

**TEMPERATURE RISING:  
CLASS ACTIONS ARE HEATING UP**

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## **Introduction**

Litigation is quickly becoming the norm for pension and benefit plan administrators, sponsors and trustees, and the frequency of such litigation is rising. This trend, which began in the United States (the "U.S.") in the mid-1980s, migrated north in the last decade. Today, pension issues are a prime source for class action litigation in both the U.S. and Canada.

In *Ormrod v. Etobicoke (Hydro-Electric Commission)*<sup>1</sup>, Justice Winkler commented on the appropriateness of litigation pension disputes in the class action context. Winkler J. noted that pension issues constitute the "quintessential class action". The claims typically involve a large number of individuals with a common membership in a pension plan and issues of a complex nature. Such claims are "tailor made" for class actions, he noted.

This paper will provide a brief overview of the components of class actions, will describe the Canadian and U.S. experiences and will outline some recent certification motions and decisions in pension class actions.

## **Class Actions – The Basics**

A class action is a procedural mechanism enabling a representative plaintiff to advance an action on behalf of or for the benefit of several persons whose claims share common questions of law or fact. The oft-cited policy reasons to support class actions are:

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<sup>1</sup> (2001), 53 O.R. (3d) 285 (Ont. Sup. Ct.).

- (a) Increased access to justice – class actions make smaller claims viable to litigate.
- (b) Judicial economy – courts decide common issues in one proceeding.
- (c) Behavioural modification for wrongdoers.

There are disadvantages for plaintiffs of class actions law suits, however. Plaintiffs often do not know most of the people in their class. Often if plaintiffs do not opt-out, they must live with the settlement or ultimate decision of the court. In addition, the ultimate settlement or court decision might provide each individual plaintiff with small damages, much smaller than the individual plaintiff might have been able to settle for or be awarded through an individual action.

### **The Canadian Experience**

Class actions have been available in Quebec since 1978. Today, Ontario, British Columbia, Manitoba, Alberta, Newfoundland, Saskatchewan and the Federal Court of Canada all have class action legislation in place.

In *Western Canadian Shopping Centres v. Dutton*<sup>2</sup>, the Supreme Court of Canada (the “SCC”) “read in” the basic elements of class action legislation into representative proceeding in jurisdictions where class action legislation does not yet exist. The SCC has stated that courts anywhere in Canada have inherent

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<sup>2</sup> [2001] 2 S.C.R. 534 (S.C.C.).

jurisdiction to create and manage the mechanics of class actions. As a result, class actions are now available in every jurisdiction in Canada.

Unlike other litigation, class actions are a two-step process: the certification motion and the trial. A representative plaintiff must have his or her class certified for the purposes of a class action in a motion before the court prior to advancing the claim. In practice, the certification motion is the primary focus of the litigation. Significant resources are used to both argue and defend the motion. The vast majority of class actions are settled once the claim gets certified due to the leverage acquired by the plaintiff of having passed the hurdle of certification. Thus, although mere certification of a class action does not establish the merits of the case, it does become a powerful settlement tool for the plaintiff.

It appears that in some Canadian jurisdictions class actions have a better chance of being certified than others. One-third of cases that apply for certification in Ontario are certified. In British Columbia, approximately two-thirds of claims that move for certification are certified. In Quebec, 80-90% of cases are certified.<sup>3</sup>

In the common law jurisdictions across the country (that is, in every jurisdiction other than Quebec), the test for certification is similar, consisting of five components:

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<sup>3</sup> K. Kay and B. Polovoy, "Class Actions: What's Next in Canada?" (Association of Corporate Counsel, September 27, 2005) [unpublished].

- (a) The statement of claim must disclose a cause of action;
- (b) There must be an identifiable class of two or more persons;
- (c) The claims of the class members must raise a common issue;
- (d) Class proceedings would be the preferable proceeding; and
- (e) The proposed class representative has a workable litigation plan and does not have a conflict of interest with other class members.

In Quebec, however, instead of preferable procedure, the issue is “whether the composition of the group makes the application of alternate procedure for joining multiple plaintiffs difficult or impracticable.”<sup>4</sup> A defendant in Quebec has no right of discovery. There is no appeal mechanism if a case is certified, but if certification is denied, plaintiffs could appeal. The Quebec class action regime appears to be plaintiff-friendly, resulting in more class actions being certified in Quebec than in any other jurisdiction in the country.

