Have Pension Class Actions Altered Traditional Trust Cost Rules? A Recent Trend.

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I. INTRODUCTION

Three recent decisions from Ontario, Nova Scotia, and British Columbia may change the way in which pension litigation is funded in Canada. Traditionally, in such cases, it was not uncommon for a plaintiff to be indemnified out of the pension fund thereby shielding unsuccessful plaintiffs from adverse costs awards. However, these recent decisions indicate that the courts may be taking a different approach to funding issues than in the past. As one of these cases will shortly be heard by the Supreme Court of Canada, we will soon see if this trend becomes the norm.

This trend may be significant for jurisdictions that immunize plaintiffs from costs in class actions. Class actions legislation that immunizes plaintiffs from costs can be found in provinces such as British Columbia,[1] Saskatchewan,[2] Newfoundland,[3] and Manitoba.[4] This legislative immunization has made these jurisdictions, at least from a cost perspective, more attractive to plaintiffs who are commencing class action proceedings. As a result of these recent decisions, jurisdictions with no-cost class action legislative regimes may soon see an increase in pension class action litigation.

This article focuses on three pension cases, namely: (1) *Kerry (Canada) Inc. v. DCA Employees Pension Committee*;[5] (2) *Smith v. Michelin North America (Canada) Inc.*,[6] and (3) *Patrick v. Telus Communications Inc*.[7] In these decisions, the courts have shown an increased willingness to consider whether the courts in shielding unsuccessful plaintiffs from adverse costs awards are taking the correct approach? In these three decisions, the courts have re-examined and refined the categories

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[1] *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 37.

[2] *Class Actions Act*, S.S. 2001, c. C-12.01, s. 40.

[3] *Class Actions Act*, S.N. 2001, c. C-18.1, s. 37.

[4] *Class Proceedings Act*, S.M. 2002, c. 14, s. 37.

[5] 2007 ONCA 416, 282 D.L.R. (4th) 227, leave to appeal to S.C.C. granted [2007] S.C.C.A. No 408 [*Kerry*].

[6] [2008] N.S.J. No. 85, 293 D.L.R. (4th) 613 (S.C.) [*Smith*].

[7] [2008] B.C.J. No. 1069 (C.A.) [*Patrick*].

in which plaintiffs may be indemnified from of the pension fund. If the Supreme Court of Canada upholds the costs award in *Kerry* and continues to develop the law in this direction, there are likely to be fewer cases in which the courts find it proper for legal fees to be paid out of the pension fund. As such, jurisdictions in which there is legislation that immunize plaintiffs from costs in class actions may increasingly become more attractive fora for claimants considering pension litigation.

II. PENSION CLASS ACTIONS IN CANADA

The availability of class actions has significantly impacted pension litigation in Canada as class actions "have become the norm with respect to large pension claims in recent years."[8] This rise in pension class actions can be attributed to many factors.[9] The introduction of class actions legislation has coincided with an increase in pension regulation and the greater attention that has been paid to the administration of pension plans generally.[10]

The increase in pension class actions can also be attributed to the heightened awareness of plan members to the availability of plan litigation.[11] As Mr. Justice Warren Winkler stated:

> The bottom line is that trustees, plan administrators, advisors, professionals, among others, should assume that if they do not fulfill their fiduciary and other duties or do not do their jobs properly, they *will* be sued. The days of being insulated by cost and psychological barriers that previously affected plaintiffs are gone.[12]

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[8] Ward K. Branch & Craig A.B. Ferris, "Pension Class Actions" (Paper presented at the Canadian Pension Benefits Institute, Western Regional Conference, 9-10 October 2003) online: Lawson Lundell, <www.lawsonlundell.com/resources/PensionClassActions.pdf> at 7.

[9] Craig A. B. Ferris, "Canada: Pension and Employee Benefit Class Actions – The Defence Perspective" *Mondaq* (22 May 2008), online: Mondaq, Labour and Employment http://www.mondaq.com/article.asp?articleid=60424 .

