Pension Plans Under Attack:
Protecting Your Fund From Class Action Litigation

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I. INTRODUCTION

Litigation is a fact of life for pension and benefit plan administrators and sponsors. The scope, frequency and complexity of litigation in this area continue to increase each year. After not hearing a pension case for approximately a decade, the Supreme Court of Canada has decided three pension cases in the last eighteen months.[1]

The purpose of this paper is to discuss and update the current trends in pension and benefits litigation as they relate to class actions. In class actions, pension professionals start from a disadvantage. For example, Mr. Justice Winkler of the Ontario Superior Court of Justice, who has dealt with many class action cases, writing extra-judicially, made the following observation:

> … that pension and benefit class actions are the way of the future should serve as a warning to these individuals that the previous barriers surrounding this type of litigation no longer exist. The bottom line is that trustees, plan administrators, advisors, professional, 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.[2]

The jurisprudence to date would indicate this observation to be true. However, over the past year, the courts have continued to chip away at the generalization that all pension cases are amendable to class proceedings. As will be discussed further below, the sentiment espoused by Mr. Justice Winkler is now being met with some judicial resistance.

II. WHAT ARE THE FACTORS DRIVING A RISING NUMBER OF CLASS ACTIONS IN THE PENSION CONTEXT

The number and creativity of pension class actions in Canada continues to expand. There is no sign of this trend fading. There are a number of factors which are driving the number of class actions in the pension context in Canada.

First, the entry of traditional class action counsel into the field has driven an increase in the number of claims. As class action legislation has expanded across Canada, more and more traditional class action counsel, who previously litigated issues such as product liability, have become interested in pension class actions. The sheer size of the monetary claims that can be made in pension class actions make them an attractive target for traditional class action counsel.

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[1] *Buschau v. Rogers Cable Systems*, 2006 SCC 28, [2006] 1 S.C.R. 973 [Buscheau]; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666 [Bisaillon]; *Bourdon v. Stelco*, 2005 SCC 64, [2005] 3 S.C.R. 279.

[2] Winkler, Hon. Warren, "Pensions, Benefits and the Canadian Class Action Experience", *Employee Benefits Issues* (2003) 43.

The second factor which makes pension class actions attractive is the procedural advantages found in class proceeding legislation. Counsel will pick jurisdictions to litigate matters based upon certain legislative advantages. The first consideration when picking a jurisdiction is the cost regime. In most jurisdictions, there is a form of a "no cost" rule. As will be discussed later in this paper, this is an attractive benefit for class action counsel and one which serves to increase the number of claims being made. Based on the "no-cost" rule, class action counsel are unlikely to be risking a cost award even if unsuccessful and in essence are only risking the investment of their personal time in a case.

In addition, the willingness of the courts in certain jurisdictions to create national classes has increased the attractiveness of class proceedings. The larger the class, generally, the larger the potential award. Class action counsel will normally seek jurisdictions where the Court will likely certify the largest possible class so the greatest number of individual claims can be aggregated.

Class proceedings are also more attractive due to the availability of secure funding arrangements through certification. Previously, counsel brought proceedings on behalf of a group of pensioners or plan members by representative proceedings. This type of proceeding brought with it the risks of costs being awarded against counsel personally, the uncertainty of recovering counsel fees from the trust fund, as well as the uncertainty of not having a court approved retainer arrangement. All these factors made representative actions riskier than class proceedings. Class proceeding legislation takes away these risks and formalizes counsel's fee arrangements. Class counsel now has certainty that they will recover their fees if a claim is certified and a recovery is made.

The investment "cycle" of pension plans is also a factor fuelling class action litigation. The fluctuation of pension plan investments requires plan administrators and/or Trustees to make decisions relating to solvency and funding. These types of decisions have large financial consequences and are considered by class action counsel to be fertile ground for court challenges.

Finally, the growth of the number of retirees in Canada is pushing pension class proceedings. The heightened interest in pension issues by retirees has lead to increased financial reporting concerning pension plans and an increased awareness among the public concerning pension governance.

The combination of (1) legislation which makes litigation relatively risk free, (2) more experienced and aggressive class action counsel, (3) pension investment cycles and (4) a larger and more knowledgeable group of retirees, has created the conditions that put pension plans "under attack".

III. KEY ELEMENTS OF THE CLASS PROCEEDING AND WHAT MAKES IT A SUITABLE VEHICLE FOR PENSION ACTIONS

A. How Class Actions Work

By their nature, disputes arising in pension and benefits appear well suited for class actions. Where a single member of a plan may not think it economic to bring a claim relating to the terms of that

plan, a class action allows one plaintiff and one class action lawyer to aggregate all the members' claims into one proceeding. For example, an individual with a $500 claim for wrongfully failing to pay a benefit would not normally pay a lawyer on an hourly basis to advance the claim. Even a contingency fee arrangement would not be an option because the potential recovery would be too low. However, if there were 1000 people each with that same $500 claim for a benefit, the claim would be worth $500,000 in the aggregate. Class action legislation allows the claimant's fee to be calculated as a percentage of the aggregate amount of the class's claim. So, while the individual with a $500 claim would still not be interested in paying a lawyer an hourly fee to take the claim, the lawyer may now be prepared to take the case on a contingency fee basis because the fee would be calculated as a percentage of $500,000 (the aggregate amount) as opposed to a percentage of $500 (the amount of the direct claim). Given the size of the monetary issues arising from pension litigation, it is no wonder lawyers are willing to take them on as a class action.

Class actions do not make claims more meritorious; they are simply a procedural tool that removes a practical impediment to bringing claims – lawyer's fees. The class action structure encourages lawyers to bring the claim even without being paid an hourly fee by a client. For lawyers, a class action holds out the promise that he or she will be paid handsomely at the end of the day by allowing him or her to retain a percentage of the recovery of the entire class.

B. Expansion of Class Actions in Canada

1. Availability of Class Actions

Class actions were first made available in Quebec in 1978.[3] Since then, Ontario,[4] British Columbia,[5] Saskatchewan,[6] Newfoundland,[7] Manitoba,[8] Alberta,[9] and the Federal Court of Canada[10] have adopted legislation permitting class actions. In addition, even in jurisdictions without class action legislation, in *Western Canadian Shopping Centres v. Dutton*[11] the Supreme Court of Canada has essentially "read in" the basic elements of class action legislation into traditional representative proceeding rules in place in these jurisdictions. Accordingly, class actions are now available in every jurisdiction in Canada.

