How Class Action Suits are Changing the Pension and Benefits Landscape

By

Murray Campbell and Craig Ferris

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please contact the author or any member of the Class Action Law Group or the Pension and Employee Benefits Law Group.

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INTRODUCTION

Since the mid-1980s litigation has been a fact of life for pension and employee benefit plan administrators and sponsors. However, there is a widely shared impression that the scope and frequency of such litigation is increasing.

Certainly, the business press now regularly reports on the difficulties facing pension and benefit plans.[1] Lexpert magazine, a magazine directed to Canadian lawyers, recently devoted its cover story to pension plans and the growth in pension litigation.[2]

Our own experience accords with this impression. Over the last three years the proportion of our pension and benefits practice devoted to litigation matters has increased dramatically. We expect that our experience is typical of most Canadian pension lawyers.

The purpose of this paper is to examine more closely this increase in pension and benefit litigation in Canada, and to comment on the role class action legislation may have had on this phenomenon. To do this, we propose to deal with the following topics.

First, we will examine in some detail the mechanics of class action proceedings, and discuss why pension disputes are well suited to being structured as class proceedings.

Second, we will give an overview of the types of pension and benefit claims that are currently being litigated in Canadian courts.

Third we will provide some comments on the dynamics of class action litigation, and why the "certify and settle" trend common in many areas of class action litigation may not be as prevalent in pension litigation.

Fourth, we will conclude with some comments regarding the future of pension litigation in Canada, and discuss some of the issues which we believe may become litigious in the near future.

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[1] A search of the Globe and Mail database over the period January 1, 2001 to date indicates that at least 78 stories have been written involving pensions and class actions.

[2] Melnitzer, Julius. "Pensions: Corporate Powerhouses in Crisis." Lexpert. April 2004: 67-85.

CLASS ACTION LEGISLATION IN CANADA

(a) Availability of Class Actions

Class actions were first made available in Quebec in 1978[3]. Since then, Ontario[4], B.C.[5], Saskatchewan[6], Newfoundland[7], Manitoba[8], Alberta[9] and the Federal Court of Canada[10] have adopted legislation permitting class actions. In 2004, New Brunswick announced that it was in the process of adopting class action legislation. In addition, in those jurisdictions in which there is no class action legislation, a recent Supreme Court of Canada decision[11] essentially "read in" the basic elements of class action legislation into traditional "representative" proceeding rules in place in the remaining jurisdictions. Accordingly, class actions are now available in every jurisdiction in Canada.

(b) Advantages of Class Actions

It is important to emphasize that class action legislation does not create new legal rights. Rather, it creates a new way of pursuing and enforcing legal rights that overcomes many of the historical barriers that were perceived to prevent litigants with meritorious claims from pursuing those claims. While each province's class action statute differs in certain respects, they all have certain common features designed to allow litigants to pursue meritorious claims.

First, if a matter is certified as a class proceeding, in most provinces the plaintiffs are virtually immune from costs, even if they are ultimately unsuccessful. This is to be contrasted with the rule in an ordinary action where the unsuccessful litigant is normally responsible to pay a portion of the successful litigant's costs. Indeed, in some jurisdictions (including British Columbia but not Ontario, plaintiffs are also immune from any costs in respect of their application to have a claim certified as a class proceeding, even if the court rules that a class action is not appropriate.

Second, in some jurisdictions, public funding is available for class actions. In Ontario, a plaintiff may be approved to receive funding from the Class Proceedings Fund of the Ontario Law Foundation for disbursements and for an indemnity to protect them against any negative costs award.[12] Public funding of class actions is not available in Alberta or British Columbia.

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[3] Quebec *Code of Civil Procedure*, Art. 1003.

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

[5] *Class Proceedings Act*, RSBC 1996, c. 50.

[6] *Class Actions Act*, S.S. 2001, 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 as amended by *Rules Amending the Federal Court Rules, 1998,* SOR/2002-417, s. 17.

[11] *Western Canadian Shopping Centres* v. *Dutton*, 2001 SCC 46.

[12] Winkler, Justice Warren. "Pensions, Benefits and the Canadian Class Action Experience". Employee Benefits Issues 2003: p. 43.