### **Pension Class Actions**

Although a part of the U.S. pension litigation scene since the mid-1980s, pension class actions have slowly become the preferred form of pensions litigation in Canada in the last decade and continue to be a growth area. Pension funds are especially susceptible to class actions because they are large pools of capital. The large sum of money that is often at stake, the time available to retirees and the awareness of the availability of class actions by retirees are all reasons for the growth in pensions class actions.

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<sup>4</sup> *Ibid.*

The types of pension claims that could arise in the class action context are as varied and diverse as the plaintiffs' and their lawyers' imaginations. Traditionally, the focus of pension class actions has been on the ownership of pension surplus. Plaintiffs often named plan sponsors as defendants. However, in the last few years the focus has begun to shift from pension surplus to issues associated with the improper payment of administrative expenses, providing investment information to members, investment losses, and plan administrators' and trustees' fiduciary obligations. Plan sponsors are no longer the only ones at risk. Actuaries, counsel and trustees are now at greater risk of becoming defendants in a pension class action. It appears that no person who is involved in any way with a pension plan is immune from being named as a defendant.

Most recent pension claims are framed in the nature of fiduciary breaches, both substantive and procedural. The following is a list of claims that have recently been filed:

- Plan surplus (including surplus entitlement on windup, surplus utilized through contribution holidays, surplus utilized to pay plan expenses and surplus used to enhance benefits to some members but not to others);
- Mismanagement of investments;
- Failure to pay retiree benefits;
- Oversight and review of professional advisors;
- Failure to provide investment information to members; and

- Unauthorized plan amendments.

## **Canadian Case Law Update**

### **I. Use of Surplus Assets**

On March 10, 2005 the Quebec Court of Appeal held that the consent of retirees need not be sought before amending a pension plan affecting, among other things, a surplus, so long as no amendments are made to retirees' accrued benefits.<sup>5</sup>

The following is an update on case law with respect to surplus assets since that decision.

### ***Lieberman v. Business Development Bank of Canada*<sup>6</sup>**

This action was brought by retirees of the Business Development Bank of Canada ("BDC"). The plaintiffs allege that BDC breached its fiduciary duties by implementing amendments to the pension plan (the "Plan") that allowed for the improper reversion of surplus to BDC upon windup or termination, taking contribution holidays and paying expenses from the trust fund.

BDC brought a motion, asking the Court to decline jurisdiction and order that the matter be heard in Quebec, the location of BDC's head office. BDC additionally

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<sup>5</sup> *Association provinciale des retraités d'Hydro-Québec c. Hydro-Québec*, [2005] J.Q. no 1644 (Q.C.C.A.) ("*Hydro-Québec*")

<sup>6</sup> 2006 B.C.S.C. 242 (B.S.C.S.).

argued that the Plan was governed by Quebec law, making Quebec the proper forum for litigation.

The Supreme Court of British Columbia certified this action on February 16, 2006 and dismissed BDC's motion. The Court held that BDC did not establish that Quebec was the more appropriate forum to hear the matter. Since the class consisted of members from various provinces, the location of the employer's head office was irrelevant. In addition, this action would require the application of Canadian law and the law of several provinces, not just Quebec law.

An application for leave to appeal was dismissed by the British Columbia Court of Appeal.

***CBC Pensioners' National Association v. CBC***<sup>7</sup>

This case involves a claim for breach of contract alleging breach of an agreement concerning the division and allocation of surplus between the employer and members of the class. The plaintiff, the CBC Pensioners' National Association, allege that in the early 1990s the CBC entered into a "Surplus Allocation Agreement" (a non-binding discretionary practice, according to the CBC) in which it agreed to share 30% of the available surplus with plan beneficiaries, including retirees.

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<sup>7</sup> [2005] O.J. No. 2693 (Ont. Sup. Ct.) (QL).

As of December 31, 2002, the pension plan (the "Plan") had an available surplus of \$156 million. The CBC decided to use the available surplus entirely for its own benefit.