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[3] Quebec *Code of Civil Procedure*, R.S.Q. c. C-25, Book IX.

[4] *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

[5] *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

[6] *Class Actions Act*, S.S. 2001, c.C. -12.01.

[7] *Class Actions Act*, S.N.L. 2001, c. C-18.1.

[8] *Class Proceedings Act*, C.C.S.M. c. C130.

[9] *Class Proceedings Act*, S.A. 2003, c. C-16.5.

[10] *Federal Court Rules*, 1998, SOR/98-106

[11] 2001 SCC 46., [2001] 2 S.C.R. 534 (for further proceedings please see Buscheau, supra note 1)

2. Advantage of Class Actions

Class action legislation does not create new substantive legal rights. Rather, it creates a procedural regime designed to overcome many of the historical barriers that were perceived to prevent individuals from pursuing meritorious claims. While each province's class action legislation differs in certain respects, they all have certain common features.

First, if a matter is certified as a class proceeding, plaintiffs in most jurisdictions are virtually immune from costs, even if they are ultimately unsuccessful. This is to be contrasted with the rule in an ordinary action where costs follow the event. Indeed, in most jurisdictions (including British Columbia) plaintiffs are also virtually immune from adverse costs ruling in their certification application, even if the court rules that a class action is not appropriate.

Pension litigation has been historically subject to different rules regarding costs where the interpretation of the trust documents has been at issue. This topic will be further discussed in Section IX.

Second, public funding is available for class actions in some jurisdictions. For example, plaintiffs in Ontario may receive funding from the Class Proceedings Fund of the Ontario Law Foundation for disbursements and indemnity to protect them against any negative costs award. Public funding of class actions is not available in British Columbia.

In addition, most jurisdictions allow limitation periods to "toll" where a claim is certified. This means that the whole the class will obtain the benefit of the filing date for the class proceeding and the limitation period will no longer run against the class. This can be a very important advantage because it aggregates into the class, claims that would otherwise be barred by the expiry of a limitation period.

Finally, class action legislation sets out a procedure whereby the court can approve fee arrangements that are based on the aggregate recovery by class. A clearly defined statutory process that allows lawyers to be well compensated for pursuing a claim on behalf of a class gives them a greater incentive to do so.

3. Class Proceeding Not the Only Way to Pursue Pension-Related Claims

Before class action legislation was introduced, every Canadian jurisdiction had, and continues to have, rules relating to "representative proceedings". While these rules differ from province to province, generally they allow individuals to bring claims in a representative capacity on behalf of an identified class. An individual applies to be appointed as such a representative and then is entitled to pursue the identified claim on behalf of the representative group. This procedure worked well, and many pension and benefit lawsuits were successfully brought as "representative actions". Indeed, many of the most important pension decisions in Canada were decided by way of representative action. For example, *Buschau,*[12] a matter that has been extensively litigated, was originally structured as a representative proceeding, not a class action.

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[12] Buscheau supra note 1

A "representative action" avoids the complexities associated with the class certification order (although a defendant could still challenge their right to proceed in a representative manner). However, none of the other advantages available under class action legislation are available in representative cases. For example, there is no statutory mechanism allowing counsel to be paid from the recovery of the class as a whole, nor is there any statutory immunity from costs.

On September 5, 2004 the British Columbia Court of Appeal issued a decision relating to costs in a representative action in pension proceedings. In *Sneddon v. B.C. Hydro*,[13] the Court of Appeal ruled that the appellant plaintiffs were responsible for the Province's costs, both at trial and on appeal. Importantly, notwithstanding that the claims related to a trust, the court refused to order the plaintiffs' costs be paid out of the trust fund.

Sneddon was thought to ring the death knell for pension representative actions where the proceeding could otherwise be brought as a class proceeding. However, *Potter v. Bank of Canada*[14] was seen to revitalize representative proceedings. The chambers judge in *Potter* reviewed a provision contained in the Ontario *Class Proceedings Act*[15] which provides that the legislation does not apply to an action which "may" be brought by way of representative proceeding. Most class proceedings legislation in Canada contains a similar provision, but prior to *Potter*, these provisions had been the subject of little judicial consideration.

In *Potter,* the Bank of Canada argued that certain claims made in the Statement of Claim should be struck out as not disclosing the cause of action. After those claims were struck out, the Bank argued that the remaining claim was simply for return of wrongfully paid administrative expenses to the trust fund. This remaining issue was a question of interpretation of the trust document which could be brought by way of a representative proceeding under the Ontario *Rules of Civil Procedure* [16]. The bank asked that the matter be converted to a representative claim. The judge in chambers agreed, holding that the question of interpretation was one which "may" be brought by a representative proceeding and, as such, class proceedings legislation did not apply.

On March 30, 2007, the Ontario Court of Appeal overturned this part of the *Potter* decision. [17] Goudge J.A., writing for the Court, held that:

(a) The *Class Proceedings Act* did not prohibit the application of class proceedings where the representative action could be brought under a "regulation" (ie. the *Rules of Civil Procedure*). Rather, the prohibition only applied where another piece of legislation expressly provides for representative proceedings.

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[13] 2004, BCCA 454, 35 B.C.L.R. (4th) 233 [Sneddon].

[14] *Potter v. Bank of* Canada, [2006] O.J. No. 739 (S.C.J.) (QL)

[15] Supra note 4

[16] *Rules of Civil Procedure* R.R.O. 1990, Reg 194

[17] *Potter v. Bank of Canada*, 2007 ONCA 234

(b) The legislative intent was consistent with this interpretation. The objective was to facilitate access to justice and class proceeding legislation was drafted to address the deficiencies of representative proceedings. It would not be consistent with this legislative intent to bar class proceedings whenever a proceeding could be brought as a representative proceeding under the *Rules of Civil Procedure*.

As a result, the Court held that the *Class Proceedings Act* (Ontario) did apply to the proceeding as there was no other legislation that expressly provided for representative proceedings for the subject matter of that case.

The decision in *Potter*, which narrowly construes the prohibition against class proceedings where representative proceedings can be brought, combined with the decision in *Sneddon*, which increases the risk of an adverse cost award, likely means that in the future, few pension claims will be brought as representative proceedings.

IV. KEY ELEMENTS OF A CLASS PROCEEDING

A class action involves four steps.

1. Filing

A person can file a proposed class action without obtaining court approval because all class actions begin as ordinary actions. Further, it is not necessary that the person commencing the action obtain the approval of any other members of the class before filing the action. The action does not bind any other class members until it is "certified" by the court, which happens at the second stage of the process. The documents initiating the lawsuit must be endorsed to read "Brought pursuant to the *Class Proceedings Act*".

