WHY EMPLOYEE AND RETIREE CLASS ACTIONS GET STARTED - AND WHAT HAPPENS WHEN THEY DO

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I. Employee and Retiree Claims as Class Proceedings

For employees and retirees who do not have the benefit of access to the grievance and arbitration mechanisms available to unionized employees, class proceedings offer a valuable and versatile means of addressing issues of broad application in a cost effective manner. The experience with employee and retiree claims over the past five years has demonstrated that this form of proceeding permits meritorious claims to come forward that would otherwise not have been possible. We will review the basic framework of these proceedings in this paper.

In this paper the contextual and nuanced approach to employment issues which Canadian courts have developed over the past decade is reviewed. This evolution makes class proceedings an excellent mechanism for advancing a number of these claims both for employees and retirees. A number of these substantive claims are discussed in the class proceeding context and an approach to pursuing and adjudicating these issues is outlined. The article then discusses the use of class proceedings to bring pension and benefit claims. The final section will evaluate the contribution of claims brought through class proceedings to the development of the substantive law of employment, pensions and benefits.

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II. Recognition of the Importance of Employment

Work and employment are critical aspects of the economic and emotional well being of individuals. Economists have recognized the relationship between the impact of work on individuals and the impact of individuals on productivity, noting in particular that worker productivity depends upon motivation and the effort each person is willing to supply.[2] Wages, benefits and pensions are an important aspect of this, since historically less than ten percent of North American workers have believed that increasing effort and thereby enhancing productivity would be personally beneficial rather than simply increasing the profits of their employer.[3]

Particularly in the past decade Canadian courts have recognized and described the importance of employment and the vulnerability of employees. In *Ceccol v. Ontario Gymnastic Federation*[4], MacPherson J.A. noted as follows on behalf of the Ontario Court of Appeal:

> In an important line of cases in recent years, the Supreme Court of Canada has discussed often, with genuine eloquence, the role work plays in a person's life, the imbalance in many employer-employee relationships and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees.

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2 Lester Thurow, *Dangerous Currents* (New York: Vintage Books, 1984), at 175.

3 Paul Weiler, *Governing the Workplace* (Cambridge, Mass: Harvard University Press, 1990), at 148-49.

4 (2001), 55 O.R. (3d) 614 at para. 47.

In *Reference re Public Service Employees Relations Act (Alta.)*[5], Dickson C.J.C. wrote:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

Writing on behalf of the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*,[6] Justice Iacobucci noted that for most people, work is one of the defining features of their lives. This means that changes to the employment relationship, in particular the termination of that relationship, are significant:

> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that results from dismissal.

Courts have also appreciated that there is a context and an economic reality to the difficulties employees face when their employment is terminated. As Justice Iacobucci stated on behalf of a majority of the Supreme Court of Canada:

> ...the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable

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5 [1987] 1 S.C.R. 313 at 368.

6 [1997] 3 S.C.R. 701 at para. 95.

> contract provisions than those offered by the employer, particularly with regard to tenure.[7]

More recently, the Ontario Court of Appeal explicitly acknowledged the practical difficulties faced by terminated employees: the immediate loss of job and income; the lack of knowledge about when they will find replacement employment; and the onerous task of financing a claim in an expensive legal system.[8]

Courts have begun (again) to articulate the importance of income security in retirement, although there is little jurisprudence from the most senior Canadian court on "a field which is gaining in importance as more and more people retire and look to their pensions to sustain them during their 'golden years.'"[9] Pensions and post-employment benefits will provide the main source of income for most retired workers. There are public and private pension systems that may provide income security in retirement, but most retired workers rely significantly on private pensions. Higher courts have, as yet, had relatively little opportunity to comment further on the role of post-employment benefits to retirees.[10]

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7 *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 1003, quoting from K. Swinton, "Contract Law and the Employment Relationship: The Proper Forum for Reform" in B.J. Reiter and J. Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980), 357 at 363.

8 *Belton v. Liberty Insurance Co. of Canada* (2004), 72 O.R. (3d) 81 at 91.

9 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 at para. 1 per Deschamps J. (hereinafter *Monsanto*).

10 The leading case in Canada is still *Dayco (Canada) Ltd. v. CAW-Canada* (1993), 102 D.L.R. (4th) 609 (S.C.C.) (hereinafter *Dayco*).

