

CANADA / JUDGMENT

Bennett v. British Columbia

2012 BCCA 115

COURT

British Columbia Court of Appeal

DECIDED

14 March 2012

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2012 BCCA 115 Bennett v. British Columbia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Bennett v. British Columbia,

2012 BCCA 115

Date: 20120314

Docket: CA037602

Between:

Frederick Bennett

Appellant

(Plaintiff)

And

Her Majesty the Queen in Right of the

Province of British Columbia

Respondent

(Defendant)

Before:

The Honourable Mr. Justice K. Smith

The Honourable Mr. Justice Chiasson

The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, October 1, 2009

(Bennett v. British Columbia, 2009 BCSC 1358, Victoria Registry 04-3706)

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Place and Date of Hearing:

Vancouver, British Columbia

June 1, 2, 3, 2011

Place and Date of Judgment:

Vancouver, British Columbia

March 14, 2012

Written Reasons by:

The Honourable Mr. Justice K. Smith

Concurred in by:

The Honourable Mr. Justice Chiasson

The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Mr. Justice K. Smith:

- [1] The question in this class-action appeal is whether some 27,000 members of the British Columbia Public Service Pension Plan who were retired as of November 30, 2002, who had elected on their retirement to receive Medical Services Plan ("MSP") and Extended Health Benefits ("EHB") insurance during their retirement, and whose premiums for this insurance were at that date fully subsidized by the respondent, have a vested contractual or statutory right to continue to receive this insurance premium-free after the respondent amended the applicable legislative scheme to require participating retirees to make premium contributions. The Honourable Madam Justice Dorgan concluded they do not and dismissed their action following a summary common-issues trial in the Supreme Court of British Columbia. Her reasons for so doing are indexed as 2009 BCSC 1358.

[2] From 1978 until 2003, premiums for MSP and EHB insurance were fully subsidized by the respondent for retirees who had elected on retirement to receive this insurance. Effective January 1, 2003, the respondent amended the applicable legislative scheme to require retirees to pay a proportion of their MSP premiums dependent on the length of their antecedent retirement, to restrict the range of EHB coverage provided, and to increase the EHB deductible amount to be borne by insured retirees. The appellant claimed these changes represented a breach of fiduciary duty owed to the class and amounted to a breach of the employment contracts of those in the subclass.

[3] The common issues tried by the judge were these:

Did the Defendant breach a fiduciary duty to provide the Retiree Benefits to the Class?

Should the Court grant declaratory relief in favour of the Class with damages to be assessed at a later date?

Did the Defendant breach a contractual obligation to provide Retiree Benefits to the Government Retiree Subclass?

Should the Court grant declaratory relief in favour of the Government Retiree Subclass with damages to be assessed at a later date?

[4] The formal judgment does not answer these questions separately. Rather, it states simply, "The action is dismissed." In her reasons for judgment, the trial judge concluded that the respondent owed the class no fiduciary duty to provide and fund the MSP and EHB insurance. She also concluded that the subclass had no vested contractual right and that the class had no vested statutory right to premium-free insurance, although the latter issue had not been certified as a common issue for trial. Thus, she implicitly answered the common questions in the negative.

[5] The appellant does not seek to revive the fiduciary claim on this appeal. Rather, he contends the judge erred in concluding the retirees have no vested contractual or statutory rights to premium-free insurance. He seeks declarations that there is a contract between the subclass and the respondent for premium-free insurance and that the contract was breached by the respondent, with damages to be assessed together with prejudgment interest. He seeks, as well, declarations that the class has a vested statutory right to premium-free insurance, that the respondent remains under an obligation to provide the insurance, and that the class is entitled to repayment of premiums paid from January 14, 2000 to date, together with prejudgment interest.

[6] The respondent demurs on the contractual issue and submits that the question of vested statutory rights was not certified for trial as a common issue and is not properly before this Court. Alternatively, the respondent argues the class had no vested statutory right to receive these retirement benefits without payment of premiums.

[7] For the reasons that follow, I have concluded the appeal should be dismissed.