The plaintiffs seek an order directing the CBC to return to the Plan 30% of the available surplus identified in 2002 and to administer the surplus, as well as subsequent available surpluses, in accordance with the Surplus Allocation Agreement.

This case was certified on March 10, 2006.

***Williams v. College Pension Board of Trustees***<sup>8</sup>

The College Pension Board of Trustees (the "Board") administered the College pension plan (the "Plan"). The Board consisted of at least ten members, appointed by both employers and unions. Beneficiaries were divided into three categories: active members, deferred vested members and retired members. The class consists of the latter two categories of beneficiaries.

In 2001 the Plan had a \$120 million surplus and the Board amended the rules to provide benefit improvement to be funded out of the surplus. The class' pension promises represented between 21% and 41% of the liabilities of the Plan. However, the class alleges that it only received 4% of the surplus, the remainder having been allocated to the employers and active members. The class alleges a

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<sup>8</sup> [2005] B.C.J. No. 1211 (B.C.S.C.) (QL).

violation of the statutory and equitable fiduciary duties owed by the Board to the beneficiaries and seeks an order to reallocate the surplus in an impartial manner among the beneficiaries. The Board claims that the surplus was allocated to a variety of purposes and was not allocated disproportionately among the beneficiaries.

At the motion for certification, the Board argued that the surplus is notional. As a result, none of the parties have a specific interest in the surplus and there could not be an actionable breach of trust. Even if there was a breach of fiduciary duty, the Board is a tribunal and, as a result, the only remedy available is judicial review of the Board's decision. Judicial review would be the preferable procedure in this case since it was cheaper, faster and fairer.

The Court held that, even if assuming that judicial review was available in this case, class proceeding is the preferable procedure because of the lack of damages as a possible remedy in a judicial review and the procedural disadvantages that would be caused by judicial review. As a result, the Court certified the action on May 30, 2005.

It would be interesting to see whether courts will agree with the Quebec Court of Appeal's decision in *Hydro-Quebec* or whether they will find that amendments affecting surplus require retirees' consent.

## II. Administrative Expenses

The following is an update on the case law with respect to the payment of administrative expenses from a pension fund.

### ***Nolan v. Ontario (Superintendent of Financial Services)***<sup>9</sup>

In 1954, the Canada Donut Company (CDC) established a pension plan (the "Plan") for its employees. The trust agreement established that contributions to the Plan were only to be used for the benefit of plan members and that all "expenses incurred by the Trustee in the performance of its duties" were to be paid by CDC.

Over the years the Plan had been amended to allow for, among other things, the payment of certain expenses out of the pension fund (the "Fund").

In 1994 Kerry (Canada) Inc. ("Kerry") became the Plan's sponsor and administrator. Kerry paid Plan expenses from the fund and amended the Plan again to allow for additional expenses to be paid from the fund. The issue in this action, among other things, was whether the amendments that allowed Plan sponsors to pay expenses out of a the Fund were valid.

The Divisional Court held that Kerry could not pay Plan expenses out of the Fund since the original trust agreement stated that the employer was to pay all expenses and that the trust funds are to be used solely for the benefit of the

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<sup>9</sup> [2006] O.J. No. 2141 (Ont. Div. Ct.).

beneficiaries of the trust. Kerry was ordered to reimburse the Fund for all amounts used for expenses after January 1, 2005 plus interest.

Kerry Canada has obtained leave to appeal to the Ontario Court of Appeal.

Unless the Ontario Court of Appeal overturns the Divisional Court decision, pension plan sponsors, administrators and trustees would be well advised to review their original trust documents to learn whether they are restricted from paying plan expenses from the pension plan fund.

### III. Pension Plan Investment

The following is an update on case law involving claims with respect to investment decisions of pension plan administrators and trustees.

#### ***Langlois v. Roy*<sup>10</sup> and *Coutu v. Roy*<sup>11</sup>**

The certification motions for these two actions were heard together.

After Jeffrey Mines filed for bankruptcy, members of the pension plan (the "Plan") commenced a class action against the Plan's pension committee, fund managers and actuaries. At the time when Jeffrey Mines filed for bankruptcy, the funded ratio of the Plan was 64%. The plaintiffs allege that Plan administration led to the Plan's under-funding due to imprudent investment policies; that the investment

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<sup>10</sup> [2006] J.Q. No. 448 (Que. Sup. Ct.) (QL).