Third, class action legislation sets out a procedure whereby the court can approve fee arrangements that bind the entire class and are based on the aggregate recovery by class. Indeed, the court will commonly approve contingency fee arrangements that compensate the plaintiff's lawyer based on the aggregate recovery by the class. While the court has always had a common law jurisdiction over lawyer's compensation, having a clearly defined statutory process that allows lawyers to be well compensated for pursuing a claim on behalf of a class clearly gives them a greater incentive to do so.

For example, a single individual with a $500 claim, even if it was meritorious, would usually not go to the trouble or expense of paying a lawyer on an hourly basis to advance such a claim. Similarly, no lawyer would agree to take such a small claim on a contingency fee basis because the hours spent on it would quickly exhaust any potential recovery for the lawyer. However, if there were 1,000 people with the same $500 claim, that claim would be worth $500,000 in the aggregate. While one individual with a $500 claim would still not be interested in paying a lawyer to take the claim on an hourly basis, the lawyer might be prepared to take the case on a contingency fee basis, if his or her fee was based on the potential $500,000 recovery.

Again, it bears repeating that class actions do not make claims any more meritorious. They simply remove two of the most significant practical impediments to advancing meritorious claims – legal fees and the risk of having to pay the defendant's costs.

2. STRUCTURE OF A CLASS ACTION

A class action involves four significant steps.

(a) Stage 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. However, the action does not bind any other class members until it is "certified" by the court, which happens at the second stage. Press accounts regarding the commencement of class actions often gloss over this fact, failing to mention that significant procedural hurdles must be overcome before an action becomes a class action.

(b) Stage 2: Certification

At the certification hearing, the court decides whether or not 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. The test is essentially whether it makes sense for the action to proceed as a class action, and whether the issues that are common to all the members of the class are sufficiently important to justify a class action. In British Columbia, there are a number of specific requirements that a plaintiff must satisfy to have his or her claim "certified" as a class action:

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

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

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

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

(v) there must be a representative plaintiff who

A. would fairly and adequately represent the interests of the class;

B. 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

C. does not have, on the common issues, an interest that is in conflict with the interests of other class members.

When a court decides whether to certify a class action, the main issue it is trying to resolve is whether the key issues in dispute are in fact "common issues", that is, 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 products 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. A claim related to such defects brought by an individual adversely affected by the defect would probably be certified as a class action.

By way of contrast, if the key issue in the case turned on the individual circumstances of each plaintiff, the case may not be approved as a class action. For example, if the complaint revolved around misrepresentations made by various agents of the defendant in different settings to different class members in different ways, then it may be necessary to hear evidence relating to the circumstances of each class member to determine whether liability exists. This sort of claim, where resolution in respect of one plaintiff does not resolve every other person's claim, cannot be effectively managed within a class action structure.

Given the test for determining whether an action should be certified as a class action, it should not be surprising that a pension or benefit plan dispute lends itself well to a class action. Commonly, numerous individuals will have been adversely affected by an action by a plan sponsor, e.g., the taking of a contribution holiday or a surplus withdrawal. Further, in such case the validity of that claim will not be dependent upon the individual circumstances of any particular plaintiff. Rather, resolving the merits of the case in respect of one plan member will often resolve the merits of any other plan member's claim. Only one legal analysis need be conducted. As a result, claims relating to the interpretation of a plan document or the unilateral action of a sponsor in respect of its plan are readily and frequently certified as "common issues".

(c) Stage 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 are common to all class members and identified by the court during the certification hearing. It should be noted that relatively few class actions proceed from the second to the third stages. That is, it is not uncommon for defendants to settle a claim once it is has been certified as a class action.

(d) Stage 4: Individual Issues Determination

After the common issues have been resolved in the common issues trial (stage 3), the court will then set up a process to resolve any outstanding individual issues. For example, in a products liability case the common issues trial might determine whether the product was defective. However, the individual issue stage would then determine what damages each individual user suffered as a result of the defect.

In pension and benefits litigation, an individual issues determination will often 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 not always be the case. For example, 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. Accordingly, in this case the validity of the amendment could be resolved at the stage 3 common issues trial, but the damages each member was entitled to as a result would have to be resolved at the stage 4 individual issues determination.

As can be seen from this discussion, the class action procedure is well suited to pension and benefit disputes. However, it should also be noted that there are other ways for pension and benefit disputes to be resolved.