Background

- [8] The relevant factual background and the complicated legislative history are canvassed in the trial judge's reasons and in previous proceedings in this action. The reasons for judgment certifying the action as a class proceeding and appointing the appellant as representative plaintiff pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50, are indexed as 2005 BCSC 1673. On appeal of the certification order, this Court amended the order to create a subclass comprising those members of the class employed by the respondent, as opposed to those employed by Crown corporations and other Crown-related entities, but otherwise dismissed the appeal: see *Bennett v. British Columbia*, 2007 BCCA 5, 277 D.L.R. (4th) 440. In these reasons, I will refer to the background information only as far as is necessary in order to explain my conclusions.
- [9] The respondent first entered the field of MSP insurance in 1955, when the Legislature enacted the Public Services Medical Plan Act, S.B.C. 1955, c. 63 (R.S.B.C. 1960, c. 322 following the 1960 general statute revision) [PSMPA], which authorized the creation of a medical insurance plan for "employees" and "pensioners". The enabling provisions were these:
11. (1) For the purpose of carrying into effect the provisions of this Act according to their true intent, the Lieutenant-Governor in Council may make such regulations not inconsistent with the spirit of this Act as are deemed necessary or advisable. All regulations so made shall have the same force and effect as if incorporated in this Act.
 - (2) Without limiting the generality of subsection (1), the power of the Lieutenant-Governor in Council to make regulations extends to
 - (c) prescribing from time to time the premium referred to in section 4.
- By s. 4(1), it was provided that premiums so prescribed would be deducted from the salary of participating employees and, by s. 4(2), from the superannuation allowance payable to pensioners. Premiums were to be subsidized by the respondent. Thus, s. 5(2) provided that the respondent would contribute "a sum not less than the premiums authorized to be paid by the employees and pensioners under section 4."
- [10] Subsection 11(2)(c) subsequently became s. 17 of Part 2 of the Public Service Benefit Plans Act, R.S.B.C. 1976, c. 46 [PSBPA] in 1979, where it remained in effect in subsequent iterations of the statute throughout the class period.
- [11] Commencing in 1958, the respondent provided employees and retired civil servants with MSP insurance for which they made premium contributions in amounts established by regulation from time to time. Then, in 1978, by B.C. Reg. 361/78, the premium contributions payable by pensioners pursuant to s. 4(2) of the PSMPA were set at "nil". Through subsequent iterations of the regulations, premium contributions payable by retirees for MSP coverage remained wholly subsidized by the respondent until 2003, as already noted.

[12] EHB insurance, on the other hand, was dealt with in Part 1 of the PSBPA. Prior to 1980, EHB insurance was offered only to employees. Then, the Legislature enacted the Public Service Benefit Plan Amendment Act, 1980, S.B.C. 1980, c. 47, which authorized the executive branch to enter into contracts for EHB insurance on behalf of employees and pensioners to whom Part 1 applied. The enabling provisions were these:

2. (1) The Provincial Secretary and Minister of Government Services, on behalf of Her Majesty in right of the Province, may insure or cause to be insured any or all employees to whom this Part applies...
3. Subject to this Part, the Lieutenant Governor in Council, or the persons or committees the Lieutenant Governor in Council appoints,
 - (a) shall determine the terms and conditions to be included in a contract made under this Part;
 - (b) shall determine whether any contribution toward payment of premium shall be required to be made by persons insured directly or under a contract made under this Part and the rates and methods of any contribution, and different rates and methods of contribution may be determined and established for different groups of persons.

...

12. (1) The Lieutenant Governor in Council may enter into an agreement or contract with any person in respect of a plan of insurance or coverage for employees or pensioners, and their dependents, for medical and other related expenses incurred by the employees and pensioners, and their dependents, to whom this Part applies, or by regulation may establish and administer a plan for that purpose.

...

17. (1) The Lieutenant Governor in Council may make regulations to carry into effect this Part.
- (2) Without limiting the generality of subsection (1), the Lieutenant Governor in Council may make regulations

...

- (c) prescribing the premium...

[13] Then, by B.C. Reg. 34/81, it was provided,

3. Persons to whom the Extended Health Care Plan Contract ... applies shall not be required to make any contribution toward payment of premiums under that contract.