III. Employment Claims in Class Proceedings

As noted above, the loss of employment perhaps more than any other event is the time when individuals are the most financially vulnerable. At the same time, for many individuals the task of financing and pursuing an action for wrongful dismissal can be daunting and perhaps impossible. Where the termination of employment is part of a large reduction or elimination of the workforce, the class proceeding has proven to be an efficient and effective means of advancing wrongful dismissal claims.

The challenge to advancing wrongful dismissal claims as class proceedings was most fully canvassed in *Webb v. Kmart Canada Ltd.*, where Brockenshire J. held:

> ...the defendant has unilaterally determined what the appropriate amount of notice or pay in lieu thereof should be for the thousands of employees dismissed and now takes the stance that it would not modify those figures unless a court of competent jurisdiction found that the individual plaintiffs, on a one by one basis, had proved the figures wrong. Because of the costs and delays involved in individual actions, the defendant would be effectively insulated from any independent review of its unilateral decision, negating any possibility of a modification of the approach of this defendant, and possibly other corporate defendants, in dealing with employees being dismissed.[11]

In virtually every wrongful dismissal claim brought as a class proceeding the defendants have taken the position at certification that there were individual issues which were so significant that certification should not be granted. Without exception courts have held that while there will inevitably be individual issues which will require resolution, there are also

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11 (1999), 45 O.R. (3d) 389 at 401-02 (S.C.J.)

common issues that would advance the proceeding.[12] This conclusion is consistent with the specific provision in class proceeding statutes for the management of individual issues, thereby creating efficiencies for the justice system.[13]

It is the management of these individual issues that has ended up being the focus of *Webb v. K-Mart* and must be carefully considered or the benefits of bringing wrongful dismissal claims as a class proceeding will be negated. As Bennett J. noted in *Gregg v. Freightliner Ltd. (c.o.b. Western Star Trucks)*, while it is appropriate to be concerned that such litigation will end up "out of control" once the common issues are determined, these concerns simply confirm that careful planning and management are required. While the litigation plan is not "written in stone", if it is not workable from the outset then the litigation "runs the risk of devolving into an expensive and cumbersome process, thereby defeating the entire purpose of the class proceeding."[14]

It would appear that this devolution is precisely what has taken place in *Webb v. K-Mart.* This case was certified in June 1999 and almost six years later the matter is still before Brockenshire J. The Defendant has most recently brought a motion to de-certify the proceeding largely on the basis that the Plaintiff's litigation plans are not methods for advancing the litigation and addressing individual claims in a way that is fair to the parties

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12 See, for example, the recent decision of Bennett J. in *Gregg v. Freightliner Ltd. (c.o.b. as Western Star Trucks)*, [2003] B.C.J. No1 345 (S.C.).

13 *Peppiat v. Nicol* (1993), 16 O.R. (3d) 133 (Gen. Div.) and *Scott v. Ontario Business College (1977) Limited*, endorsement of Shaughnessy J. dated September 20, 1999 (Court File No. 100514/99).

14 *Supra* at paras. 85 and 97.

and achieves economies of scale and preserves judicial resources. That motion was dismissed, and the Plaintiff's revised plan of proceeding, which involved the appointment of individual referees across Canada, was accepted subject to further scrutiny by the Court.[15]

Among other things, the judicial history of this proceeding demonstrates the difficulty the courts and lawyers still have in dealing with contentious disputes of limited economic value even after the adoption of class proceeding statutes. Yet even with all of the difficulties that appear to have beset this case, Brockenshire J. concluded: "Despite all of the intervening problems and delays in the many years since certification, in my view the original reasons for finding a class proceeding to be the best procedure still apply".[16]

IV. Pension and Benefits Claims in Class Proceedings

Class proceedings involving pensions and benefits claims have expanded rapidly in the past decade, in part because, as noted by Justice Winkler of the Ontario Superior Court of Justice, these claims are "tailor made" for class proceedings.[17]

For the purposes of the class proceeding form, the key features of both pension and post-employment benefit claims are similar enough to be considered together. This section will

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15 *Webb v. 3584747 Canada Inc.* [2005] O.J. No. 499 (S.C.J.).

16 *Supra* at para. 27.

17 See *Ormrod, infra* note 21.

consider the main elements of pension and benefits claim certifications, and the next will summarize recent cases in each of these areas.