3. CLASS ACTIONS NOT 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". These rules allowed individuals to bring claims in a representative capacity on behalf of an identified class. An applicant would apply to court to be appointed as such a representative, and then would be entitled to pursue the identified claim on behalf of the representative group. By and large, that procedure worked well, and many pension and benefit lawsuits were successfully brought as "representative actions".

A "representative action" had the advantage of avoiding the complexities associated with the class certification order (although a defendant could 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. 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. Nevertheless, many of the most important pension decisions in Canada were decided by way of representative action. For example, the litigation in *Buschau* v. *Rogers Cable System*[13], a matter which has been extensively litigated in British Columbia recently, is structured as a representative proceeding, not a class action.

On September 5, 2004 in British Columbia, our Court of Appeal issued a decision relating to costs in a representative action which may be the death knell for its further use in pension proceedings. In *Sneddon v. B.C. Hydro*[14] the Court of Appeal ruled that the Plaintiffs were responsible for the Province's costs, both at trial and on appeal, and refused to order the Plaintiffs/Appellants costs be paid out of the trust fund. The protection from costs available in class actions will likely result in Plaintiffs now choosing class proceedings over representative actions.

4. CURRENT PENSION AND BENEFIT LITIGATION

(a) Surplus/Contribution Holidays/Mergers

For many years the bulk of the litigation in the pension area involved fairly straight-forward disputes over surplus entitlement or contribution holidays. The leading Supreme Court of Canada pension law decision, *Schmidt* v. *Air Products*[15], involved disputes over the ownership of surplus assets in two merged pension plans, and the contribution holiday the sponsor took from the merged plan prior to its termination.

The *Schmidt* decision had an interesting effect on pension litigation in Canada. While it set down broad general principles on surplus ownership and contribution holidays (generally, sponsors were not entitled to termination surplus assets, but were entitled to take contribution holidays), those principles were only presumptions that could be rebutted by the specific wording of the relevant documentation. Indeed, given the reasoning in *Schmidt*, a case by case analysis of the historical wording of the relevant plan's documents has become necessary to resolve these difficult issues. The results of such analysis are not always definitive, which means that many surplus related matters must continue to be resolved in the courts.

A recent cluster of decisions from Ontario[16] and British Columbia[17] have applied a surplus-like analysis to determine whether a sponsor can merge the assets of two plans without having to continue to account for the merged plan's assets and liabilities separately after the merger. In particular, the courts have again taken to looking at the historical wording of the affected plan's documentation to determine whether it permits the trust funds to be effectively pooled or merged.

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[13] See, e.g., [2001] B.C.J. No. 50.

[14] *Sneddon v. B.C. Hydro*, 2004 BCCA 454

[15] *Schmidt* v. *Air Products Canada Ltd.*, [1994] 2 S.C.R. 611.

[16] *Aegon Canada Inc.* v. *ING Canada Inc.*, (2003) 179 O.A.C. 196.

[17] *Bower* v. *Cominco Ltd.*, (2003) 37 B.L.R. (3d) 185 (C.A.), (2003) 19 B.C.L.R. (4th) 284; *Buschau* v. *Rogers Cablesystems Inc.*, (2001) 83 B.C.L.R. (3d) 261 (C.A.).

While litigation relating to surplus entitlement and contribution holidays remains common, a remarkably diverse and sophisticated array of other pension and benefit issues is now being presented to the courts. The following is a sampling of some of the issues the Canadian courts have dealt with recently.

(b) Surplus Entitlement on Partial Terminations

On July 29, 2004, the Supreme Court of Canada released its decision in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*[18]. The Supreme Court of Canada dismissed an appeal from a decision of the Ontario Court of Appeal which held that on a "partial termination" of a pension plan, Ontario pension legislation crystallized the surplus rights of the affected plan members. In particular, if the pension plan provided that on its termination the surplus assets belonged to the then plan members, on a partial termination the members affected by the partial termination thereby became entitled to a proportionate share of the plan's then surplus assets.

The *Monsanto* decision is based upon a provision of the Ontario pension legislation which provides that members affected by a partial termination have the same entitlement to benefits on a partial termination as they would on a full termination of the plan. Provisions such as this are contained in the provincial legislation of most Canadian jurisdictions. However, in Alberta and British Columbia the relevant provision provides that partial terminations do not trigger any surplus rights unless the plan documentation says so. In Quebec, the pension legislation does not recognize the concept of partial terminations.