<sup>11</sup> [2006] J.Q. No. 449 (Que. Sup. Ct.) (QL).

manager and consultant failed change the investment policies of the Plan when they were necessary and that the pension committee breached its fiduciary duty when it did not modify its investment policies when such modifications were necessary.

Certification was granted for these two actions on January 23, 2006.

#### IV. Duty to Disclose Information to Plan Members

##### ***Hembruff v. Ontario Municipal Employees Retirement Board***<sup>12</sup>

The plaintiffs were former employees who resigned from the Toronto Police Services Board and withdrew the commuted values of their pensions from the pension plan (the "Plan"). The following year, the Ontario Municipal Employees Retirement Board (the "Board") implemented a benefits enhancement. Although four former employees were given the benefits enhancement, the plaintiffs were not. They brought an action against Plan administrators alleging that they had been wrongly deprived of the benefits enhancement and claiming damages for breach of fiduciary duty. Alternatively, the plaintiffs claimed damages for negligent misrepresentation, stating that the Board had a duty to inform members in advance of possible changes to the Plan.

The trial judge found that the Board had a duty to tell members in advance of potential changes, so that members could make informed decisions with respect to the Plan. The Board was liable for negligent misrepresentation to six of the

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<sup>12</sup> (2005), 78 O.R. (3d) 561 (O.C.A.).

eight plaintiffs. In addition, the trial judge found that the Board breached its fiduciary duty to those six plaintiffs.

On appeal, the Ontario Court of Appeal (the "Court") reversed the trial judge's decision. The Court held that although a pension plan administrator has an obligation to disclose highly relevant information regarding a pension plan's existing terms and conditions, information on a pension plan's future plans is not highly relevant; it is speculative in nature and not reasonably reliable. A representation must be a matter of ascertainable fact, not speculation. The claim for negligent misrepresentation therefore failed.

With respect to the Plaintiffs' alternative position, the Court held that the Board did not breach its fiduciary duty to the plaintiffs. Section 26 of the *Pension Benefits Act*<sup>13</sup> requires 45-days' notice in certain circumstances of an amendment that would result in a reduction of pension benefits or otherwise adversely affect the members' rights or obligations. Section 26 did not apply in this case since an enhancement does not reduce or negatively impact rights or obligations. The Court noted that there was "no legal authority for the imposition of a disclosure obligation in respect of pension plan changes that are under consideration."<sup>14</sup> As a result, the Board did not breach its fiduciary obligations to the plaintiffs.

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<sup>13</sup> R.S.O. 1990, c. P.8.

<sup>14</sup> *Hembruff v. Ontario Municipal Employees Retirement Board* (2005), 78 O.R. (3d) 561 (O.C.A.) at para. 89.

An application for leave to appeal to the SCC was dismissed.

As a result of this decision, pension plan administrators have a duty to disclose “highly relevant” information regarding a pension plan’s existing terms and conditions. However, potential amendments do not fall within the realm of “highly relevant” information. As a result, there is currently no duty on administrators to inform members of potential pension plan amendments.

#### V. Labour Arbitrations vs. Pension Class Actions

Over the last few years Canadian courts have been struggling with the conflict between labour legislation requiring a court to stay all court proceedings in favour of arbitration if there is a collective agreement between the parties and class action legislation requiring courts to certify proceedings if certain statutory requirements are met.

Historically, the trend in Canadian case law favoured the enforcement of arbitration agreements. However, in 2004 the British Columbia Court of Appeal found that where there is a conflict between labour and class action legislation, to decide whether a class proceeding is the “preferable procedure”, a court must weigh the circumstances of each case.<sup>15</sup> Where a court finds that the statutory test for certification in class proceedings has been met, the court must find that the collective agreement is “inoperative”. If arbitration is preferable, the

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<sup>15</sup> *Mackinnon v. Money Mart*, 2004 BCCA 473 (B.C.C.A.).

requirements of certification have obviously not been met and the matter will be adjudicated at arbitration.