The first element is that members of a pension plan and retirees receiving post-employment benefits are a clearly identifiable class. Typically, pension and benefits administrators will have detailed information on the identity of the plaintiffs, in some cases sufficient to facilitate the calculation of damages.

Second, as a group, members of pension plans and benefits plans are subject to essentially the same terms of a pension plan text or insurance contract. Depending upon the nature of the dispute, the proper interpretation of the plan text, trust agreement, insurance contract or communication with plan members will resolve a significant number of common issues to the class, if not the entire dispute.[18]

Third, these claims are well within the purpose of class proceedings legislation. Employees and in particular retirees, as individuals, are effectively unable to individually litigate a pension surplus or benefits premiums issue, notwithstanding the significant impact it may have on their health and well-being. Further, retirees on the whole are not consistently represented by unions or employee associations, and do not have access to their dispute resolution mechanisms.

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18 Whether individual evidence is required on certain aspects of a claim is the main limitation to this form, as will be discussed below.

There are also structural features of pension and benefit relationships that create barriers for individual claims. Like an employment relationship, pensions and benefits provision by employers to beneficiaries are unusually long relationships. They may extend for 30 or 40 years, involve power imbalances in bargaining and significant information asymmetries. In that relationship, the understanding and control of decisions and material information is almost entirely the plan sponsor's responsibility, and subject to statutory disclosure to plan members. Explaining pension systems to employees is a complicated task. Describing a typical employees' pension scheme, Laurence Kotlikoff and Daniel Smith report:

> a typical worker might face age and service restrictions on plan participation, a graduated vesting schedule, portability with a specified set of co-participating employers, a social security step-rate integrated benefit formula, an optimal peak-years or terminal years earnings base, age- and service-specific early retirement benefit reduction rates, supplemental early retirement benefits, partial actuarial increases in benefits for work beyond the plan's normal retirement age, and limited cost of living overhead allowances.[19]

This is only a description of the information about the provisions of a typical defined benefit plan. An informed plan member would also want to understand the investment decisions of the plan's investment managers – or, in the case of defined contribution plans, to understand their own investment decisions. Such decisions are typically explained to plan members as "Goldilocks" options: high, medium and low risk investments. Upon imparting this information, the employee is thought to have assumed the risk of adverse investment performance.

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[19] Laurence Kotlikoff & Daniel Smith, *Pensions in the American Economy* (Chicago: University of Chicago Press, 1983) at 14.

Further, were there some wrongful conduct in all this, the damages arising as a result may not be discoverable until some date well into the future, possibly decades.

Pension and benefit plan members are therefore reliant upon plan sponsors and administrators to provide accurate and clear information about benefits. The typical claims that will arise in this situation are claims for negligent misrepresentation, for omissions or misstatements about benefits or options, and parallel claims for breach of fiduciary duty under statute or at equity, and for improper provision of pension and benefits information. Administrators of pension plans have significant duties at law and by statute to plan members, and liability around communications with members is one of the perennial "hot topics" in pension law seminars.[20]

The type of relationship, the nature of the law and the efficient class structure combine to make a pension or benefit claim "a quintessential class action".[21]

Other solutions to these problematic features of retiree pension and benefit claims have been explored. One solution to the problem of representing groups of retirees is to encourage the formation of retirees' associations and use of those associations in class proceedings. Other solutions to organizing retirees import conflicts or are more limited in

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20 Most pension legislation places fiduciary duties on plan administrators (and employers, in their capacity as plan administration), and failure to provide proper and timely information. Courts have been willing to hold administrators to these duties, and find ways around normal defences to state claims in this context: see for e.g., *Spinks v. Canada*, [1996] 2 F.C. 563 (C.A.) [hereinafter *Spinks*].

21 *Ormrod v. Etobicoke (Hydro-Electric Commission)* (2001), 53 O.R. (3d) 285 (S.C.J.) at 289 [hereinafter *Ormrod*] .

scope. Attempts have been made to incorporate retirees benefits plans into existing collective agreements and bring retirees claims within labour relations mechanisms, although this can create problematic duties for unions representing active workers and retirees with an employer. A third solution is applicable in insolvency proceedings. In a *Companies' Creditors Arrangement Act* (Canada) proceeding, groups of retirees have had their interests represented by independent counsel, at the cost of the employer.[22] We will discuss the interaction of these solutions in some more detail below.