[10] *Ibid.*

[11] Jeff Galway, "Pensions class actions a growth area," *The Law Times*, online: Law Times News http://www.lawtimesnews.com/index.php?option=com_content&task=view&id=733 .

[12] Justice Warren Winkler, "Pensions, Benefits and the Canadian Class Action Experience" (2003) Employee Benefits Issues at 46.

There is also a strong public policy reason for the use of class actions in pension proceedings as class actions allow for greater access to justice for plan members. As the Supreme Court of Canada stated in *Western Canadian Shopping Centers Inc. v. Dutton*:[13]

> [B]y allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left un-remedied.[14]

This public policy objective of access to justice is also reflected in the way in which costs in pension litigation have been awarded.

III. COST AWARDS IN PENSION LITIGATION

Plaintiffs in pension litigation have often been shielded from adverse cost awards as, under certain circumstances, costs are payable out of the pension fund. Over 100 years ago, Mr. Justice Kekewich in *Re Buckton*[15] identified three categories of trust fund litigation and determined whether costs should be paid out of the fund for each. The first category was where trustees applied to the court for either guidance on the trust instrument or when a question regarding the proper management of the fund had arisen through the course of administering the trust. As any costs incurred in such instances were done so for the benefit of the estate, the Court held that they should be paid out of the fund. The second category was when an application was made by someone other than the trustees after "some difficulty or construction or administration" of the trust had arisen.[16] Again, such applications were necessary for the administration of the trust and were to the benefit of all of the members of the trust and, as in the first category, any costs incurred were to be paid out of the fund. The final category was when a beneficiary made a claim that was adverse to other beneficiaries. The Court held that actions in this category were to be treated according to the general rule in litigation of costs following the event.[17]

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[13] 2001 SCC 46 [*Western*].

[14] *Ibid.* at para. 20.

[15] [1907] 2 Ch. 406 (Ch. Div.).

[16] *Ibid.* at 414-415.

[17] *Ibid.*

In the recent pension class action decision in *Sutherland v. Hudson's Bay Co. Ltd.*,[18] Mr. Justice Cullity refined the *Re Buckton* categories of proceedings in which it is appropriate for costs to be paid out of a fund. The first category in *Sutherland* is where the rights of the unsuccessful beneficiaries "are not clearly and unambiguously dealt with in the terms of the trust instrument." [19] The second category is when the claim of the unsuccessful party may be considered to have been "advanced for the benefit of all of the persons beneficially interested in the trust fund."[20] Accordingly, if a proceeding did not fit within one of the above categories, the usual cost rules would apply. When determining costs, courts would have to decide whether the action was truly brought for the interpretation of the plan and for the benefit of all members or whether it was adversarial in nature. The determinative factor in deciding whether the litigation was adversarial in nature was whether, had the plaintiff succeeded, other members of the plan would be negatively affected.[21]

IV. RECENT JURISPRUDENCE INDICATING A POSSIBLE SHIFT

Three recent decisions from Ontario, Nova Scotia, and British Columbia indicate a willingness on the part of the courts to reconsider when costs in pension litigation will be paid out of the fund. The way the courts in these decisions have interpreted the traditional categories established in *Re Buckton* and *Sutherland* seem to indicate a shift toward limiting the situations in which it will be appropriate to order costs to be paid out of the pension fund.

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[18] [2006] O.J. No. 2009 (S.C.J.) [*Sutherland*].

[19] *Ibid.* at para. 11.

[20] *Ibid.*

[21] See, for example, *Turner v. Andrews*, 2001 BCCA 76 at para. 17 [*Turner*]; and *Huang v. Telus Corp. Pension Plan (Trustees of)*, 2005 ABQB 40 at para. 151.