2. Certification

At the certification hearing, the court decides whether the action should proceed as a class action. The legislation in each jurisdiction sets out the requirements that must be met, which are similar throughout Canada. In British Columbia, there are a number of requirements that a plaintiff must satisfy to have his or her claim "certified" as a class action:

(c) the pleadings must disclose a cause of action;

(d) there must be an identifiable class of 2 or more persons;

(e) the claims of the class members must raise common issues, regardless of whether the common issues predominate over issues affecting individual members only;

(f) a class proceeding must be the preferable procedure for the fair and efficient resolution of the common issues; and

(g) there must be a representative plaintiff who

(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 of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.[18]

In certification applications, courts analyze whether the proposed common issues are in fact "common issues", i.e., whether the same legal analysis will be used to resolve a complaint and whether its resolution will apply to and bind all members of the class. For example, in a product liability case, individual testimony from each class member is not necessary to decide whether a product was defective when it left the defendant's plant. By contrast, in class actions, if the issue depends on individual circumstances, certification will likely be refused. For example, in a class action claim for misrepresentation, it may be necessary to hear evidence relating to the circumstances of each class member to determine whether liability exists. This sort of claim is generally not amenable to class determination.

Given this analysis, it is not surprising that a pension or benefit dispute often lends itself to a class action. Numerous individuals can be affected by a plan sponsor through the taking of a contribution holiday or a surplus withdrawal. In these cases, the validity of that claim may not be dependent upon the individual circumstances of any particular member, and resolving the merits of the case in respect of one plan member will often resolve the merits of any other plan member's claim.

3. Common Issues Trial

If a claim is certified as a class action, then the case will proceed to a "common issues" trial. In this stage, the court will resolve all the legal issues that were certified as common issues. Relatively few class actions proceed from the second to the third stage. It is not uncommon for defendants to settle a claim once it is has been certified as a class action. However, as will be explained more fully below, the "certify and settle" strategy is less likely to be prevalent in pension and benefit class litigation.

4. Individual Issues Determination

After the common issues have been resolved, the court will then set up a process to resolve any outstanding individual issues. For example, in a product liability case, the common issues trial might determine whether the product was defective. The individual issue stage would then determine what damages each individual user suffered as a result of the defect or whether individual limitation periods have expired.

In pension and benefits litigation, the determination of individual issues may be unnecessary. For example, if the court were to determine that a contribution holiday was unlawful, the remedy would be to restore the funds to the pension fund and no individual issues would arise. However, that will

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[18] *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4.

not always be the case, i.e., a group of plan members could challenge the legality of an amendment implementing an early retirement program and claim that the sponsor imposed an unreasonable time restriction on availability, thereby causing them to retire prematurely to avail themselves of the program. In such a case, the legality of the amendment itself would be suitable to be resolved as a common issue. However, having resolved that issue, whether each class member actually retired prematurely and suffered loss as a result would require individual determination. The damages each member was entitled to would be resolved at the individual issues stage.

V. RECENT PENSION AND BENEFITS CERTIFICATION DECISIONS

The following are summaries of the latest pension and benefits certification and certification-related decisions in Canada:

1. *Alan Potter v. The Bank of Canada and CIBC Mellon Trust Company,* 30 March 2007, Docket C45056 (Ont. C.A.)

This is a proposed class action brought by three retired employees of the Bank of Canada who were receiving pensions from the Bank's pension plan. The Bank is the sponsor and administrator of the Plan. The existence of an actuarial surplus gave rise to the claims in the action. The plaintiffs alleged that the Bank improperly caused expenses of the Plan to be paid from the fund.

The Bank of Canada brought a preliminary application seeking to strike out portions of the Statement of Claim in which the plaintiffs claimed an entitlement to have damages paid directly to them and, secondly, seeking a declaration that the *Class Proceedings Act*[19], was inapplicable to the plaintiffs' claim.

The chambers judge, Madame Justice Ellen Macdonald of the Ontario Superior Court granted the Bank's application. In particular, she ordered that the portions of the Statement of Claim seeking a direct payment out of the fund be struck from the Statement of Claim. The Court held that the relevant principle was that the plaintiffs, if successful, were entitled to be put in the position they would have been if there was no breach. This meant that any restitution that was required would be paid to the fund and not to the individual plaintiffs.

Class action legislation in Canada does not apply where an action is required or permitted to be brought in a representative basis by other legislation. In Ontario, the *Rules of Civil Procedure*[20] expressly permits petitions to be brought in a representative capacity. The Bank argued that once the claim for direct payments were struck, the case was essentially an interpretation of a trust document which is required to be commenced by way of petition and that the plaintiffs were permitted to commence such a Petition on a representative basis. The court agreed and ruled that the *Class Proceedings Act*[21] was inapplicable to the claim.

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[19] Supra note 4

[20] Supra note 16

[21] Supra note 4

On March 30, 2007 the Ontario Court of Appeal released their reasons for judgment in *Potter*[22]. The Court of Appeal upheld the chamber judge's decision that the claim for direct payments out of the Pension Plan must be dismissed. The Court of Appeal found that it was "plain and obvious" that this claim could not succeed for several reasons.

First, the claim for direct payments would give the class members more than they were entitled to receive under the Plan. The Bank of Canada Plan is ongoing and, as a result, the members were only entitled to receive the defined benefits provided by the Plan. Second, the claim for direct payments would prefer the interest of existing of beneficiaries of the Plan and disregard the interest of contingent beneficiaries. Third, the court disagreed with the argument that the remedy of direct payments would "serve fairness and justice". The court found that tax legislation does not prohibit the restoration of money improperly paid out of the fund. Accordingly, the argument that repaying the funds to the Plan would offend the *Income Tax Act* [23], was found to be without merit. The court wrote at paragraph 29 as follows:

> "In summary, the remedy that the law has always provided for the breach of trust alleged here, namely restitution to the Plan by the respondent, is available. On the other hand, the claim for direct payments does not serve the requirements of fairness and justice in these circumstances. Thus, I think it is plain and obvious that the claim will not be granted at trial as the remedy for breach of trust."

2. *Williams v. College Pension Board of Trustees*, 2007 BCCA 19, 29 E.T.R. (3d) 145

This is a claim brought by certain members of the College Pension Plan against the College Pension Board of Trustees ("Trustees"). The plaintiffs allege the Trustees allocated an actuarial surplus in the pension funds disproportionately in favour of active members over the retired and deferred vested members. Certification was opposed by the defendant Trustees and various interveners (the Provincial Government, the Post Secondary Employer's Association, and the College Institute Educators Association).