Pension Class Proceedings

The types of class proceedings that have arisen are broadly consistent with the trends in pension plan funding over the past 25 years, in particular pension plan surpluses in the 1980s and 1990s. After 2000, instead of surpluses, there have been some large-scale restructurings prompted by pension deficits[23], more plans at risk, and some plans wound up.[24]

However, class proceedings by retirees and members of pension plans are largely a phenomenon of the late 1990s, after class proceedings legislation became more widely available.

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22 See, for e.g., the Stelco Inc. restructuring.

23 See, for e.g., the Air Canada Ltd. and Stelco Inc. restructurings of 2003-2005.

24 See, for e.g., the Participating Co-operatives of Ontario Trusteed Pension Plan in *Martin et al.* v. *Barrett et al.* (2003) Court File No. 03-CV-244195CP (Ont. S.C.) [hereinafter *Martin*].

i. Surplus distribution

By now, it is well established that the class proceeding is suitable to issues of surplus sharing. Some recent examples include:

- *Burleton v. Royal Trust Corp*.[25], in which the employees of Royal Trust sought to establish their entitlement to the surplus in the pension plan, and settled for $50 million.

- *Hinds v. Colgate-Palmolive Canada Inc.,* in which members of the plan alleged that contributions holidays were improperly taken by the employer (and therefore the employer owed moneys to the plan).[26]

- *Sutherland v. Hudson's Bay Co.*,[27] in which the plaintiff group was ordered to amend the class to include all beneficiaries of a pension plan, in order to bring a claim for distribution of a surplus from a merged pension fund.

- However, expansion of a class can be a barrier to certification. In *Lacroix and Ladoucer v. Canada Mortgage and Housing Corporation,*[28] the court denied the

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25 [2003] O.J. No. 2168 (S.C.).

26 [2003] O.J. 1934 (S.C.). The *Income Tax Act* (Canada) requires that, where a registered pension plan experiences a surplus in excess of 110% of liabilities of the plan, employers must use the excess to fund their ongoing obligation to make contributions to the plan.

27 [2003] O.J. No. 2005 (S.C.).

28 [2003] O.J. 2610 (S.C.).

motion to expand the class to include a wider group of former employees in a claim for pension surplus distribution, on the grounds that it raised conflicts.

These cases – and others – have demonstrated the suitability of the class proceeding format for the determination of surplus issues. They have also tended to show that partial classes of plan members will lead to potential conflicts or could jeopardize certification, and that classes should try to represent the entire class of plan members, including retirees and active members. As discussed above, this practice is likely to come under greater pressure as employers choose to fund existing obligations to retirees or accrued benefits of active members at the expense of future accrual of benefits of active employees.

Class proceedings have not significantly developed the law of pension surplus. The law of pension surpluses has only had two treatments at the Supreme Court of Canada, *Schmidt* and *Monsanto*, neither of which were class proceedings, but were substantively representative proceedings. The appellate courts have applied *Schmidt* in the context of each jurisdiction's statutory rules for distributing surplus in pension plans, rules which have by-and-large been the product of the early 1990s, and negotiated deals to distribute surplus between employers and employees. Retirees have gained some access to these distributions and negotiations by virtue of class proceedings, and it is fair to say that class proceedings have, to date, therefore facilitated retiree access to the existing pension surplus law frameworks.

ii. Pension plan deficits

Class proceedings have also been used to bring claims in the context of pension plan deficits or failures. These include:

- In *Givogue* v. *Burke,*[29] Voyageur Colonial Ltd. involved an underfunded plan that was terminated. A group of former employees alleged that at the time of the termination of the plan, the assets were not sufficient to provide for the accrued benefits, and alleged that the deficit was caused by negligence and breach of fiduciary duty.

- The *Martin*[30] case, which involves a multi-employer plan that experienced a deficit of nearly 50%, and was forced to wind up by FSCO.[31] The statement of claim alleges that the trustees and investment consultants were negligent and in breach of their fiduciary duties when, in the 1990s, they implemented a plan to use a series of derivative investment contracts to avoid losses to the plan, but repeatedly lost money and incurred losses unwinding the strategy.

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29 [2003] O.J. No. 1932 (S.C.).

30 *Martin*, *supra* note 24.

31 Multi-employer plans do not have access to the pension benefit guarantee fund in Ontario. This fund is essentially a form of pension benefit insurance available to single-employer pension plans that are wound up in a deficit position.

