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PENSION DISPUTE ARBITRATION PREVAILS OVER CLASS PROCEEDINGS

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On May 7th, 2007, the British Columbia Court of Appeal overturned the certification of a major pension class proceeding in *Ruddell v. BC Rail Ltd.,* 2007 BCCA 269. In doing so, the court ruled that BC Rail had properly invoked its right to have the dispute determined by arbitration. The court found that, in the circumstances of this case, arbitration took precedence over the class proceeding, which had to be stayed.

Ruddell represents the first time that the British Columbia courts have had to grapple in a pension dispute with the apparent statutory conflict between class proceedings legislation, which requires that a proceeding that meets certain prerequisites be certified as a class action, and arbitration legislation, which requires that a court proceeding be stayed if the arbitration procedure has been validly invoked. In recent years, the jurisprudence emanating from Canadian courts in other factual contexts had shown a clear preference for class proceedings over private arbitration. The courts had previously relied upon the procedural advantages inherent in a class proceeding to provide the policy reasons for preferring class proceedings to arbitration. For example, in British Columbia, the courts resolved the conflicting statutory mandates by finding that wherever a class proceeding was a "preferable" method to resolve the dispute, the competing arbitration agreement was "inoperative".

Ruddell provides a useful limit to this line of jurisprudence. In finding that arbitration prevailed over class proceedings, the British Columbia Court of Appeal has effectively ruled that a wide range of pension disputes in British Columbia can be put it in hands of a private arbitrator, rather than be subject to class proceedings, if one of the parties to the disputes wishes to do so.

Section 62 of the *Pension Benefits Standards Act ("PBSA")* requires a British Columbia pension plan to contain a provision for arbitration of certain categories of disputes. These categories include: the taking of a contribution holiday, the allocation of surplus assets upon the winding up of a plan and the payment or transfer of any surplus assets. The argument in *Ruddell* was that section 62 of the *PBSA* evinced the intention of the British Columbia Legislature to prefer arbitration to class proceedings for those specified categories of disputes. It followed that the statutory conflict between class proceeding legislation and commercial arbitration legislation should be determined differently where a legislature has evinced an intention to prefer one mode of dispute resolution to the other. Until *Ruddell,* the British Columbia courts had not had the opportunity to consider this argument.

Mr. Justice Holmes of the British Columbia Supreme Court had previously certified *Ruddell* as a class proceeding. He ruled that section 62 of the *PBSA* did not answer the statutory conflict between class proceeding and arbitration legislation. He held that the case met all of the prerequisites for certification and that the arbitration agreement was therefore "inoperative".

One of the key tests for certification is whether a class proceeding is the "preferable procedure". Mr. Justice Holmes weighed the circumstances of the case and determined based on very general policy grounds that a class proceeding was the preferable procedure. Given the general and vague policy grounds upon which he relied, the decision raised concerns as to whether arbitration could ever be considered "preferable" when compared to class proceedings.

The British Columbia Court of Appeal disagreed with Mr. Justice Holmes' analysis. The court overturned certification and stayed the action in favour of arbitration.

Madam Justice Saunders, writing for the court, found that Mr. Justice Holmes had erred by failing to recognize the force of the Legislature's stated preference for arbitration evidenced by Section 62 of the *PBSA* and the broadly binding effect of the arbitration award. The court distinguished the leading British Columbia case *Mackinnon v. Money Mart*, which favoured class proceedings, on the basis that it dealt with a standard form commercial contract. She found that the *Mackinnon* analysis did not apply because the preference for arbitration was found in a statute enacted by the British Columbia Legislature. She concluded by saying that the preference for class proceedings "falls away" when one considers both "the specific statutory instruction that disputes as to surplus and contribution holidays in pension plans may be referred to arbitration and that, once referral is made, the dispute must be arbitrated" and the "potentially broad application of the arbitration decision."

The court's comments regarding the potential procedural difficulties arising from multiple arbitrations merit mention. The court rejected these difficulties as a reason for preferring class proceedings in the context of this case. In doing so, they relied upon the recent Supreme Court of Canada decision in *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666. The court wrote that *Bisaillon* was instructive "in that it adopts a position, tolerant of some procedural difficulties, in favour of arbitration as required by the legislative scheme."

In the end, Madam Justice Saunders resolved the conflict between class proceedings and arbitration legislation by accepting the Legislature's specific choice of arbitration for certain disputes as evidencing its intention to prefer arbitration over class proceedings in those circumstances.

Ruddell may have wide implications for pension and benefit litigation where arbitration of the dispute is permitted or required by legislation. In those circumstances, the appeal decision in *Ruddell*

indicates a preference for the public policy of alternate dispute resolution rather than the class proceeding framework.

The Plaintiff in *Ruddell* has indicated an intention to seek leave to appeal to the Supreme Court of Canada.

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