The defendant Trustees and the interveners opposed certification on the grounds that the plaintiffs' claim did not disclose a cause of action and that any possible relief must be by way of judicial review, which, in any event, was the preferable procedure. Further, they submitted that the plaintiffs had not properly identified a class, had not identified common issues in sufficient particularity, and that the representative plaintiff could not fairly and adequately represent the interests of the proposed class.

Mr. Justice Sigurdson rejected the defendants' arguments. Of great interest, was his finding that the claim did not need to be brought by way of judicial review. The Trustees derived their powers from Schedule A of the *Public Sector Pension Plans Act*, S.B.C 1999, c. 44. Thus, the Trustees were authorized by statute to make their decisions, which resulted in regulations being promulgated. The decision to divide the actuarial surplus remains set out in a valid provincial regulation which stands

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[22] supra note 17

[23] *Income Tax Act,* R.S.C. 1985, c.1 (5th supp.)

unchallenged by the plaintiffs. The defendants' view was that until the regulation was set aside, the plaintiffs' claims did not disclose a cause of action. Mr. Justice Sigurdson disagreed with this argument. He did so on the basis that it was not "plain and obvious" that the claim was required to be brought by way of judicial review.

On January 11, 2007, the Court of Appeal of British Columbia overturned its decision of Mr. Justice Sigurdson and allowed the appeal. In doing so, they ruled that the Plaintiffs' claim did not disclose a cause of action and, therefore, certification should have been denied.

Prior to the hearing of the appeal, the plaintiffs amended their Statement of Claim to make it consistent with the argument that they had made to the chambers judge. They had argued that their claim was not one for judicial review of the regulation but rather one for damages. Accordingly, they elected to remove the claim for declaration that the Trustees' decision and/or the regulation was not valid and, instead, claimed only damages. The Court of Appeal ruled that a claim for only damages could not stand. Mr. Justice Hall, writing for the court, wrote:

> "I am in agreement with the submissions of the appellants that if a court were to find that the amending regulation 266/2001 and 314/2001 were passed in breach of the fiduciary duty of the Board, then such amendments were void from their inception. The core allegation of the respondents is just that, namely that the Board breached its fiduciary duties to the respondents/plaintiffs. Although the respondents have disclaimed any wish to strike down the Regulations in these proceedings, the striking down of the Regulations would be an inescapable corollary of a successful allegation of a breach of fiduciary duty or responsibility by the Board. They are thus met with an insuperable objection on the part of the appellants that if there allegations should be ultimately successful, no action is maintainable because the foundation for them, the amending Regulations, are swept away. Because of this impossible conundrum at the heart of the case advanced by the respondents, I consider the chambers judge ought to have held that there was no valid cause of action pleaded by the respondents and his failure to do so was an error."

3. *Buschau v. Rogers Communications Inc.*, 2006 SCC 28

Although not a certification decision, the decision in *Buschau* is of such importance to the pension and benefits field, that I am compelled to discuss it.

Rogers had purchased Premier Communications Ltd. in the early 1980s. Premier had a pension plan with a surplus and this surplus continued to grow. The Premier pension plan was closed to new participants in the mid-1980s. Both Rogers and the plan members thereafter engaged in extensive litigation to determine who could access the surplus.

At issue in *Buschau* was the applicability of the rule in *Saunders v. Vautier* to a modern pension trust. This rule allows a trust to be collapsed and all asset transferred to the members if all members are

competent and consent. The British Columbia Court of Appeal allowed the respondents to invoke this rule provided they could obtain the necessary consents.

The Supreme Court of Canada ruled that the rule in *Saunders v. Vautier* did not apply to the modern pension trust. Emphasizing wording which had not previously been recognized as significant, the court quoted from *Schmidt v. Air Products Canada Ltd.* [24] as follows:

> "When a pension fund has been impressed with a trust, that trust is subject to all applicable trust law principles." (emphasis not added)

Therefore, the first task was to determine which trust law principles were *applicable* before considering how they would apply. The Supreme Court of Canada relied on four reasons to find the rule in *Saunders v. Vautier* inapplicable to modern pension trusts.

First, pension plans are heavily regulated and the *Pension Benefits Standards Act* R.S.C. 1985 c. 32 was intended to displace the rule found in *Saunder*s v. *Vautier*. Second, the modern pension plan is not a stand alone trust instrument and can only be understood in terms of the pension plan to which it attaches. Third, the blanket statement that the employer does not have an interest in a pension plan was inapplicable to the modern pension trust. Finally, accelerating the date of the beneficiary's entitlement has broad social consequences in the pension plan context which were not mirrored in the normal family or testamentary trust circumstances. All of these findings led the Court to the conclusion that the rule in *Saunders v. Vautier* should not apply to modern pension trusts.

This decision is of significance to pension plan litigation. It means that the analysis of all pension litigation must start with the proposition of whether of traditional trust rules are "applicable". The arguments that were accepted by Supreme Court of Canada to determine applicability were mainly policy oriented. As a result, counsel should be prepared for renewed advocacy on the policy rationale for traditional trust rules and ensure the necessary evidence to found such policy arguments is entered at trial.

4. *Bisaillon v. Concordia University*, 2006 SCC 19

In 1977, Concordia established a pension plan for its employees. The vast majority of the plan's members were unionized employees covered by one of the nine collective agreements between Concordia and its unions. The respondent, a unionized employee, applied to the Quebec Superior Court for authorization to institute a class action in order to contest a number of decisions made with respect to the administration and use of the pension fund. The Supreme Court of Canada ruled the class action procedure cannot have the effect of conferring jurisdiction on a superior court over a group of cases that would otherwise fall within the subject matter jurisdiction of another court or tribunal. Further, the Supreme Court of Canada ruled that a class proceeding was incompatible with the exclusive jurisdiction of grievance arbitrators and the representative function of certified unions. Certification was therefore denied.