- In *Sadler v. Watson Wyatt & Co.,*[32] the employer, Westar Mines Ltd., had a plan deficit. Past employees brought an action for negligence and breach of fiduciary duty. They also sought to enjoin the actuary and the custodial trustee to the fund.

To our knowledge there have been fewer class proceedings brought that deal with plan underfunding, and fewer full decisions as a result. This could be a matter of time – plan deficit issues have been more recent than plan surplus issues. It may also be because similar issues are dealt with in the context of corporate restructurings, particularly under the *Companies' Creditors Arrangement Act* (Canada), including the difficulties of representing active and retiree groups. Pension plan deficits can be a significant factor in the decision to enter restructuring, and so these issues may be channelled into the insolvency context.

However, the certifications of class proceedings so far have established that certain issues of plan deficits may effectively be brought in a class proceeding, especially those in which employer, trustee and advisors have been negligent or breached fiduciary duties to plan members, and involve fewer individual issues (such as communications with individual members to establish reliance).

Class proceedings involving issues of plan deficits have brought new claims, and have indicated a direction in which these claims might evolve, but have not to date developed

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32 [2001] B.C.J. No. 237 (B.C.S.C.). The issue of liability of third party administrators and other advisors is an emerging topic in the broader context of corporate restructurings – many of which involve significant pension funding issues. See, for e.g., *TCT Logistics Inc. (Re)* (2004), 70 O.R. (3d) 321 (Ont. C.A.), which will be heard at the S.C.C. this fall.

significant new law. These claims generally arise when claims "crystallize" in spin-offs, downsizing, plan transfers, a sale of assets and in particular, insolvencies. There has been some development in pension and insolvency law as a result. Most recently, the decisions relating to the underfunding of pension plans in the Air Canada, Stelco and United Airlines restructurings, in combination with new questions on the liability of third party administrators and advisors, have indicated the future directions.[33] As noted above, active employees are more effectively represented in restructurings, often by unions, and retirees are often less well represented.

Benefits Class Proceedings

Class proceedings bringing benefit plan issues have been relatively unrecognized by practitioner discourse, but are in fact likely to be an important area in the future of benefits law and broader social policy. Trends in the U.S., which are often harbingers for Canadians, have demonstrated the tendency of employers to reduce health and welfare benefits in order to be able to maintain pensions plan commitments.[34]

In Canada, the trends in benefit plan provision, and claims arising as a result, are today important for: (i) a technical accounting reason, (ii) the state of Canadian law on these

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33 A key concern in the insolvency context is the jurisdiction to decide questions relating to plan administration and funding (pension regulators) versus administration to oversee the restructuring (insolvency court).

34 This is particularly difficult for retirees in the U.S., where there is more limited access to health insurance for fixed income retirees, and a less portable and universal public health care system. See M. Walsh & E. Porter, "Retirement Becomes a Rest Stop As Pensions and Benefits Shrink", *New York Times*, February 9, 2005 at A1.

benefits, and (iii) the same trends as those in the U.S. – an increase in pressure on employers to control or reduce costs in health and welfare plans.

Under the old accounting rules relating to benefits plans, the annual cost of the benefit or the annual premium of an insured benefit was required to be disclosed. The annual premium or cost can be significant, but in the context of most large employers, it is relatively modest. Under recent changes to the Canadian Institute of Chartered Accountants Rules, employers are required to recognize the value of benefits accrued in the period in which they are earned by the employee – that is, to recognize future benefits not when they are paid, but when they are accrued. Much more than current costs are recognized in the disclosure of the estimated liability by the employer (which, like pension valuations, involves estimations about people's future lifespan, health and other financial variables affecting future cost of provision). These valuations can affect the value of corporations. Employers have come under pressure from their stakeholders to "control" these costs, which often means "cut", but have been restricted by leading case law.

That case law is also the second major factor. In *Dayco* [35] the Supreme Court of Canada established the presumption that retiree benefits crystallize or vest upon the retirement date of an employee. Vested benefits – even if provided by contract – cannot be amended or revoked without the consent of the beneficiary. In *Dayco* the Court recognized that unlike active employees who are free to bargain the terms of their conditions of employment,

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35 *Dayco*, *supra* note 10.

including benefits, retirees are no longer in the workplace and have retired on a fixed income.[36] The only way to clearly establish a right to revoke or amend these benefits is to include "*Dayco* language" in the benefit plan, clearly reserving the right to terminate or amend a benefit.