Unfortunately, the Supreme Court of Canada's decision probably created more questions than it answered. For example, the partial termination in question in *Monsanto* occurred over a 25 month period. On every day of that 25 month period the amount of surplus assets in the plan would have fluctuated, but the Supreme Court gave no guidance as to what would be the effective date of the partial termination that crystallized that entitlement.

There are hundreds of partial terminations in Ontario which were on hold pending the outcome of this decision. It is likely that there will now be a significant number of lawsuits relating to these partial terminations to resolve the surplus rights of the affected members, and to resolve the other questions left unanswered by the Supreme Court.

(c) Shortfalls on Plan Wind-Up

There have now been several cases where a pension plan has been terminated with a solvency deficiency at a time when the sponsor could not make good 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 those parties failed to take steps that would have prevented or mitigated the shortfall, and the resulting reductions in their pensions.

The seminal decision in this area is *Froese* v. *Montreal Trust Company of Canada*, a 1996 decision of the British Columbia Court of Appeal.[19] In *Froese*, the employer, Johnsons Terminal Limited, became

[18] 2004 SCC 54.

[19] (1996) 137 D.L.R. (4th) 725.

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.[20] While the custodial trustee successfully defended its position at trial, the BC 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 which 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. Accordingly, 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.[21] This action was certified as a class action, and after a trial of certain preliminary issues[22] the matter was settled.

A more recent Ontario dispute involves similar facts. In *Givogue* v. *Burke*, it appears that the employer, Voyageur Colonial Limited, became bankrupt at a time when various of its plans were under funded. The plan members have sued the trustees of the plan and their actuaries alleging that the shortfall was caused by their negligence and/or breach of fiduciary duty. To date, this matter has not gone to trial, though it has been certified as a class action.[23]

As an aside, in *Givogue* the defendant actuaries brought a preliminary motion to have the claims against them dismissed arguing that, as a matter of law, they only owed legal obligations to their client, the plan sponsor.[24] This motion was dismissed.

While there is no reported Canadian trial level decision on the merits which has held that actuaries owe a fiduciary duty to the plan's members, and awarded damages to the members (as opposed to the sponsor) for breach of that duty, there are now several cases (including *Givogue*) where such claims have survived preliminary challenges by the defendant actuaries.

(d) Insufficient Assets Transferred into the Plan

In a recent Ontario matter the members of a plan challenged a sponsor's decision to transfer assets and liabilities from another pension plan into its pension plan. In addition to a number of more

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[20] The events in *Froese* preceded the coming into force of the *Pension Benefits Standards Act* (British Columbia) ("**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.

[21] *Sadler* v. *Watson Wyatt and Co., Royal Trust Corporation of Canada et al.*, 2001 BCSC 246, [2001] B.C.J. No. 289 (British Columbia Supreme Court).

[22] *Ibid.*

[23] *Givogue* v. *Burke* [2003] O.J. No. 1932 (Ontario Superior Court of Justice).

[24] *Ibid.*, at para 10.

conventional claims (contribution holidays and invalid amendments), the members also claimed that the sponsor permitted an insufficient amount of assets to be transferred into the plan, thereby jeopardizing the solvency of the receiving plan. This matter was certified as a class action[25], and subsequently settled.[26]

(e) Plan Conversions: Inappropriate Transfer Values

The leading case concerning inappropriate transfer values is the 1999 Ontario decision of *McLaughlin* v. *Falconbridge Limited*.[27] The dispute in *McLaughlin* arose out of the termination of the pension plan for Kidd Creek Mines Ltd. and its replacement on January 1, 1986 with a Group RRSP. In particular, the plaintiffs claimed that the employer and its actuary improperly pressured the plan members to accept commuted 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.

The *McLaughlin* case is of particular interest to actuaries because the defendant actuaries vigorously defended the plaintiffs' allegations that they owed a fiduciary duty to the plan members.[28] Indeed, the defendant actuaries opposed certification of the plaintiff's claim against them on this ground (certification being the process by which the court allows an action to proceed as a class action, which will be discussed in greater detail below). However, at the certification hearing the plaintiffs have a very low threshold to meet in order to satisfy one of the requirements for certification, and the claim against the actuaries was certified. It is my understanding that after an unsuccessful attempt to appeal this preliminary ruling[29], the claim was settled.