The following case is the SCC's ruling on this issue, released on May 18, 2006.

***Bisaillon v. Concordia University***<sup>16</sup>

In 1977, Concordia University (the "University") established a pension plan (the "Plan") for both its unionized and non-unionized employees. 80% of the members of the Plan were covered by one of nine collective agreements with the University. Each collective agreement referred to the Plan.

Bisaillon, a union member claiming to represent the Plan members (the "Members"), moved for certification of a class action challenging the validity of amendments to the Plan, amendments that were made without Members' consent. The amendments allowed the university to pay Plan expenses from the fund, to grant itself contribution holidays and to use surplus assets to fund a University program.

One union intervened and requested that the court dismiss the motion on the grounds that the Court lacked jurisdiction to hear this case since the dispute fell within the exclusive jurisdiction of a grievance arbitrator. The Union further argued that the plaintiff was bound by a collective agreement and was, therefore,

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<sup>16</sup> 2006 SCC 19 (S.C.C.).

obligated to use the grievance procedure provided for in the collective agreement to resolve any disputes with respect to the Plan.

The Quebec Superior Court allowed the Union's motion and refused to certify the action. On appeal, the Quebec Court of Appeal decided that the Quebec Superior Court should exercise its jurisdiction and hear the case since the Plan existed independent of the collective agreement. In addition, the Court reasoned that an arbitrator's jurisdiction could not extend to the 20% of the class that was not unionized.

On appeal to the SCC, in a 4-3 decision, the majority held that the court of first instance lacked the jurisdiction to hear this case and properly dismissed the motion. Justice LeBel, writing for the majority, stressed that an arbitrator under the Quebec Labour Code has exclusive jurisdiction over "any disagreement respecting the interpretation or application of a collective agreement." In the instant case, the subject matter of the dispute, the Plan, was referred to in each of the nine collective agreements. Therefore, any disputes with respect to the Plan fell within a grievance arbitrator's exclusive jurisdiction.

The Court also observed that although arbitration decisions are not binding on third parties, non-unionized employees would benefit indirectly from an arbitration award, even though the award would not be legally binding on them.

The implications of SCC's decision are clear. If there is no language in a collective agreement providing that pension disputes are not to be dealt with through the grievance procedure provided in the collective agreement, this decision requires that such disputes be referred to arbitration so long as the collective agreement mentions the pension plan in one form or another. At first glance, this is good news for plan sponsors, administrators and trustees. Since generally grievance procedures in collective agreements provide time limits for filing a grievance and referring it to arbitration, the SCC's decision in *Bisaillon* would provide peace of mind to plan sponsors, administrators and trustees' actions that they are not forever open to attack.

However, if multiple collective agreements exist, as was the situation in *Bisaillon*, referring disputes with respect to the same plan to arbitration under different collective agreements may result in contradictory arbitration decisions. In such a situation, a class proceeding would be preferable. One way to avoid this potential situation is for the collective agreement language to provide that pension disputes involving more than one individual will not be subject to the grievance procedure in the collective agreement.

Furthermore, grievance procedures could only be utilized by plan beneficiaries who are union members and still employees of the employer. Retirees would have to resort to an action in court and would not have access to the grievance procedure.

## The U.S. Experience

Pension class actions in the U.S. first emerged in the late 1950s. Several beneficiaries brought a class action lawsuit against Trustees of a benefits trust fund who allegedly diverted trust fund monies to themselves.<sup>17</sup> A similar action was brought against trustees in the late 1960s involving excessive compensation for trustees, improper employment practices and improper administration of trust funds.<sup>18</sup>

In the U.S., a class action will only be certified if the class representative establishes numerosity, commonality, typicality and adequacy.<sup>19</sup> Once these criteria are satisfied, a court may order certification only if separate actions create a risk of inconsistent adjudication, injunctive or declaratory relief is sought or questions of law or fact that are common to members of the class predominate.<sup>20</sup>

Federally, the *Employee Retirement Income Security Act*<sup>21</sup> ("ERISA") applies to all claims dealing with employee benefit plans. To be considered an "employee welfare benefit plan" under ERISA, a benefit plan must be a plan, a fund or a program that is established or maintained by the employer, employee organization or both that provides benefits to the participants or their beneficiaries.