The third set of factors driving these cases are similar to those in the U.S. In 1995 then Finance Minister Paul Martin capped health care transfer payments to the provinces in the Canada Health and Social Transfer. Provincial governments have been reducing the scope of public health insurance, which is placing increasing pressure on private benefits provision, and employers are under pressure to fund current levels of entitlement by reducing future entitlements of acting employees.[37] The broad strategy is to leave accrued benefits alone – partly on the strength of the *Dayco* case and some subsequent class proceedings, such as *Kranjcec* – and to focus on the reduction of future accrual of benefits. In this strategy, notice is given to employees of changes to plans, their benefits reduced and flex benefits options introduced.

Within this context, class proceedings involving benefit plans have included:

- The *Ormrod* case, discussed above, in which unilateral changes to a benefit plan were successfully resisted by a group of retirees. *Ormrod* was a claim for post-

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36 *Id.* at 647-48.

37 For example, before the 1990s, governments paid for out-of-country medical costs, but have capped that cost at the cost of provision "in province", which is often a fraction of the cost in other health care systems. Formularies no longer automatically cover new drugs coming to market.

employment benefits, in which the plaintiffs sought to enforce a promise by the employer to pay insurance premiums for post-employment health and welfare plans.

- *Kranjcec v. Ontario,*[38] in which a significant group of government retirees (nearly 51,000) objected to the reduction of health, dental and hospital benefits as had been established past practice of the Ontario government. Although retirees might have individual issues in the particular usage of these benefits, Cullity J. certified the motion on the basis that the opt-out provisions were available, and the common issues would address the substance of the claim. This matter is expected to proceed to trial in approximately the next year.

- *Markle v. Toronto (City),*[39] in which a claim was brought by a group of retirees for prescription drug and out-of-province benefits coverage after age 65. The City consented to the class proceeding model (but asserted that the benefits were never included in its retiree benefits program).

As Justice Winkler noted, the class proceeding has proven to be a useful form for bringing these claims, which would otherwise be very difficult to bring on an individual basis.[40] What remains to be determined for these claims (and pension plan claims) is whether the trends in the management of health and welfare plans noted above will create sufficient

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38 (2004), 69 O.R. (3d) 231 (S.C.).

39 [2004] O.J. No. 2034 (S.C.).

40 *Ormrod, supra* note 21.

differences among groups of retirees, such that the individual issues overwhelm the common issues and make certification less certain.

V. Limitations to the Class Proceedings Form

In the context of pension and benefits claims, the primary limitations in employing class proceedings are: (i) the balance between common issues and individual issues in a claim; (ii) the balance between the interests of groups of plaintiffs; and (iii) recent decisions imposing cost awards in class proceedings.

The balance between common and individual interests arises in significant part out of the type of claims advanced. Where a claim involves breach of contract, negligent misrepresentation, or breach of fiduciary duty, it may be important to the resolution of the claim to bring evidence of reliance on employer statements or other communications to employees in order to establish both an element of the claim (reliance), and damages arising from the claim.

To a certain extent, this limitation can be addressed by careful framing of claims to emphasize key communications made to all members of a proposed class (say, employer communications in widely-dispersed information booklets, or, as can occur in the context of corporate transactions, mass correspondence to all employees. This limitation can also be addressed by bringing the appropriate type of claim. Where negligent misrepresentation is alleged in the context of a pension or benefit plan, it may also be possible to allege breach of fiduciary duty on the part of a pension plan administrator by statute or at law, or

to establish a fiduciary relationship based on the "open textured" category of fiduciary relations.[41] A claim for breach of fiduciary duty theoretically does not require establishing reliance as an element of the claim (or at least, individual reliance will likely not be as crucial to the success of a claim for breach of fiduciary duty). A further advantage to breach of fiduciary duty is the availability of equitable compensation as a remedy, potentially more options relating to limitations period defences,[42] and at least theoretically, fewer doctrines limiting damages, such as foreseeability, available in equity.[43]

Finally, for large claims in particular, it may be administratively useful to separate these proceedings into liability and damages phases, such that common issues in liability can be determined before proceeding to a damages phase, which might serve the twin interests of determining common issues of liability, and if the result is favourable to a plaintiff class, providing a basis upon which to base settlement discussions about damages.[44]

The second major limitation is more difficult to address. The primary communities of interest that have emerged to date are active employees and retirees, and trends in

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41 See, for e.g., McCamus, J. and Maddaugh, *The Law of Restitution* (Toronto: Canada Law Book, looseleaf) at 27-6 to 27-8.