(f) Administrative Expenses

While issues relating to surplus withdrawals are litigated frequently, a related issue, a sponsor's withdrawal of funds from the pension fund to pay administrative expenses, has not. However, that trend is changing, and plan members now commonly add claims relating to administrative expenses to their surplus related claims. For example, in a matter currently being litigated in British Columbia, *Gregg* v. *Freightliner Ltd.*,[30] the plaintiff plan members are not only claiming an entitlement to the surplus assets remaining in the plan on termination, they also challenge the sponsor's payment of administrative expenses out of the plan prior to its termination.[31] This matter is in the process of being certified as a class proceeding. However, no decision on the merits has been reached.

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[25] *Hinds* v. *Colgate-Palmolive Canada Inc.* (26 February 2002), O.J., Court File No. 98-CV-153808, [2003] O.J. No. 1934.

[26] [2003] O.J. No. 1934 (Ontario Superior Court of Justice).

[27] [1999] O.J. No. 5641, 21 C.C.P.B. 133 (Ontario Superior Court of Justice).

[28] *Ibid*, at paras. 21 to 33.

[29] [1999] O.J. 5640 and 5641(Ontario Superior Court of Justice).

[30] 2003 BCSC 241.

[31] *Ibid*, at para. 64.

(g) **Failure to Change Investment Policy when Plan Termination Imminent**

In the *Gregg* case referred to above, the plan members claim they are entitled to the surplus assets remaining in the plan on its termination. They also claim these surplus assets should be augmented by a return of the administrative expenses paid from the pension fund and the value of the contribution holidays the employer took prior to termination. While these are fairly conventional claims, the *Gregg* plaintiffs have also advanced a claim which I believe is the first of its kind in Canada.

In *Gregg*, the plaintiffs allege that once the plan sponsor knew that termination of the plan was likely, it should have immediately altered the plan's investment policy to reflect that fact[32], presumably 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. During the time period immediately before the plan's termination (September 30, 2002), the equity markets declined significantly. As noted, no decision on the merits of this novel claim has yet been rendered.

(h) **Failure to Extend Early Retirement Enhancements**

Certain former members of a pension plan sponsored by Imperial Oil Limited challenged their exclusion from an early retirement enhancement program offered by the plan sponsor.[33] Specifically, shortly before initiating a significant workforce reduction the plan sponsor modified its enhanced early retirement program to restrict it to plan members who were age 50 or older as of the date of their termination of employment.[34] The plaintiffs, who did not meet these further age restrictions, challenged these amendments by commencing a proceeding[35] with the Ontario pension regulators, with whom the plan was registered. Having no success in that forum, the plaintiff plan members initiated litigation in Alberta. This litigation appears to be ongoing, but no decision on the merits appears to have been reached.

(i) **Exclusion from Surplus Sharing Arrangement**

Canada Mortgage and Housing Corporation (CMHC) had a significant surplus in its pension plan. Perhaps with a view to avoiding litigation with the plan members regarding the surplus assets (a hope which was not realized), CMHC adopted a surplus distribution program effective January 1, 1999. However, to share in the distribution an individual had to be a member of the CMHC plan as of October 23, 1998.

The plaintiffs were individuals who had terminated employment and taken commuted value transfers prior to that date. They were thus excluded from the surplus distribution, and sued CMHC for, among other things, not advising them that it might distribute the surplus to the plan

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[32] *Ibid*, at para. 64.

[33] *Lloyd* v. *Imperial Oil Ltd.*, (2001) 289 A.R. 293 (Alberta Court of Queen's Bench).

[34] *Ibid*, at para. 3.

[35] *Ibid*, at para. 22.

members.[36] The claim appears to have been certified as a class proceeding in 2000. However, as a result of the *Monsanto* decision the plaintiffs sought to amend their pleadings to include *Monsanto*-based claims stemming from alleged partial terminations that occurred prior to the surplus distribution. The court refused to allow such amendments, finding that the amendments would make the litigation "unmanageable".[37]

(j) Liability for Negligent Investment

In early 2003 a class action was commenced on behalf of the members of the pension plan for employees of certain Ontario farm cooperatives, 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 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 the process actually resulted in significant losses being realized.[38] This matter has not yet proceeded to hearing.