(a) *Kerry (Canada) Inc. v. DCA Employees Pension Committee*

This was a claim by the DCA Employees Pension Committee (the "Committee") against Kerry (Canada) Inc. ("Kerry") alleging that Kerry had been improperly taking contribution holidays and paying expenses out of the fund. Kerry successfully defended the claim and was awarded costs by the Ontario Court of Appeal on a partial indemnity basis. Although the Court, pursuant to s. 131(1) of the Ontario *Courts of Justice Act*,[22] could have ordered the costs to be paid out of the fund, it held that the costs were properly to be paid by the Committee. In reaching this decision, the Court stressed that there was "no special rule or presumption applicable to pension cases that entitles plan members to have pension litigation financed by the pension fund."[23]

In its reasons, the Court cited both *Re Buckton* and *Sutherland* and expressed a preference for the cost award categories set out in the latter, which the Court referred to as the "pension trust approach."[24] With this approach, the two different categories of when costs will be granted from the trust fund are (1) when proceedings are brought to ensure the proper administration of the fund; and (2) when proceedings are brought for the benefit of all of the beneficiaries. Under this approach, if the proceedings do not fit within one of these two categories, the normal costs rules will then apply with costs following the event.

The two categories of when costs will be paid out of the fund in the pension trust approach are based on different public policy reasons. The first reflects the public interest in ensuring that trust funds are properly administered. Paying costs out of the fund in such situations ensures that parties have access to the courts to settle administrative problems without the risk of cost consequences. The policy behind the second category is that in situations where the proceedings benefit all the beneficiaries, it is fair that all of the beneficiaries bear the costs of the proceedings by paying the costs out of the fund.

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[22] R.S.O. 1990, c. C-43 which reads as follows:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid.

[23] *Supra* note 5 at para. 5.

[24] *Ibid.* at para. 8.

Though the Court indicated a preference for the pension trust approach, it echoed the rule in *Re Buckton* by stating that in determining whether a proceeding falls into either of the pension trust categories, it is critical to determine if the action is adversarial in nature or not. In adversarial proceedings beneficiaries make claims adverse to other beneficiaries. The Court stated that awarding costs out of the fund in such situations would be "inherently unfair" as it would diminish the fund and thereby limit the money available for the benefit of all the plan members.[25] The Court held that though the proceedings could be said to be aimed, generally, at ensuring the proper administration of the fund and relieving any ambiguity that there may have been with the pension and trust documents, this was not enough for the action to fall under the first category of the pension trusts approach. Rather, in order to warrant a costs award payable out of the fund under the first category, the claim had to be "directed at the interpretation of documents to ascertain beneficiaries' rights."[26]

In *Kerry*, the Court found that the litigation was not focused on determining the content of beneficiaries' rights; instead, it was to determine the correctness of the actions of the fund managers. The Court took into account the fact that certain members of the Committee had been senior management and were therefore involved in making the very decisions being challenged in the action.[27] Had they been concerned about the legality of those administrative decisions they could have easily turned to the courts for direction when the actions were being contemplated in the first place.[28] Furthermore, the Court held that the aim of the proceeding was to force the employer to make payments into the fund, which would only benefit a limited group of the beneficiaries. Hence, the claim was essentially adversarial in nature and did not fit within either of the two pension trust categories.

In reaching its decision, the Ontario Court of Appeal took a step toward limiting the situations in which payment of costs out of a fund are available by narrowing the interpretation of what constitutes a proceeding that is truly aimed at the due administration of a trust and one that is adversarial in nature.

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[25] *Ibid.* at para. 20.

[26] *Ibid.* at para. 16.

[27] *Ibid.* at para. 17.

[28] *Ibid.* at para. 17.