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<sup>17</sup> *Booth v. Security Mutual Life Insurance Company*, 155 F.Supp. 755.

<sup>18</sup> *Giordani v. Hoffman*, 295 F. Supp. 463.

<sup>19</sup> Fed. R. Civ. P. 23(a).

<sup>20</sup> Fed. R. Civ. P. 23(b)

<sup>21</sup> 1974, 29 U.S.C. § 1001.

Pursuant to ERISA, beneficiaries have four causes of action:

1. Benefits (s. 502(a)(1));
2. Breach of fiduciary duty (s. 502(a)(2));
3. Claim for equitable relief (s. 502(a)(3)); and
4. Claim for interference with protected rights under ERISA (s. 510).

ERISA imposes personal liability on any fiduciary who breaches his or her fiduciary duty. A fiduciary is defined as just about any person who has discretionary authority over a plan:

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercised any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority of discretionary responsibility in the administration of such plan.<sup>22</sup>

Specific statutory duties are imposed on fiduciaries by ERISA, including exercising the care, skill, prudence and diligence of a prudent person, acting solely on the interests of beneficiaries and plan participants for the exclusive

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<sup>22</sup> 29 U.S.C. § 1002(21)(A).

purpose of providing benefits to the beneficiaries and participants and diversifying investments to minimize risk of substantial loss.<sup>23</sup>

Until 1998, ERISA issues were dealt with as part of securities actions. However, in 1998 the first ERISA class action was certified,<sup>24</sup> opening the door to a flood of ERISA class action litigation. In addition, since *Enron*, a new crop of class actions has popped up in what one article calls the "ERISA Copycat Phenomenon."<sup>25</sup> These actions typically involve companies who offer a retirement plan involving investment in company stock which declined in value. Often the claims allege that the fiduciaries of the stock plan misled and/or failed to disclose to beneficiaries information about the quality of the company's stock as an investment option. It appears, therefore, that the focus of class action litigation in the U.S. has shifted to issues dealing with investment losses, especially in the pension context. This trend might be partly due to lower investment returns and financial hardships that might be faced by some pension plan sponsors.

### **U.S. Case Law Update**

In *Moench v. Robertson*<sup>26</sup> the Court established a presumption in ERISA litigation that the decision of a fiduciary under ERISA to continue with an investment in company stock is presumed to be reasonable unless the plaintiff can

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<sup>23</sup> 29 U.S.C. § 1104(a)(1).

<sup>24</sup> F. Denmark, "Lawyering Up" (2004) Sponsors.com 104 at 104.

<sup>25</sup> M. Chester, D. Dodds and T. Walker, "The Erisa "Copycat" Phenomenon" (2005) November/December Compensation & Benefits Review 34 and page 34.

<sup>26</sup> 62 F.3d 553 (3d Cir. 1995).

demonstrate an abuse of discretion because a prudent fiduciary acting in similar circumstances would have invested differently. Abuse of discretion will be proven if the plaintiff could show not only that the fiduciary breached ERISA fiduciary duties, but also that the breaches by the fiduciary caused losses under the Plan. The following is a recent decision dealing with similar issues.

***In re RCN Litigation***<sup>27</sup>

RCN Corp.'s ("RCN") 401(k) plan provided for the beneficiaries to invest their contributions in various investment options including an RCN stock. RCN matched contributions that were made to the RCN stock.

By December of 2000, RCN's stock plummeted and lost 90% of its value. In 2003 the Plan administrator amended the structure to disallow participants from contributing to the RCN stock. Shortly after that, RCN stopped matching contributions. In 2004 RCN filed for bankruptcy.

A group of RCN employees brought a class action against, among other parties, RCN and Merrill Lynch Trust Co., the trustees for the pension plan. The claim alleged, among other things, that RCN and Merrill Lynch breached their fiduciary duties under ERISA by offering the company's stock as an investment option even when it became an imprudent investment and that RCN breached its duty to inform those participating in the plan by failing to provide material information

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<sup>27</sup> 2006 WL 743149 (D.N.J., March 21, 2006) ("RCN").

about the imprudence of investing in RCN stock and failing to provide accurate and full information about the stock.

