefits. The plaintiffs sued the plan trustees, the plan's actuaries and the plan sponsors. They alleged that the

⁷ *Id.* at paras. 46-50

⁸ *Lunes v. The Mutual Life Assurance Company of Canada*, [2003] O.J. No.1160 (O.C.A.)

⁹ (2003), 25 C.C.E.L. (3d) 91 (Ont. S.C.) [hereinafter *Givogue*]

shortfall was due to the defendant's negligence and/or breach of fiduciary duty. The Court accepted three common issues:

- (a) Whether the defendants were responsible for the shortfalls accruing to the plan, and to what degree;
- (b) Whether the defendants have a fiduciary duty towards the members and former members of the plan; and
- (c) Whether any of the defendants breached that duty.

As was the case in *Gregg*, the Court modified the class (by splitting it into subclasses depending on when and how the beneficiaries left their employer) and required additional representative plaintiffs. The Court also trimmed three obviously improper common issues. Notwithstanding the defendant's allegation that there was a conflict of interest between the classes, the Court certified the class action, noting that "I am satisfied that all groups will be advancing the same common submission namely, but for the negligence and/or breach of fiduciary duty of the defendants or any one of them each member of the class would have received 100% of accrued benefits at the time of partial termination or final termination."¹⁰

In *Lieberman v. Business Development Bank of Canada*¹¹ the Court dealt with Certification in a scant four paragraphs. While the defendants made no arguments concerning certification (instead challenging the jurisdiction of the Court) Justice Davies noted that

Having considered all of the evidence and the submissions of counsel as I am bound to do notwithstanding the lack of objection by the BDC (aside from its *forum non conveniens* submissions), I am satisfied that the plaintiffs have met the burden of establishing that the action would appropriately be certified as a class action in British Columbia under s. 4 of the *Class Proceedings Act*.¹²

¹⁰ *Id.*, at para. 30

¹¹ [2006] B.C.J. No. 337 (Sup. Ct.) [hereinafter *Lieberman*]

¹² *Id.* at para. 31

Lieberman concerned allegations that the bank, which administered its own pension plan, had improperly amended the pension plan to divert funds for its own interests, took improper contribution holidays, improperly used plan funds to pay certain expenses and otherwise failed to live up to its fiduciary duties. The class members, retired employees of the bank, proposed two common issues: did the bank breach its fiduciary duties, and, if so, what relief should be granted.

One of the crucial details about this case was the ongoing involvement of the pensioners prior to the launch of the litigation:

The various amendments to the FBDB Pension Plan and the BDC Pension Plan resulted in Retired Members of the BDC Pension Plan becoming very concerned about allegedly unfair treatment by the BDC to their detriment. Various committees were formed to liaise with the BDC in relation to the effects of the various amendments on Retired Members and Active Members.

From approximately 1994 to 2001, the proposed plaintiff, Lucien Lieberman, was the pensioners' representative on a pension committee of the FBDB whose mandate was to produce an annual report for Retired Members and Active Members to keep them informed about the BDC Pension Plan.

...

The 1997 Amendment providing for the possibility of contribution holidays for the BDC and its current employees was widely criticized by Retired Members and when that criticism failed to abate, the "Pensioners' Association of the [BDC] Pension Plan" formed an "Advisory Committee", the mandate of which was to "review and present to the Board of Directors of the Association the concerns and views of the pensioners regarding various aspects of the [BDC] Pension Fund".

The Advisory Committee was comprised of five members, those being a chairperson and four members at large from different regions of Canada.

Mr. Lieberman was selected to represent the western region.¹³

¹³ *Id.*, at paras. 11-17

One consideration which must be addressed is the possibility of a conflict of interest between various subclasses. In *Boucher v. Public Service Alliance of Canada*¹⁴ Justice Charbonneau refused to certify a class action where there was a conflict of interest between several of the subclasses. The plaintiff sued the Public Service Alliance of Canada, which administered its own pension plan. The statement of claim alleged that plan assets had been improperly used for, *inter alia*, a contribution holiday and early retirement incentives. The claim was brought on behalf of all beneficiaries who retired prior to December 31, 2001.

The claim, if successful, could require that certain beneficiaries reimburse the fund for prior payments. The sub-classes that may have had to make repayments were clearly in a different position vis-à-vis the litigation than those claimants who had no potential liability. The Court found that these potential conflicts were fatal to the claim: "The plaintiffs submitted there is a good possibility the various members of the class would come to an agreement as to how the surplus would be shared and possibly even as to what amount the members of the fully sharing group would have to reimburse. However, there exists no such agreement at this time. The class action may not be allowed to proceed on a mere hope of the conflicts resolving themselves along the way."¹⁵ The dismissal was not without prejudice.

As indicated by his reasons, the conflict of interest could have been avoided through several different routes. One would be to bring separate class actions for the various subgroups, each with different counsel. Another possibility would be to reach an agreement between the sub-groups. In such a scenario, each of the sub-groups would require separate legal advice.

¹⁴ 2005 CanLII 23098 (ON S.C.)