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[24] [1994] 2 S.C.R. 611

Of particular interest are the court's comments at paragraph 58, 60 and 64:

> "I must admit that this solution is not free of procedural difficulties, particularly because of the multiplicity of possible proceedings and of potential conflicts between separate arbitration awards in respect of the different bargaining units. However, the potential difficulties are not sufficient to justify referring the matter to the Superior Court and holding that it has jurisdiction".
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> ….
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> "The Court of Appeal was accordingly concerned about the chaos that could ensue if contradictory decisions were to result. The respondent has not demonstrated that a real possibility of such procedural chaos exists. It is not a foregone conclusion that confirming the jurisdiction of grievance arbitrators would automatically lead to multiple arbitration proceedings. Various options remain open under the fundamental rules of labour law. Thus, it is possible in such situations that all, or at least a large number of, the unions would decide to come to an agreement with the employer to submit the various grievances to a single arbitrator. In the instant case, it would be hard for the employer to oppose this approach, which I feel should have been the preferred one for all the parties involved. Moreover, <u>should one arbitrator decide a grievance filed by one of the unions in the unions' favour, all the employees would benefit indirectly from this award, since all the money wrongfully taken from the pension fund would be returned.</u> Any grievances filed by the other unions would, in practice, become moot. Assuming the worst, if there were contradictory or incompatible arbitration awards, Concordia could probably, subject to the limited possible grounds for judicial review by the Supreme Court, resolve any conflict by complying with the award least favourable to it."
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> ….
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> "In short, despite the fear that procedural difficulties – which, I might add, would not be insurmountable – might result from a decision in favour of arbitration, the class action option cannot be accepted. To authorize a class action in the case at bar would be to deny the principles of the exclusivity of the grievance arbitrator's jurisdiction and of the union's monopoly on employee representation. The Superior Court was thus correct in granting the motion for declinatory exception and dismissing the respondent Bisaillon's motion for authorization to institute a class action."

5. *Bennett v. British Columbia,* 2007 BCCA 5, C.C.P.B. 167.

Bennett sought to bring a class action on behalf of some 27,000 persons who, until their retirement dates, were employed by the Province of British, by crown corporations or other crown-related bodies. This class had historically received benefits, namely premium-free MSP and extended health plan coverage which the Province paid from the consolidated revenue fund between 1978 and 2001. After that date, they were paid for from a separate fund. The Province sought to reduce these benefits. Bennett contended that these benefits were part of the consideration for employment and therefore constituted vested contractual rights legally enforceable upon retirement.

An issue in this application was whether this action could stand given the collective agreements in place between most of the individuals whom the Plaintiffs sought to represent and the Province of British Columbia. The Province argued that the British Columbia Supreme Court lacked the jurisdiction to hear the case because it was within the exclusive jurisdiction of a labour arbitrator appointed under one of the collective agreements to which most of the retirees were bound. The chambers judge declined to grant the Province's motion, ruling that the court had jurisdiction to hear the action and that certification was appropriate.

The Province appealed the Order but the British Columbia Court of Appeal rejected its appeal.

The Court of Appeal purported to adopt the two-pronged analysis from *Bisaillon*[25] which requires looking both at the subject matter of dispute and the parties to the dispute. The Court found that none of the collective agreements entered into by the Province with its unions dealt with post-retirement benefits; these benefits were always the subject of statute or regulation. Based on this finding, the court wrote "it simply cannot be said that the essential characters of this dispute arises from the interpretation, application, administration or violation of a collective agreement".

This conclusion was said to be reinforced because the plaintiffs were retirees and, thus, the personal aspect of the arbitrator's jurisdiction was not present. The court concluded that retired employees, being non-parties to the collective agreement, have a right to an independent cause of action in court for alleged violation of their rights.

Bennett does not appear consistent with the policy underlying *Bisaillon*. The Province of British Columbia has filed an application for leave to appeal to the Supreme Court of Canada. No decision has yet been rendered on that application.

6. *Neville v. Plumbing and Pipefitting Workers Local 170 Pension Plan (Trustees of)*, 2006 BCCA 460

Again, although not a certification decision, *Neville* is an important pension and benefits decision which requires comment.

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[25] Supra note 1

In this case, the British Columbia Court of Appeal reviewed the issue of unequal treatment of beneficiaries in a pension plan. The trustees of the pension plan had in response to a solvency deficiency reduced benefits unequally among beneficiaries. Their decision was upheld by the Court.

The trial judge's reasons were expressly adopted by the Court of Appeal:

> "Pension plans are complex financial structures in which disparate plan members, each with his or her individual characteristics and needs, are bound together in a scheme to serve the retirement needs of all. By necessity, the scheme is unlikely to meet all of the needs of its participants. Each of the participants may be affected differently by changes in benefits. However, the environment in which pension plans derive the income that is essential to their purpose creates circumstances that require benefits to be increased or decreased. Whenever this occurs, some of the members of the plan – sometimes all - will be disadvantaged by the change. In other cases, the changes will beneficial to some and detrimental to others. This creates a particular problem for trustees of pension plans. The impact of the trustees' decisions will never be equally distributed among the beneficiaries of the plan. Accordingly, it is impossible to enforce equity by demanding equality of treatment. It must be left to the trustees to navigate these shoals and determine the nature of the change that will achieve a fair result".

7. *Kranjec v. Ontario*, (2006), 33 C.P.C. 6th 290 (Ont. S.C.J.) [Kranjcec]

This was an application for approval of a settlement under the *Class Proceedings Act* R.S.B.C. 1986 c. 51. Under the terms of the settlement, the crown obtained a release from all claims relating to changes in post-retirement benefits that were made prior to March 7, 2006. In return, the crown paid $20 million to be distributed among the class members equally per capita after payment of counsel's fees and disbursements (there were approximately 47,000 members of the class). It was estimated that this would result in a payment of $350 to each member the class. In addition, the settlement agreement provided that class members would be entitled to all new benefits negotiated by the OPSEU for its members in the 2005 collective agreement.

Plaintiffs' counsel submitted that there were two principal risk factors that mitigated in favour of the settlement: the uncertainty of litigation and the age of many of the class members. The court wrote that its role was to determine whether the settlement fell within a range of reasonableness in light of the circumstances and the interest of the class as a whole.

Approximately 17 of the class members submitted written objections to the court. The objections stated that if the crown would not restore the post-retirement benefits that had been taken away that the case should proceed to trial. Some were also concerned about the size of counsel's contingency fee (15% or approximately $3 million) versus the recovery to each class member ($350).

The court approved the settlement. It was found that continuing the litigation could not be justified on the basis of an experienced assessment of the risks of litigation and the delays that would inevitably ensue.