In a decision released on March 22, 2006, the U.S. District Court for the District of New Jersey dismissed the claim against RCN that it breached its duty to inform participants by failing to provide information about the RCN stock. The Court found that RCN had no duty under ERISA to give investment information to participants. The Plan's documents provided that the administrative committee has the duty to communicate with Plan participants, absolving RCN of that responsibility.

The Court also dismissed the claims against Merrill Lynch. The plaintiffs did not establish that Merrill Lynch had a fiduciary duty to disregard the investment directions given to it by the fiduciaries named by the Plan. Merrill Lynch would have only breached its fiduciary duty as trustee if it was in possession of material information that was not available to the public that was necessary to weigh the prudence of investing in the RCN stock and did not act on that information. All of the information on which the plaintiffs based their fiduciary duty argument against Merrill Lynch was information that was publicly available. Merrill Lynch did not have a duty to provide publicly available information to participants. In sum, Merrill Lynch did not breach its fiduciary duty by not removing the RCN stock as an option when it became an imprudent investment.

RCN establishes that a plaintiff who alleges that a fiduciary breached its ERISA fiduciary duty in relation to investments must show that the information relied on by the fiduciary was material information that was not publicly available. If the information was not material information, or if it was publicly available, ERISA fiduciary duties would not be triggered.

### **What Can Trustees Do to Protect Themselves?**

Although pension class action litigation is on the rise, the following steps will provide trustees and other fiduciaries with greater protection from such actions:<sup>28</sup>

1. Be diligent and careful in performing your job – ensure that the administration of the plan is performed properly.
2. Conduct regular legal audits for compliance – ensure that all communication of information impacting the benefits and stock choices of beneficiaries are uniform and hold up to a set standard. Review the procedure and the standards annually and ensure that any discrepancies in application are addressed and eliminated.
3. Delegate – trustees may delegate to service providers, who can then be cross-claimed if an action is started against the trustees. However, ensure to document the delegation properly.
4. Create a paper trail – Establish and enforce a document retention policy to show how decisions are made and communicated among sponsors, trustees and other fiduciaries.

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<sup>28</sup> D.M. Reilly and R.J. Guite, “ERISA Fiduciary Claims: Planning, Protecting and Preparing for Class Actions” (2005) 31 Employee Relations Law Journal 45 at 45-46.

5. Watch for signals of potential claims – corporate restructures, bad corporate headlines and benefit changes are all signs of potential pension class actions claims.
6. Follow the media – Plaintiffs' counsel often solicit class actions in newspapers, magazines, on websites and on television. Make it a practice to review these sources weekly if the potential for a class action claim exists.
7. Obtain fiduciary insurance – seek the advice of an insurance broker and an insurance lawyer to assist you in selecting the right type of insurance.

If, nonetheless, a pensions class action suit has been filed against your organization, ensure that your class action team includes your corporate counsel, accounting department, investment department, public relations department and outside counsel. A good class action team could make a difference between a long lawsuit that will drag through the courts and dialogue with plaintiffs that might result in the dismissal of the action or settlement.

### **The Future of Pension Class Actions**

It is expected that, as in the past, future Canadian pension class actions will follow the U.S. trends of today. Although in the past the focus of pension class actions has been on the ownership and use of surplus, and though it is expected that such issues will continue to be present, it appears that they will no longer dominate the pension class actions scene. A weakening market, lower investment returns and potential plaintiffs' awareness of trends in pension

litigation suggest that the focus of pension class actions is slowly shifting toward investment issues.

Class actions, as a litigation tool, have not been used as extensively in Canada as they have in the U.S. However, the incidence of pension class actions is on the rise and it is expected that it will become the main tool for retirees to litigate issues they might not have chosen to litigate before the days of class actions. As stated by Justice Winkler, a judge who is familiar with 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, professionals, among others, should assume that if they do not fulfill their fiduciary and other duties or do not do their job properly, they will be sued. The days of being insulated by cost and psychological barriers that previously affected plaintiffs are gone.<sup>29</sup>

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<sup>29</sup> W. Winkler, "Pensions, Benefits and the Canadian Class Action Experience" (2003) 45 Employee Benefit Issues at page 46.