(k) The Calculation of "Final Average Earnings"

In July 2003, the Superior Court of Quebec certified a class action brought by certain members of a pension plan sponsored by Noranda Inc. in which they challenged the method Noranda had used for calculating their pensionable earnings under the plan. In particular, they challenged the sponsor's exclusion of certain amounts from the definition of earnings.[39]

(l) Failure to Give Retirees a Share of Surplus Assets

There are currently three matters pending in British Columbia where retired plan members are seeking certification of a class action relating to the plan sponsor's alleged failure to give the retirees a specific "share" of the ongoing surplus assets in the pension plan.[40] Each of these disputes involve a pension plan which 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 now seek a distribution of surplus assets among the proposed class. A similar claim brought by the retirees of the Hydro Quebec Plan was dismissed by the Quebec Superior Court in September 2002.[41]

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[36] *Lacroix* v. *Canada Mortgage and Housing Corporation,* [2003] O.J. No. 2610, Court File No. 99-CV-10694.

[37] *Ibid*, at para. 62.

[38] Court File No. 03-CV-244195CP (February 19, 2003): *Martin* v. *Barrett et al, as trustees of the Participating Co-Operatives of Ontario Trusteed Plan.*

[39] *Courchesne* v. *Noranda,* (2003) 37 C.C.P.B. 40.

[40] *Williams* v. *College Pension Board of Trustees,* BCSC, Vancouver Registry No. L030951; *Ruddell* v. *BC Rail Ltd.*, BCSC Vancouver Registry No. L032814; *Lieberman* v. *Business Development Bank of Canada*, BCSC Vancouver Registry No. L041024.

[41] *Assoc. provinciale de retraités d'Hydro-Quebec* c. *Hydro-Quebec*, [2002] R.J.Q. 2475. The Quebec Court of Appeal has heard the appeal, and its judgement is pending.

(m) **Reduction in Post Retirement Benefits**

There are now three significant lawsuits pending in Canada regarding reductions in post retirement benefits provided to certain public sector retirees.

Last January, the Ontario Superior Court of Justice certified a class action against the Ontario provincial government relating to certain reductions in the post retirement benefits provided to its retirees.[42]. Since 1974, the Ontario government has provided group benefits to its retirees, and appears to have given retirees the same group benefits as those given to active members. In the latest round of collective bargaining with its employees, the Ontario government appears to have secured an agreement on certain reductions in the group benefits provided to its active employees, and the Ontario government sought to apply the same reductions to the retirees.

The defendant moved to have the matter dismissed on the basis that the plaintiff's claims were unknown to law.[43] However, as will be discussed below, the burden on the plaintiff to defeat such a preliminary motion is quite low, and they succeeded in having their action certified as a class action.[44]

Two similar lawsuits have been brought in British Columbia involving the post retirement benefits provided to the members of the Municipal Pension Plan and the Public Service Pension Plan respectively.[45]

5. THE DYNAMICS OF CLASS ACTION LITIGATION

As indicated above, one of the hurdles facing a plaintiff who wishes to bring a class action is that he or she must be able to demonstrate that their claim discloses a cause of action known to law. At the certification stage this a very low threshold. In particular, the novelty of the plaintiff's claim is not a bar to finding that the cause of action does not exist. Further, the court is entitled to make this determination on the assumption that all facts plead by the plaintiff in his or her pleadings will be proven to be true.

A review of the case reports indicates that many defendants in pension and benefit actions mount vigorous attempts to have certification denied on the basis that the pleadings do not disclose a valid cause of action. Indeed, defendants will often mount a thorough and comprehensive attack on the merits of the plaintiff's claim at the certification stage.

While such an attack might well defeat the claim on the merits at trial, the test at the certification stage is much different, and the odds are stacked in the plaintiff's favour. Even if the court believes

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[42] *Kranjcec* v. *Ontario* (2004), 39 C.C.P.B. 32 (Ontario Superior Court of Justice).

[43] *Ibid*, at paras. 14 through 46.

[44] *Ibid*, at para. 73.

[45] *BCNU et al* v. *Municipal Pension Plan Board of Trustees*, BCSC, Vancouver Registry No. S035595; *Bodner v. Her Majesty the Queen in Right of the Province of British Columbia*, Victoria Registry, No. 04 3706.

that a defendant's substantive defences will be ultimately prove meritorious, the strength (or weakness) of the plaintiff's claims will not normally prevent certification.