[14] The next important statutory instrument was B.C. Reg. 141/95, enacted pursuant to the PSBPA, which provided,

1. In this regulation

"benefit" means coverage under the ... Extended Health Care Plan or Medical Services Plan;

...

"member" means

- (a) a person who receives a superannuation allowance under the Pension (Public Service) Act ... and elects coverage under the ... Extended Health Care Plan or Medical Services Plan ...
- 2. (1) A member who receives a superannuation allowance under the Pension (Public Service) Act must make the following contribution to the payment of the premium coverage for the member:
 - (a) 0% of the premium for Medical Service Plan coverage;
 - (b) 0% of the premium for Extended Health Care Coverage...

[15] It is common ground that members of the class are within the definition of "member" in s. 1(a) of B.C. Reg. 141/95. The term "member" also included persons receiving pensions under the Pension (Municipal) Act, R.S.B.C. 1996, c. 355, Pension (College) Act, R.S.B.C. 1996, c. 353, and Pension (Teachers) Act, R.S.B.C. 1996, c. 357. Premium contributions required from these members were set by B.C. Reg. 141/95 at percentages of the premiums payable on a scale ranging from 0% to 100% in inverse relation to the member's years of pensionable service.

[16] Thus, as of November 30, 2002, the members of the class, having retired and elected MSP and EHB coverage were required to pay "0%" of the premiums for this coverage.

[17] Finally, B.C. Reg. 276/2002 amended B.C. Reg. 141/95 effective January 1, 2003 as follows:

3. Section 2 is amended

(a) by repealing subsection (1)(a) and (b) and substituting the following:

(a) for Medical Services Plan coverage,

...

(b) despite paragraph (a), for Medical Services Plan coverage

...

The ellipsis marks represent omitted subsections that set out a sliding scale of contributions to premiums in inverse relation to the length of "pensionable service" and that required all members of the class to contribute to the premiums for MSP insurance. It is not clear from the record or the submissions just where changes were made to the provisions for EHB insurance but it is common ground that at or about the same time similar amendments were made for premium contributions and further amendments were made to increase the deductible for EHB insurance and to reduce the range of coverage.

- [18] At all material times, retirees were entitled to elect to receive the insurance coverage provided by the scheme. All members of the class so elected.

The Claim of the Subclass to Vested Contractual Rights

- [19] The appellant contended at trial that the respondent promised premium-free MSP and EHB insurance after retirement as an inducement to subclass members to join the public service or to continue to work in the public service until retirement. As evidence of the alleged promise, he relied on statements made in numerous documents, such as retirement letters, brochures, information sheets, booklets, retirement application and notice forms issued by various agents of the respondent, and on the evidence of seminar leaders and audience members of their recollections of statements made to subclass members concerning their retirement benefits.
- [20] The judge began her analysis by setting out the approach she must follow. She said,
- [23] The Supreme Court of Canada in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, 177 D.L.R. (4th) 73 at para. 33, directs that this Court's inquiry in considering the contractual terms between the parties, "should focus on the terms of the civil servant's contract. These are to be found in the written and verbal manifestations of the agreement, applicable statutes and regulations, and the common law."
- [21] The judge looked first at the written and verbal manifestations of the agreement.
- [22] She summarized the evidence of alleged promises relied upon by the appellant and said she had difficulty accepting the appellant's submission that the evidence established representations made to attract and retain employees. In her words,
- [24] The plaintiff would have me accept that various documents submitted for my consideration -- including retirement letters, brochures, information sheets, booklets, retirement application and notice forms, and the recollections of seminar leaders and audience members from seminars and meetings regarding retirement -- constitute written and verbal manifestations of the employment agreement(s) at issue here. ...
- [25] ... I have particular difficulty accepting the proposition that the retirement letters, retirement information seminars and forms used by civil servants when applying for retirement are capable of indicating representations "made to attract and retain employees" given that the receipt of such information occurred long after hiring and at a time when retention was not truly an issue.
- [23] Next, she noted that, in the face of ambiguity, she was entitled to examine post-contractual conduct and said this:
- [26] The court can also look to post-contractual conduct for further evidence of the content of an employment contract in the event of an ambiguity: *B.C. Hydro & Power Authority v. Cominco Ltd.* (1989), 34 B.C.L.R. (2d) 60 at 74 (C.A.). For example, I take it that the plaintiff

would have me accept that the Crown's provision of premium-free Retiree Benefits for approximately twenty years shows the Crown's intention to be contractually obligated to provide such benefits for the lifetime of eligible retirees. However, for the reasons that follow, I do not view that conduct as capable of indicating such an intent in the face of the statutory regime involved.