8. *MacDougall v. Ontario Northland Transportation Commission*, [2007] O.J. No. 573 (S.C.J.) (QL) [MacDougall]

The appellant/plaintiffs each brought motions to certify class proceeding against the respondent regarding the status of amendments made to the ONTC Pension Plan. The six respondent unions who represent active ONTC employees were added as defendants. The appellants appealed the decision refusing to certify the action as a class proceeding. The appellants' claimed that the plan was an irrevocable trust and that by making certain modifications to it ONTC was in breach of trust. The impugned modifications included amendments relating to ownership of surplus, amendment powers, contribution holidays, enhanced retirement benefits and payment of administrative expenses.

The chambers judge found that class proceedings were not the preferable procedure. Her decision was largely based on the fact that the relief claimed sought orders striking down plan amendments. Because the claims did not include monetarily relief, she believed that alternative procedures could be utilized without the need to engage the intricacies of a class proceeding which require the definition of classes, and the consideration of sub-class conflicts among the different groups.

The chambers judge also found that judicial economy would not be served because the plaintiffs were not pursuing individual remedies. This meant that the alternative to a class proceeding was not a multitude of individual actions but rather an application for declaration. She also found conflicts between the sub-classes to be irreconcilable, identifying in particular a conflict between retired employees and active non-union members, and noting that some members would be enjoying the benefits while others would not (i.e. early retirement programs).

The Ontario Superior Court of Justice sitting as a divisional court dismissed the appeal. They found that the chambers judge had made no errors of law or palpable or overriding errors of fact.

This case is an important example of a pension and claim for certification being denied. Some of the arguments that have been raised in this case have not been accepted in other cases. Accordingly, there is now some authority that applications which are by their nature for collective, as opposed to individual, relief should not be brought by way of class action.

9. *Ruddell v. BC Rail Ltd.,*[26] 2005 BCSC 1504, 260 D.L.R. 4th 550 [Ruddell]

The plaintiff was a retired member of the BC Rail pension plan. He alleged an inequitable allocation of an actuarial surplus in the BC Rail pension fund whereby the BC Rail, as administrator, did not provide him and other retired members with commensurate benefits upon the taking of contribution holiday by the company and its active members.

[26] Subsequent to the publication of this paper, this decision was reversed 2007 BCCA 269. The author was counsel for the appellant.

Ruddell deals with an important issue relating to the use of alternate dispute resolution, namely arbitration, in the face of a class proceeding. In *MacKinnon v. Money Mart*,[27] the British Columbia Court of Appeal ruled that where a court finds that a class proceeding must be certified by meeting the statutory test set out in the *Class Proceeding Act*[28], the court must find that the arbitration agreement is "inoperative". One of the key requirements in a certification application is that a class proceeding be determined to be the "preferable procedure". In essence, the British Columbia Court of Appeal in *Money Mart* now requires a court to weigh the circumstances of each case to determine whether a class proceeding or arbitration is the preferable procedure. If a class proceeding is preferable, the requirements of certification are met and the arbitration agreement is inoperative. If arbitration is preferable, the requirements of certification are not met and the action will be stayed in favour of arbitration.

The *Money Mart* analysis may not apply in pension disputes. Section 62 of the *Pension Benefits Standards Act* ("*PBSA*")[29], requires a British Columbia pension plan to contain a provision for arbitration of disputes involving certain specified matters such as the taking of a contribution holiday, the allocation of surplus assets on a winding up of a plan, and the payment or transfer of any surplus assets. Until *Ruddell*, the courts had not commented on whether the *Money Mart* analysis would extend to arbitration elected pursuant to an arbitration agreement mandated by the *PBSA*.

In *Ruddell, Mr.* Justice Holmes of the British Columbia Supreme Court ruled that the *Money Mart* analysis applies to pension disputes notwithstanding the mandatory requirement to include an arbitration agreement in British Columbia pension plans under the *PBSA*. Even though he determined that the Defendant had established a *prima facie* right to have the proceeding stayed in favour of arbitration, he determined that the Legislature's preference for arbitration of pension disputes as evinced by section 62 of the *PBSA* should not cause the court to alter the approach as determined in *Money Mart*. In short, he determined that the *PBSA* did not answer the apparent statutory conflict between class proceeding legislation and arbitration legislation.

The appeal from this decision was heard on October 11, 2006. The panel hearing the appeal (Chief Justice Finch, Mr. Justice Hull and Madame Justice Saunders) reserved judgment.

VI. ACTIONS AGAINST THIRD PARTIES: AUDITORS, ACTUARIES, INVESTMENT ADVISORS AND TRUSTEES

1. Shortfalls on Plan Wind-Up

Several cases deal with the situation where a plan with a solvency deficiency was wound up and the sponsor could not make good on the shortfall. In some of these instances, the plan members have taken steps to make the plan's custodian, its actuaries and others liable for the shortfall, arguing that

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[27] 2004 BCCA 137, 44 C.P.C. 5th 72 [Money mart]

[28] Supra note 5

[29] *Pension Benefits Standards Act* R.S.B.C. 1996, c. 352

those parties failed to take measures that would have prevented or mitigated the shortfall, and the resulting reductions in their pension entitlements.

The seminal decision in this area is *Froese v. Montreal Trust Company of Canada*,[30] a 1996 decision of the British Columbia Court of Appeal. In *Froese*, the employer, Johnsons Terminal Limited, became insolvent in the late 1980s. Prior to its insolvency, the employer discontinued making contributions to its pension plan. The plan members sued the custodial trustee, claiming that it had a fiduciary duty to the plan members to warn them of the company's default.[31] While the custodial trustee successfully defended its position at trial, the Court of Appeal reversed the trial court's decision and held that the custodial trustee had a "duty to warn" the beneficiaries that contributions were not being made. The Court also held that the custodial trustee had an obligation to ensure that the plan was properly wound up, a duty that the Court said it had breached by ignoring certain deficiencies in the actuary's wind-up report.

Froese spawned a similar lawsuit in connection with the pension plan sponsored by Westar Mines Ltd., another bankrupt British Columbia company. As was the case in *Froese*, prior to Westar's bankruptcy in 1992, the sponsor failed to make certain contributions to its pension plan. However, there was a suggestion that the sponsor did so on the advice of its actuary. Relying upon the principles set out in *Froese,* the plan members sued the custodial trustee, the directors of the bankrupt corporation, and the actuaries who allegedly advised the employer not to make contributions.[32] This action was certified as a class action, and after a trial of certain preliminary issues the matter was settled.[33]

A more recent Ontario dispute involved similar facts. In *Givogue v. Burke*,[34] it appears that the employer, Voyageur Colonial Limited, became bankrupt at a time when several of its plans were under funded. The plan members sued the trustees of the plan and their actuaries alleging that the shortfall was caused by their negligence and/or breach of fiduciary duty. Though this matter has been certified as a class action, it has not proceeded to trial as at this date.