This situation leads to the parties having essentially joined issue on the merits in a forum where the plaintiff is almost certain to succeed. If the plaintiff succeeds in certifying their claim after rebutting the defendant's attacks on the merits, this tends to invigorate the plaintiffs. Conversely, it often discourages and demoralizes the defendant.

In fact, relatively few class actions proceed from the second stage (certification) to the third stage (common issues trial). Many defendants, perhaps because of their failure to demonstrate that the plaintiff's claim does not pass the thresholds described above, or because of concerns regarding the potential liability they may now have to the entire class for damages and costs, choose to settle instead of proceeding to the third stage.

In our view, there is little to be gained by a defendant in a class action by joining serious issue with the plaintiffs on the merits at the certification hearing. Rather, it may be better for the defendant to focus its efforts on challenging the other elements the plaintiff must establish to have his or her claim certified, e.g., are the issues truly common, are the class definitions appropriate, is the plaintiff an appropriate representative of the claim, etc. These measures will avoid giving the plaintiffs a "dress rehearsal" opportunity to review and challenge the defendant's defence. This approach might also tend to dampen the "certify and settle" dynamic often seen in other forms of class action litigation.

It is not clear that the "certify and settle" dynamic should become as prevalent in pension and benefit matters as it does in other litigation. To be clear, proceeding as a class proceeding will increase the costs and complexity of the defence. For example, once a class proceeding is certified, the court will require that various notices be provided to the class members, often at the defendant's expense. Further, the plaintiff's immunity from costs may encourage him or her to pursue avenues he or she would not pursue if subject to the normal costs rules. However, at the end of the day, and despite the plaintiff's immunity from costs, the overall financial dynamic facing defendants in significant pension related claims is not altered significantly by certification. Unlike product liability litigation, pension claims normally involve a large sum of money whether there is one plaintiff or a thousand. It does not significantly affect the defendant's economic incentive to mount a full and vigorous defence to, say, a contribution holiday claim if such a claim is certified as a class proceeding.

6. THE FUTURE

We believe the number of class actions and other lawsuits in the pension and benefits area will continue to increase, and that the diversity of the claims being advanced will continue to expand.

In Ontario, Quebec and British Columbia law firms that have traditionally represented plaintiffs in class action proceedings have become interested in the pension law area. For example, one of the leading union side labour law firms in Ontario has recently partnered with a Vancouver law firm that specializes in class actions, and have brought the three class actions on behalf retired plan members regarding the distribution of surplus in ongoing plans described above in part 1(l).

Litigation in the pension and benefits areas has now progressed well beyond the boundaries of litigating surplus withdrawals and contribution holidays. In addition to the wide array of topics described above in item 1, we would venture the observation that it may only be a matter of time before we see litigation on one or more of the following topics:

- claims by members of a "participant directed" defined contribution pension plan (i.e., one with several investment options) that they were provided with poor educational or other information relating to their investment options, with the result that they realized insufficient rates of return on their pension assets;

- claims by plan members against sponsors who continued to take a contribution holiday from a DB plan based on an actuarial valuation which, because of significant adverse investment experience, no longer accurately depicts the funded status of the plan (e.g., the Air Canada scenario);

- claims by members of a participant directed defined contribution pension plan which allows members to choose the vehicles in which their assets will be invested claiming that they should **not** have been given the ability to manage their investments, and that the losses they have suffered are as a result of the plan sponsor not retaining responsibility for investments.

To conclude, we would like to quote from an article written by Mr. Justice Warren Winkler, a justice of the Ontario Superior Court of Justice who has dealt with many of the class actions brought in Ontario. Writing extra judicially, he made the following observation regarding pension and benefit class actions:

> 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.[46]

We agree with Justice Winkler's observation, and predict that class proceedings will become an increasingly familiar feature of the pension and benefits landscape. All of us who work with pension and benefit plans on a day to day basis must take this reality into account.

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[46] *Supra*, note 43, at p. 46

Vancouver
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

Calgary
3700, 205-5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
Telephone 403.269.6900
Facsimile 403.269.9494

Yellowknife
P.O. Box 818
200, 4915 – 48 Street
YK Centre East
Yellowknife, Northwest Territories
Canada X1A 2N6
Telephone 867.669.5500
Toll Free 1.888.465.7608
Facsimile 867.920.2206

genmail@lawsonlundell.com
www.lawsonlundell.com

LAWSON LUNDELL LLP