- [24] Then, the judge considered whether members of the subclass could be said to have given consideration for what they interpreted as promises. She observed that pensions promised at the inception of an employment agreement are generally considered to be earned in return for labour provided during the employment period, citing *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717, 33 C.B.R. (3d) 161, *aff'd* (1997), 145 D.L.R. (4th) 747, 32 O.R. (3d) 103 (C.A.). However, she found that approach to be inapplicable in this case. She said,
- [30] ... I find no such contractual arrangement here. If an offer of lifelong premium-free Retiree Benefits was not made by the Government in negotiations leading up to contract formation, the now-former contributions of labour from members of the Subclass cannot constitute good consideration. There is no evidence before me capable of establishing that the Government's offer of employment to members of the Subclass included any such term.
- [31] In my view, the booklets, pamphlets, information sheets, recollections from meetings and seminars, and application and notice forms were all provided to employees post-hiring and, most often, when retirement was either imminent or had already begun. And, even if the statements made were of a promissory nature, (which I do not necessarily find), there is no evidence before me of any fresh consideration. Therefore, I am not persuaded that it would be reasonable for me to treat these various written and verbal communications as manifestations of the terms of the employment contract.
- [25] Ultimately, she concluded the statements relied upon by the appellant were not promises, but were merely descriptions of the retirement benefits available from time to time, and that the members of the subclass gave no consideration for them in any event. In this regard, she said,
- [57] ... I have no evidence of consideration before me that would elevate the statements made post-hiring, and most often near or following retirement, to the status of a contractual arrangement. ... I consider the brochures and other documents simply amount to descriptions of the content of the retirement benefits as they existed from time to time.
- [26] The appellant does not dispute that consideration is essential to the formation of a contract or that past consideration will not suffice and he concedes that no reversible error can be found in the judge's conclusion that no contract for post-retirement premium-free MSP and EHB insurance was made at the time of the initial hiring of members of the subclass. However, he contends the judge erred in two respects. First, he submits she failed to recognize that the subclass members' continuing to work for the respondent until retirement was consideration for promises of premium-free insurance made to them before

retirement. Second, he submits she erred in concluding that the communications on which he relied were mere descriptions of the retirement benefits as they existed from time to time rather than promises.

[27] The appellant's first proposition asserts what is known as a "unilateral contract", for which there is ample authority: see, for example, *Carlill v. Carbolic Smoke Ball Co.*, [1892] EWCA Civ. 1, [1893] 1 Q.B. 256; *Sloan v. Union Oil Company of Canada Ltd.*, [1955] 4 D.L.R. 664 (B.C.S.C.); and *Mosier v. Linden-Alimak Inc.* (1985), 65 B.C.L.R. 111 (B.C.S.C.). A unilateral contract arises when an offer "is such as to make it clear that it is the performance of some act by the offeree which concludes the contract and amounts to acceptance, making the contract binding without any requirement of communication of acceptance in advance of the performance of the act": G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Canada Limited, 2006) at 71. Under this principle, if the respondent's communications constituted a promise or an offer to current employees that it would provide premium-free insurance on retirement if they should continue their employment until their retirement and should elect such coverage, then their continuing in the respondent's employ until retirement and so electing would constitute an acceptance of the offer and would supply the necessary consideration to bring a contract into being.

[28] The appellant submits that Sloan and Mosier establish that a unilateral contract was formed in the circumstances of this case.