(b) *Smith v. Michelin North America (Canada) Inc.*

In this case, Smith, the applicant, was a representative plaintiff for all members, member spouses, and beneficiaries having an interest in the Michelin Pension Plan.[29] Smith had claimed that the defendant Michelin North America (Canada) Inc ("Michelin") was not entitled to take contribution holidays out of the fund. Michelin was entirely successful in defending Smith's claim and the Court awarded Michelin costs, payable half by the plaintiff, and half out of the fund.[30]

In reaching its decision, the Court expressed its agreement with the Ontario Court of Appeal's assessment in *Kerry* that the crucial issue in determining how costs should be awarded in pension proceedings is whether the litigation was "adversarial or a matter of administering the pension fund."[31] Smith argued the proceeding was to determine whether the defendant was entitled to take contribution holidays and that this was an issue which involved the administration or interpretation of the pension plan.[32] Michelin, on the other hand, claimed the matter was of a contractual nature in that Smith had alleged Michelin had failed to contribute to the plan, as it was contractually obligated to do. Michelin claimed that the applicant had also alleged that Michelin had breached its fiduciary obligations and had in effect misappropriated the trust funds by taking contribution holidays.[33] In arguing that the nature of the procedure was in fact adversarial, Michelin claimed that not only was there a huge sum of money at stake, but that if costs were to be paid out of the fund such an order would essentially mean that Michelin would have to pay the costs as it was the only party contributing to the fund.[34]

In determining whether the litigation was adversarial in nature, the Court referred to *White v. Halifax (Regional Municipality) Pension Committee.*[35] In that case, the Nova Scotia Court of Appeal held that when deciding whether costs awards should be paid from the pension fund the circumstances

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[29] *Supra* note 6 at para. 8.

[30] *Ibid.* at para. 23.

[31] *Ibid.* at para. 22.

[32] *Ibid.* at para. 23.

[33] *Ibid.*

[34] *Ibid.*

[35] [2007] N.S.J. No. 61 (C.A.) [*White*].

of each case had to be considered and the "relevant considerations weighed and balanced."[36] In so doing, the Court in *Smith* concluded that the litigation was adversarial in nature and in the process made an important assertion about what constituted an adversarial proceeding. The Court stated that adversarial proceedings are not limited to those in which beneficiaries have neither competing claims nor where the success of some beneficiaries will come at the expense of other beneficiaries. The Court went on to conclude that this "was no friendly court application" (quoting from *White*). Michelin was not involved in this proceeding as a disinterested participant like a trustee, seeking the court's interpretation of the plan or how it should be administered."[37] Furthermore, the Court held that a successful result would have been extremely 'adverse' to Michelin."[38] A proceeding does not need to be adverse *as against other beneficiaries* in order to be considered adversarial for the purpose of determining whether costs should be awarded from the fund. The Court seemed to express that this was not the type of situation contemplated by *Re Buckton* or *Sutherland.* In reaching its conclusion, the Court expanded the meaning of "adversarial" and, arguably, has limited the scope of when costs may be held to be payable out of the fund.

(c) *Patrick v. Telus Communications Inc.*

Patrick is a 2008 costs decision by the British Columbia Court of Appeal reversing an order by the lower court, which held that even though the applicant's case was dismissed, the applicant was still entitled to its costs payable out of the fund. The trial judge had classified the proceeding as one based on issues "concerning the appropriate interpretation and administration of the consent provisions under the Plan" and therefore concluded that the case fell under the second category set out in *Re Buckton*.[39] In reversing this decision, the Court of Appeal held that the case was in fact one in which certain beneficiaries had brought a claim to establish their rights and not to aid in the administration of the plan nor to benefit all of its beneficiaries. As such, the case did not fall within the second category set out *Re Buckton* and the Court set aside the order for the applicants' costs and held that the respondent was entitled to costs according to the normal rule that costs follow the event.

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[36] *Ibid* at para 101, as cited in *Smith*, *supra* note 6 at para 32.

[37] *Supra* note 6 at para 32.

[38] *Ibid.*

[39] *Patrick v. Telus Communications Inc.*, [2006] B.C.J. No. 1967 (S.C.) [*Patrick* (2006)].