¹⁵ *Id.* at para. 27

Pensions cases, which will often have various sub-classes (for example current employees who receive no benefits and retirees), are likely to present intra-class conflicts.

Jurisdictional Issues: The Supreme Court carves out an exception

Pensions, and pension litigation, involve many different areas of law. In particular, where a pension is part of a collective agreement, labour law will play an important role. A recent case before the Supreme Court dealt with changes made to a pension which was part of a collective agreement. The Quebec *Labour Code*¹⁶ gave jurisdiction over collective agreement disputes to a grievance arbitrator.

In *Bisaillon v. Concordia University*¹⁷ the Supreme Court of Canada addressed the issue of whether a class action was the proper procedure to adjudicate the management of a pension explicitly provided for in a collective agreement. In a four-to-three decision, the Supreme Court found that jurisdiction was properly with the grievance arbitrator. Simply, the changes to the pension (which had been supported by one of the unions representing Concordia's employees, but not the other eight) were matters of the "interpretation, application, performance or violation of the collective agreement."¹⁸ As part of the process of unionizing, the plaintiff had lost certain individual rights, notably the right to negotiate the terms of his own employment. The pension plan, part of the collective agreement, was not subject to individual negotiation. The ability to dispute the changes to the plan lay with the Unions and the grievance procedure.¹⁹

¹⁶ R.S.Q., c. C-27

¹⁷ [2006] S.C.J. No. 19 (S.C.C.) [hereinafter *Bisaillon*]

¹⁸ *Id.*, at para. 30

¹⁹ *Id.*, at para 56-7

While this ruling may suggest an advantage for pension plan sponsors (as it removes the benefits conferred by the class actions), in reality unions are often well situated to protect the rights of their members and have extensive experience with the grievance process. This decision only applies where the employees are unionized, the pension plan is part of a collective agreement, the provincial labour legislation confers jurisdiction to a grievance arbitrator and the impugned conduct can properly be said to be a question of the "interpretation, application, performance or violation of the collective agreement."

The three-member minority noted that since the pension plan in question was common to nine unions (with nine collective agreements) the management of the pension superseded any individual agreement, and thus the grievance arbitrator did not have jurisdiction over the matter. The minority opinion suggests that had there only been one collective agreement, the grievance arbitrator would necessarily have jurisdiction over the matter.²⁰

If unions or their members wish to preserve the ability to bring class actions to protect their pension rights, such pensions should not be made part of collective agreements in order to avoid the application of arbitration mandated by the provincial labour code (if any).²¹ In Ontario, such arbitration is mandated by s. 48 of the *Labour Relations Act, 1995*.²² While the tactics particular to the argument of such an arbitration is beyond the scope of this paper, there are obvious similarities with class actions and counsel experienced with pension class actions would be an asset to either side.

Non-unionized members of pension plans are not protected by unions, or the provincial labour codes, thus their collective remedy remains a class action.

²⁰ See, *inter alia*, *Bisailon* at para. 83

²¹ This would likely have to be explicitly set out in the collective agreement.

²² S.O. 1995, c. 1, Sch. A

Conclusion: A clear trend for pension class actions

Pension class actions will become more prevalent in the coming years due to demographic trends and the favourable jurisprudential environment. If, notwithstanding conflicts of interest issues, class action certification is generally straightforward in pension cases, this substantially changes the incentive structure surrounding the administration of pensions. While it is somewhat difficult to predict how these changes will manifest, we can already predict some likely changes to the incentives the various parties are subject to.

First, we should expect that more members of the plaintiffs' class actions bar will develop expertise in this area. Given Canada's changing demographics and the favourable law in this area, the proliferation of pension class actions is a certainty. As plaintiff firms without expertise in this area will find themselves left behind in a changing legal marketplace, most of the class actions bar will take steps to master this area of law.

Second, plan administrators have sharply increased incentives to properly manage funds. Given the entrepreneurial nature of the class actions bar, the potential for high damages and costs, the overwhelming likelihood of certification and the generally sympathetic facts that pension class actions present, plan administration should assume that any failure on their part will lead to litigation. As any such litigation will prove costly to defend and damages will negate any benefit of "aggressive" plan management, plan administrators should ensure that they are engaging in, and are constantly reviewing, best practices.

Finally, we perhaps can expect that pension beneficiaries may take a more active role, at least informally, in the oversight of their pensions. Individual pension beneficiaries, armed with

essentially no-cost representation, should be thorough in reviewing their treatment by pension plans. Being pro-active can limit the damage suffered by retirees. Further, well informed representative plaintiffs will help ensure that any class action is well managed and argued. This trend can be seen in *Lieberman*, where the retirees played an active role in the genesis of the suit.

We can expect increased pension litigation since class actions will be a powerful tool for retirees to safeguard their benefits. Indeed the mere existence of class actions may put pressure on all involved to ensure that the management of pensions is fair. The purpose of class action legislation has been described as judicial economy, access to justice, and behaviour modification. Pension class actions are well situated to achieve these goals.