2. Plan Conversions - Inappropriate Transfer Values

The leading case concerning inappropriate transfer values is the Ontario decision of *McLaughlin* v. *Falconbridge Limited*.[35] The dispute in *McLaughlin* arose out of the termination of the pension plan for Kidd Creek Mines Ltd. and its replacement with a Group RRSP. In particular, the plaintiffs claimed that the employer and ***its actuary*** improperly pressured the plan members to accept commuted

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[30] (1996) 137 D.L.R. (4th) 725 (B.C.C.A.). [Froese]

[31] The events in *Froese* preceded the coming into force of the *PBSA* and its requirement in s. 43 that a plan's fundholder advise the Superintendent of any failure by an employer to make the required contributions to its pension plan within the time periods mandated by the *PBSA*.

[32] *Sadler* v. *Watson Wyatt and Co.,* 2001 BCSC 246, 27 C.C.P.B. 291.

[33] *Ibid.*

[34] [2003] O.T.C. 607 (S.C.J.).

[35] (1999), 100 O.T.C. 298 (S.C.J.) [McLaughlin].

value settlements of their defined benefit entitlements (which commuted values were then presumably credited to the members' accounts in the Group RRSP) with a view to increasing the amount of surplus in the plan, which the sponsor subsequently withdrew.

3. Administrative Expenses

Plan members now commonly add administrative expenses to their surplus related claims. For example, the plaintiff pension members in *Gregg* v. *Freightliner Ltd.*,[36] in addition to claiming an entitlement to the surplus assets remaining in the plan on termination, also challenged the sponsor's payment of administrative expenses out of the plan prior to its termination.[37] This matter has now been certified. In *Gregg,* the claim for improper payment of administrative expenses has been made against Freightliner and the custodial trustees.

The Ontario Divisional Court, sitting in an appeal from the Ontario Financial Services Commission, found that administration expenses had wrongly been paid and ordered the sponsor to repay them to the trust fund. The decision in *Nolan v. Superintendent of Financial Services*[38] applied a traditional trust analysis to the payment of administrative expenses and, in essence, treated them in the same manner as surplus claims. This decision finds that if the trust documents allow for the payment of the expenses, they can be paid, otherwise, the payment of administrative expenses is improper. This decision is currently under appeal.

4. Failure to Change Investment Policy when Termination Imminent

In the *Gregg* case referred to above, the plaintiffs also alleged that once the plan sponsor became aware of the fact that termination of the plan was likely, it should have immediately altered the plan's investment policy to reflect that fact.[39] Presumably this alteration would be done with a view to mitigating the risk of any investment losses being realized on the surplus during the interval preceding the plan's wind-up. No decision on the merit of this case has been made.

Again, this claim has been made against both the company and against the custodial trustees. The claim against the custodial trustee appears to be a failure to warn type allegation.

5. Liability for Negligent Investment

As mentioned earlier, in early 2003, a class action was commenced on behalf of the members of the pension plan for employees of certain Ontario farm cooperatives,[40] alleging that the defendant board of trustees, its investment manager, consultant, and custodian were collectively negligent and in breach of their fiduciary duties to the plan members because they participated in and permitted

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[36] 2003 BCSC 241, 35 C.C.P.B. 31 [Gregg] ; Gregg is scheduled for trial in April 2008

[37] *Ibid* at para. 64.

[38] *Nolan v. Ontario (Superintendent of Financial Services) (*2006), 54 C.C.P.B. 112 (Ont S.C.J.)

[39] *Ibid* at para. 64.

[40] *Martin v. Barrett,* (unreported, 10 February 2003, Court File No. 03-CV-244195CP) Ont. S.C.J.

significant investment losses to be realized. In particular, it appears that the trustees and their investment managers used some form of derivative instruments to avoid losses to the plan, but that process actually resulted in significant losses being realized. This matter was certified as a class action in February 2005.[41]

6. Failure to Give Retirees a Share of Surplus Assets

There are three matters pending in British Columbia where retired plan members are advancing claims relating to the plan sponsor's alleged failure to give the retirees a specific "share" of the ongoing surplus assets in the pension plan.[42] All three of these disputes involve pension plans that had significant surplus assets in the late 1990s. These surpluses led the plan sponsors to take contribution holidays and/or grant enhancements to current plan members. In some cases, specific enhancements were also provided to the retired plan members. However, in each instance, the retirees claim they did not receive an adequate share of the surplus, and are now seeking a distribution of surplus assets among the proposed class.

The Quebec Superior Court dismissed a similar claim brought by the retirees of the Hydro Quebec Plan in September 2002.[43] The Quebec Court of Appeal dismissed an appeal of that decision in March 2005.[44] An application for leave to appeal to the Supreme Court of Canada was also dismissed.[45]

VII. CERTIFY AND SETTLE?

Class actions in pension cases may often be somewhat different than other types of class actions. The cost of defending a pension class action while still weighty may be more similar to the cost that has historically been involved in defending major pension litigation. This is because unlike some product liability litigation, pension claims normally involve large sums. Even if a single member brought an application claiming a right to a surplus, the declaration that would be granted in that litigation would always have had tremendous consequences for the plan, and, by definition, would have been applicable to all plan members whether or not they were involved in the proceeding. So while the cost of defending such claims will be great, it may not differ that greatly from the normal cost of defending some of the larger pension law disputes in Canada.

Further, in a product liability case, the risk to a defendant increases materially if an action is certified. A case for $500 becomes a case for $5 million. However, this dynamic does not work in the same manner as a pension class proceeding. If a surplus withdrawal was inappropriate, the monies will need to be paid back to the fund regardless of whether the claim is brought by one plaintiff or by

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[41] *Ibid,* order of Winkler J. dated 10 February 2005.

[42] *Williams* v. *College Pension Board of Trustees*, 2005 BCSC 788, 254 D.L.R. (4th) 536, certification refused on appeal 2007 BCCA 19, 29 E.T.R. (3d) 145; *Ruddell* v. *BC Rail Ltd.* , 2005 BCSC 1504, 260 D.L.R. 4th 550 an arbitration issue reserved on appeal 2005 BCCA 638, 262 D.L.R. (4th) 297; *Lieberman* v. *Business Development Bank of Canada*, 2005 BCSC 389, 45 C.C.P.B. 314.