In reaching its decision, the Court made an important conclusion with respect to what constitutes an adversarial proceeding. The Court of Appeal held that:

> [W]hether a claim by a beneficiary is adverse to other beneficiaries is not necessarily determinative of whether the application falls under the third category; rather, the definitive criterion is whether the application is brought for the purpose of establishing rights of the beneficiary that should be determined in the trial of an action commenced by writ.[40] [Emphasis added]

In *Re Buckton,* the parties had used an originating summons or originating notice (which in British Columbia has now been replaced by the originating application, found in Rule 10(1) (b) and (d) of the *Rules of Court*[41]). In *Patrick*, the applicants could have used an originating application to seek the advice of the court regarding their question of construction; however, the applicants "coupled their question of construction with an alternative claim for damages for breach of fiduciary duty and proceeded to a conventional trial in an action commenced by writ."[42] The Court of Appeal found that this took them outside the *Re Buckton* principles because the second category established in *Re Buckton* only applied to applications brought in chambers. The Court asserted that the trial judge failed to appreciate the underlying rationale of the first and second *Re Buckton* categories, "which is that the chambers procedure is a relatively expeditious and inexpensive procedure for resolving questions of construction and administration that must necessarily be resolved in the interests of all concerned for the proper administration of the estate."[43] In *Patrick*, the Court concluded that the claim was made by the beneficiaries not to determine a question of construction but to establish their rights in an action that necessitated a fourteen day trial to resolve.[44] Hence, it did not fall under the second *Re Buckton* category and the appellants' costs should not have been awarded out of the fund

In reaching its decision in this case, the Court of Appeal appears to have limited the situations in which the *Re Buckton* principles will apply and has made an important comment about the appropriateness of awarding costs to be paid from the fund. It seems that the Court is limiting

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[40] *Supra* note 7 at para. 32.

[41] B.C. Reg. 221/1990.

[42] *Supra* note 7 at para. 22.

[43] *Ibid.* at para. 24.

[44] *Ibid.* at para. 39.

applicability of the first two *Re Buckton* categories to prevent applicants from misusing the advantage they afford. Only when the applicant is truly bringing the action for the benefit of all involved or for the proper administration of the trust should they be free of cost consequences.

(d) *Kerry* Appealed to the Supreme Court of Canada

The DCA Employees Pension Committee applied for and was granted leave to appeal before the Supreme Court of Canada. The appeal will be heard on November 18, 2008. The Committee's submission is that the Court of Appeal erred in finding that their action was adversarial in nature and not for the benefit of all of the plan members. The Committee claims that not only was the action brought for the benefit of the entire plan membership, but that it is also for the benefit of the entire Canadian pension community.[45] As such, there "can be no better illustration of a case where employees should have their litigation funded from their pension trust."[46]

Kerry responded to this argument by stating that that the Court of Appeal correctly recognized the categories in which it is appropriate to order costs out of the fund and simply found that the specific circumstances of this case did not fall within those categories. Kerry submits that the action was "manifestly adversarial" in nature as its focus was not on the trust serving its function but rather on forcing the employer to make payments into the fund to the benefit of a limited group of beneficiaries.[47] As such, Kerry submits that the Court of Appeal was correct in exercising its discretion to award costs in the manner in which it did.[48]

The Committee also argues that there is a strong public policy reason for the Supreme Court of Canada to reverse the Court of Appeal's cost award. Throughout pension litigation an underlying theme is the meaningful access to justice for employees. The Committee contends that if plaintiffs cannot rely on their costs being paid out of the fund in circumstances such as in this case, the effect would be that:

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[45] *Elaine Nolan et. al. v. Kerry (Canada) Inc. et. al.*, scheduled for hearing before the Supreme Court of Canada November 18, 2008 (Factum of the Appellant at para. 111).

[46] *Ibid.*

[47] *Elaine Nolan et. al. v. Kerry (Canada) Inc. et. al.*, scheduled for hearing before the Supreme Court of Canada November 18, 2008 (Factum of the Respondent at para. 99).

[48] *Ibid.* at para. 93.