42 This may be important given the very long time periods involved in pension and benefit claims. This area of law is far from settled, and courts and regulators have been reluctant to bar meritous claims based on limitations periods. See, for example, *Spinks*, *supra* note 29 and *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 39 O.R. (3d) 38 (C.A.).

43 This is an area that is still not settled in law, See, for e.g., *Lac minerals ltd. v. International corona resources ltd.*, [1989] 2 S.C.R. 574, and the expansion of claims after following *Hodgkinson* v. *Simms,* [1994] 3 S.C.R. 377.

44 This type of segmentation is used successfully in other complicated areas of law, such as patent litigation, in order to more efficiently use judicial resources.

employer management of pension and benefit plan costs have tended to shift the cost, and the risk associated with these plans, from current retirees (or active employees with accrued benefits) to active employees and future accrual of benefits. Employers have converted defined benefit plans to defined contributions plans, and have revised health and welfare plans to include *Dayco* language. This limitation will likely produce the major issues to be addressed by plaintiff counsel in future pension and particularly benefit class proceedings.

The third limitation is the manifestation of the primary reason to bring claims by plan members in the first place: costs. The employer-side defence bar is not famous for low billing rates, and two recent cases have demonstrated that courts will award costs, and sometimes substantial costs, to defendants where certification has been denied.[45] Nordheimer J. (who heard both cases) awarded over $100,000 in each case, noting that the proceedings represented significant risk and potential liabilities, and warranted the costs of defence.

VI. Conclusion

Most pension plans in Canada are primarily regulated by minimum standards legislation in each jurisdiction.[46] Health and welfare plans remain largely unregulated. Law reform in both

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45 *Gariepy v. Shell Oil Company* (2003), 23 C.P.C. (5th) (Ont. S.C.); *Pearson* v. *Inco Ltd.*, [2002] O.J. No. 3532 (S.C.).

46 With the important exceptions of Registered Retirement Savings Plans, Supplemental Pension Plans (often executive pension plans) and similar "unregistered" plans. These are primarily regulated by the *Income Tax Act* (Canada), which is not minimum standards legislation and does not have a mandate to protect employees' or retirees' interests.

fields has languished in Canada. There have been calls to harmonize pension law across jurisdictions and to modernize the rules regarding pension investments, but they have not yet met with an answer.

The lack of comprehensive law reform for private pension and benefit provision has contributed at times to pension and benefit claims being framed in terms of other policy initiatives. For example, the Ontario government appears prepared to end mandatory retirement, which will have the indirect (but, we assume, intended) effect of reducing pressure on pension funds and post-employment benefits. While this type of reform may alleviate the pressure on funding pension promises – although it is not clear it will – it will not address the wider variety of pension and benefit issues, some of which are currently driving litigation.[47]

The pressures and trends in pension and benefit plan management discussed above indicate that these claims have the potential to grow in number and scope, so that class proceedings may yet play a role in the development of the law. Perhaps, though, the threat of these proceedings – which have significant liability attached to them – will prompt a more comprehensive effort at law reform.

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47 It has been somewhat confusing to the pension bar that a number of these cases have been refused hearing at the Supreme Court of Canada, while cases with far less national application and import have been heard. See, for e.g., *ING Canada Inc. v. Aegon Canada Inc.*, [2004] S.C.C.A. No. 50 (QL), which was refused leave to appeal in July 2004; *Bower v. Cominco Ltd.*2003] S.C.C.A. No. 527 (QL) and *Buschau v. Rogers Cable Systems Inc.*[2001] S.C.C.A. No. 107 (QL). While these cases were denied leave, *Monsanto, supra* note 10, which was originally about the status of an administrative law doctrine and which contained a question applicable only in Ontario, had already been subject to two strong appellate judgments. See S. Archer, "On the Effective Date of the Partial Wind-up': *Monsanto Canada Inc. v. Ontario*" (case comment) forthcoming, (2005) 41 *Canadian Business Law Journal.*