[43] *Assoc. provinciale de retraités d'Hydro-Quebec* c. *Hydro-Quebec*, (2002), R.J.Q. 2475 , 32 C.C.P.B. 1 (C.S.)

[44] *Assoc. provinciale de retraités d'Hydro-Quebec* c. *Hydro-Quebec*, 2005 QCCA 304, [2005] R.J.Q. 927.

[45] *Assoc. provinciale de retraités d'Hydro-Quebec* c. *Hydro-Quebec*, [2005] C.S.C.R. no. 215.

500 class plaintiffs. Accordingly, the increase of financial risk that results from a successful certification decision in a negligence case does not often apply to a pension class action. This significantly alters the dynamics of a pension class proceeding and disrupts the normal "certify and settle" methodology used by plaintiff's counsel.

While these considerations would make it appear that "certify and settle" should apply with less vigour in pension class actions, the *Kranjcec* settlement might suggest otherwise. To an outside observer, the allegations in *Kranjcec* appeared to have little or no merit. Still the Ontario government paid $20 million (with approximately $3 million to class counsel) to settle the claim. It is expected that this settlement will provide greater incentive for future class proceedings.

VIII. STRATEGIES FOR DEFENDANTS IN CLASS ACTIONS

This paper started with the passage from the extra-judicial writing of Mr. Justice Winkler which, if accepted, places a relatively high onus on defence counsel seeking to avoid certification. Class action legislation is designed to determine individual rights in a aggregate fashion where those individual rights are based upon the same underlying claim. A pension plan would, at first glance, appear to be the ideal vehicle for a class proceeding. Plan members in a pension plan which has remained static often have the same rights arising from the same plan documents and can make a common claim. Accordingly, in its simplest form, a pension case would appear ideal for a class proceeding.

However, these generalities do not tell the full tale. Prospective class counsel should ask themselves whether they want a class proceeding. A representative proceeding can be started and brought to summary disposition far quicker and with far less aggravation than a class proceeding. There is no requirement for certification, for notice, or any of the other procedural overlays included in class proceeding legislation. Often, class proceeding legislation can be a burden to the overall progress of the action.

Assuming, however, that a class proceeding is brought, prospective counsel must be aware of potential defences to certification. Post-*MacDougall*, the first question should be whether the claim seeks only non-monetary collective relief. If so, it is arguable that certification is not appropriate.

If this hurdle is passed, defence counsel should ask if there is, in fact, a cause of action. While this is a very low hurdle, it does not mean in every case all of the claim or even parts of it cannot be struck out. In *Potter*, portions of the Statement of Claim seeking direct payments to class members were struck out. In *Williams*, the British Columbia Court of Appeal found no cause of action for damages existed due to the legislative scheme. The courts are clearly putting some teeth in the requirement. This means that it will not suffice simply to say that a breach of fiduciary duty has been pled and that is a cause of action known to law.

In addition, at times there may be the opportunity to defend claims based on class composition (are there benefits which part of the class enjoys and the other does not?) or the representative plaintiff (is he or she truly representative of the class as a whole?). In a recent Ontario decision, the Ontario Supreme Court found that a Union leader was not an appropriate plaintiff to act as a representative plaintiff because he was not a member of the plan even though he was the elected union leader

representing all the members of that plan. Accordingly, there is room for surgical defences on specific claims if you have the appropriate facts.[46]

Defending certification is difficult. In doing so, it is important to separate the arguable points from the winnable ones. If a winnable point can be found, often the whole lawsuit can be moved to a different track which may lead to a more successful outcome for your client.

IX. COSTS IN PENSION CLASS ACTIONS

This topic may seem out of place given the discussion concerning class proceeding being generally a "no costs" regime. However, this comment must be tempered by the fact that traditionally there are rules that allow plaintiffs (both successful and unsuccessful) to claim the costs of a legal proceeding (including legal fees) from the trust. This has meant that where the issue is one of interpretation of the trust documents the courts have generally required that the costs of litigation be paid from the trust fund.[47]

This traditional rule regarding costs in pension trust cases does continue to have relevance to class proceedings. For example, it was argued (and rejected) in *Ruddell* that the cost rule was one which made a representative proceeding preferable to a class proceeding because in a representative proceeding the plaintiffs had the opportunity to have any award they might obtain increased by counsel fees as opposed to having counsel's fees taken out of the award.[48]

More importantly, it has been argued that the historical trust costs have some relevance during the conduct of a class proceeding. In *Gregg*[49], the plaintiff requested an order that the defendant pay the costs associated with newspaper advertisements and a mail out of notice to class members. This argument was based on traditional trust costs principles on the basis that these expenditures were properly payable out of the trust fund. Madam Justice Bennett wrote on this point as follows:

> "Returning to the question of whether the pension plan case law should apply when I am taking into account whether to exercise my discretion, in my view the analysis of the pension plan cases do not clearly apply to this case. The parties could have proceeded in a manner other than simply by way of class action and then at the end of the day would be entitled to apply for cost payable from the pension plan. The idea that the plaintiffs are acting in the best interests of the pension plan in my view would be a factor to take into account in excreting my discretion pursuant to section 24 if it was clear from the evidence that that was the fact in this case.
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> ….

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[46] Ryan v. Ontario Municipal Employees Retirement Board (2006), 51 C.C.P.B. 237 (Ont. S.C.J.).

[47] *Bentall Corp. v. Canada Trust Co.* [1997], 4 W.W.R. 414 (B.C.S.C.)

[48] *Ruddell*, supra note 40 at paras 115 to 119

[49] *Gregg*, supra, 12 January 2005 at paras 17 to20

> To be clear, the pension plan analysis is not foreclosed by these reasons in other cases. At this stage of the proceeding, in this case, the evidence does not show me that the plaintiffs are acting in the best interests of the administration of the pension plan. If it did, then that may have been a factor to take into account when determining whether the pension plan should pay the costs for the notice."

Accordingly, notwithstanding the no costs principle, there may still be some room to argue for the application of traditional trust costs principles in the context of class proceedings.

X. CONCLUSION

The number of class actions and other lawsuits in the pension and benefits area will continue to increase and the diversity of the claims and issues being advanced will continue to expand. Law firms that have traditionally represented plaintiffs in class action proceedings have become interested in the pension law area. This can only serve to increase the number of pension and benefit class proceedings brought in Western Canada.

Litigation in the pension and benefits areas has now progressed well beyond the boundaries of litigating surplus withdrawals and contribution holidays. The types of claims will continue to grow and be limited only by the legal imagination and creativity of counsel.

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