> employees, properly counselled, will question why they should ever prosecute a novel or meritorious pension case since they would face steep cost awards against them personally, even where they receive no personal benefit and the litigation benefits the entire Canadian pension system.[49]

The Committee argues that this will have a "chilling effect" on employees thereby "diluting access to justice and making it unlikely for employees to secure effective legal counsel."[50] To prevent this limitation of access to justice, the Committee is requesting the Supreme Court of Canada to restore the previous test for when costs are to be awarded from the fund based on the rule in *Re Buckton.*

Kerry contends that the Court of Appeal has recognized in its decision access to justice public policy reasons in holding that costs are to be paid out of the fund when the action is brought for the purpose of ensuring or compelling due administration of the trust and when proceedings are to the benefit of all beneficiaries.[51] Kerry argues that if the proceeding does not fall within one of these two categories, "access to justice considerations do not justify compelling the Fund, and indirectly, other members of the Plan and Kerry, to bear a litigation risk undertaken by the Committee."[52] Furthermore, says Kerry, if the Supreme Court of Canada were to revert back to the broad interpretation of the *Re Buckton* categories it would have the effect of removing a "moral hazard to speculative litigation" and place the burden of such speculation on all plan members whether they consented to the action or not.[53] As such, "there are other vehicles, such as class actions and contingency fees, that are more suitable to provide the appellants with access to justice."[54]

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[49] *Supra* note 45 at para. 3.

[50] *Supra* note 45 at para. 112.

[51] *Supra* note 47 at para. 91.

[52] *Ibid.* at para 98.

[53] *Ibid.*

[54] *Ibid.*

V. CONCLUSION

Standing out in the decisions in *Kerry*, *Smith* and *Patrick* is an apparent desire by the Courts to address what was really decided in *Re Buckton* and *Sutherland*. The Courts seem to be saying that costs are being awarded out of pension funds in situations that were not contemplated in *Re Buckton* and *Sutherland* and have reacted by refining the traditional categories in which costs are properly awarded from the fund. Should the Supreme Court of Canada uphold the Ontario Court of Appeal's cost order in *Kerry* the effect will be to limit the scope and applicability of the categories in which costs will be awarded out of the fund.

The *Kerry* decision purports to affect what types of proceedings will be considered adversarial. The fact that a claim involves interpretation of the plan is not enough to place it under the first *Sutherland* category. In *Smith*, the Court determined that a proceeding does not have to be adverse as against other beneficiaries to be considered adversarial for the purpose of making a costs award. The Court in *Patrick* confirmed the assertion made in *Smith* and found that costs should only be awarded out of the fund under the *Re Buckton* categories where the proceedings are commenced by originating application.

One of the primary public policy objectives behind cost immunity in class actions for plaintiffs is enhanced access to justice; however, if the courts in cost-immunizing jurisdictions are faced with a growing number of pension class actions applications due to the attractiveness of immunity from costs consequences, it begs the question of whether cost immunity is in fact desirable. Cost immunity for plaintiffs may open the door for claims to be brought under class action regimes as a means of escaping costs awards that the courts have deemed to be necessary in normal litigation. In other words, these jurisdictions may see an increase in pension litigation which may have weak merits because of the absence of cost consequences. It is unlikely that legislatures had this use of class action proceedings in mind when they drafted the cost immunity provisions.

The apparent shift in attitude that these pensions decisions represent is yet another reason for pension actions to be commenced by means of class actions, particularly in those provinces that allow plaintiffs to advance their claim without the risk of costs awards against them. This is significant given the fact that the British Columbia Supreme Court has held that costs provisions in class action legislation can be a juridical advantage to plaintiffs when considering issues of *forum non*

conveniens. In *Lieberman and Morris v. Business Development Bank of Canada*,[55] the Court found that British Columbia's "no-cost" regime "avails the plaintiffs of a juridical advantage in British Columbia that is unavailable to them in Quebec [where there is no immunity from costs under the class actions regime]."[56] Hence, plaintiffs who find themselves with more than one possible jurisdiction in which to advance their claim may have a strong argument for commencing the action in a province with a regime that immunizes them from costs.

[55] 2006 BCSC 242.

[56] *Ibid.* at para. 74.

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