[29] In Sloan, an employer stated in pamphlets and circulars that employees who were terminated without cause would be entitled to a termination allowance. After the plaintiff was terminated, the employer argued that the termination allowance was a gratuitous benefit that could be rescinded at any time. The trial judge concluded there was valid consideration. He said at 673,

Now [the plaintiff] was, of course, already bound to serve [the defendant] during his period of employment and the consideration for that service was his salary. But he was not bound to continue to serve them until he was dismissed. He could, at any time, have quit his employment. By staying until he was discharged he did something that was not required by his contract of employment and he says that his knowledge of the provision for a termination allowance was one of the factors which induced him to continue his employment.

[30] In Mosier, the question was whether an employer had, by way of a memorandum to employees, made a binding commitment to provide pension benefits on the basis of past service for employees terminated without cause prior to retirement age. The trial judge concluded, at 116,

The purpose of an employer, such as this defendant, in promising such future benefits to its employees is that it will maintain or improve the morale and efficiency of its workforce. These are matters highly relevant to the employer's productivity and ultimately its profitability. A promise of future income by way of pension benefits may be no less important in achieving desirable objectives in the staff relations field than an immediate wage increase.

I am for this reason quite unable to accept that when an employer promises benefits to employees who subscribe to a pension scheme it acts gratuitously. In the context, at least, of this particular case - one in which the employer expressly committed itself to recognize all past as well as future service in calculating pension income for employees at retirement age - I think an offer is made which the employee may thereafter accept and give consideration for by contributing to the plan and by continuing to work for the employer.

- [31] The appellant submits the trial judge erred in failing to conclude that the subclass was asked by the respondent to continue working until retirement and to elect whether to accept MSP and EHB coverage, and that doing so constituted valid consideration.
- [32] I cannot agree. In my view, the trial judge had the unilateral-contract approach in mind when she alluded (at para. 25) to the appellant's contention that the respondent's communications were "made to attract and retain employees" and, as well, when she found that the communications relied upon "occurred long after hiring and at a time when retention was not truly an issue" (also at para. 25) and that the communications said to constitute promises were all made "post-hiring and, most often, when retirement was either imminent or had already begun" (para. 31).
- [33] Thus, the judge's statement, "I have no evidence of consideration before me that would elevate the statements made post-hiring, and most often near or following retirement, to the status of a contractual arrangement" (at para. 57) was a logical corollary - continuing to work until retirement could not be consideration for the alleged promise when the members of the subclass were either intending to retire imminently in any event or were already retired when the promise was made.
- [34] The finding that the communications were made to retired and about-to-be retired employees, which was central to the trial judge's conclusion that they were not promises and that, if they were promises, no consideration was given for them, was a finding of fact. Accordingly, the appropriate standard of review is that described in *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 121, where McLachlin J. (as she then was) said, for the Court,

It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at pp. 188-89 (per L'Heureux-Dubé J.), and all cases cited therein, as well as *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and

Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

- [35] The judge's finding as to the timing of the communications was grounded in the evidence. For example, the affidavit evidence tendered by the appellant spoke of "a system that when employees were approaching or considering retirement, they would be given an interview and information on all aspects of their retirement", of "speeches respecting superannuation benefits at retirement information seminars for Government employees ... approaching or considering retirement", of letters received by employees "upon retirement ... from the Government which outlined our individual Pension and Retiree Benefit entitlement", and of attendance "at the retirement seminars that were presented to employees outlining our entitlement to Pension and retiree Benefits upon retirement."
- [36] To be sure, there was also evidence from one subclass member that one of the seminars he attended was given for employees "who would be retiring within 10 years" and of another who said he elected early retirement on the basis of what he considered to be a promise he would receive the insurance premium-free. However, I see no reason to conclude the judge overlooked this evidence. The weight to be given this evidence and the inferences to be drawn from it were within the judge's province. Moreover, this was a common-issues trial and she was not obliged to give subclass-wide effect to any conclusions she might have reached on the basis of this evidence as to whether these members had valid individual claims.
- [37] Accordingly, I would not give effect to the appellant's submission that the trial judge erred in failing to recognize that the subclass members' continuing to work for the respondent until retirement was consideration for the promises of premium-free insurance made to them during their employment. In my view, no palpable and overriding error in the judge's reasoning has been demonstrated and I am not convinced there is any basis upon which we could properly interfere with her finding that the communications were made "most often" just prior to or after retirement of the members of the subclass or with her conclusion (at para. 57) that, even if they were promises, no consideration was given for them.
- [38] Further, I would not interfere with the judge's conclusion (also at para. 57) that the communications were merely "descriptions of the content of the retirement benefits as they existed from time to time" rather than promises of future benefits. This contention raises the distinction between representations and promises, which is described in *The Law of Contract in Canada*, supra, at 3, 4:

... A promise is an undertaking as to the future conduct of a party promising, the promisor, with respect to the party to whom the promise is given, the promisee. The former agrees to act, or refrain from acting, in a certain way, to the advantage or for the benefit of the latter. He undertakes to limit his future freedom of action, and to that extent may be said to have accepted or undergone a detriment. ...

...

It is the idea of promise which distinguishes contract from representation. A representation is not an undertaking, although, sometimes it may resemble a promise in its form, for example, where a seller of goods states that the goods in question are "top quality". Representations are statements as to an existing or past fact, not promises as to future events or states of affairs. Although representations can have legal consequences, if made falsely, or negligently, or, on occasion, without either fraud or negligence on the part of the representor, such consequences are non-contractual in their nature. They stem from the misleading nature of a statement, not from any promissory character.

[39] The appellant emphasizes the evidence of statements such as, "If you choose to elect BC Medical and Extended Health Benefits coverage, premiums will be paid by the pension plan", "Plan members ... will have their Medical Services Plan [and] Extended Health Benefits Plan premiums paid entirely by the pension plan", and similar statements that appear in many of the documents filed in evidence. He contends the judge should have construed these statements as promises or undertakings as to the respondent's future conduct.

[40] From a grammatical perspective, since these statements are expressed in the future tense they could be construed as commitments as to future actions. However, a determination of the grammatical sense of the words used does not exhaust the interpretive exercise. As Cory J. said in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at 669, for the majority,

Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees.

[41] Findings as to the circumstances surrounding the use of the words in the communications and the meaning to be attributed to them in their context are questions of fact with which an appellate court may not interfere in the absence of a palpable and overriding error: *Keefer Laundry Ltd. v. Pellerin Milnor Corporation*, 2009 BCCA 273 at paras. 55-60, 94 B.C.L.R. (4th) 205. I have already commented on the evidence of two of the subclass members as to the timing and effect of the communications and noted that the judge was not required to give their evidence subclass-wide effect. I have also commented on the circumstances in which the communications were made and have found no error in the judge's conclusion that they were made to employees on the verge of retiring or already retired. As for the words used, I

note, for example, that in the booklets entitled "BC Pensionfacts" which appear to have been issued annually, they are set out immediately adjacent to the words, "This fact sheet provides Public Service Pension Plan members with information on eligibility, costs and payment of optional health benefits."

- [42] The evidence, in my view, was sufficient to support the trial judge's conclusion that these statements were descriptive of the benefits available at the time and were not promises that the respondent would pay the premiums for the subclass members in the future.
- [43] The judge said, in the passage I have quoted at para. 23 of these reasons, that she would examine the statutory regime in the context of the respondent's "post-contractual" conduct as objective evidence of an intention to contract. Since her analysis of the legislation is applicable to the appellant's claim for vested statutory rights, I will discuss it in the next section of these reasons. As will be seen, it is my view that the judge correctly concluded that the application of the principles of statutory construction to the legislation and subordinate regulations enacted during the class period demonstrates that the class did not acquire accrued or vested rights to premium-free MSP and EHB insurance. She used this conclusion as evidence that the "post-contractual" conduct of the government did not demonstrate an intention to enter into a contract with the subclass for vested contractual rights. I do not think she erred in so doing.
- [44] In the result, I would not accede to the appellant's submission that the judge erred in failing to find there was a contract between the subclass and the respondent for premium-free MSP and EHB insurance and in dismissing his claim that the respondent was in breach of contract.

The Claim of the Class to Vested Statutory Rights

- [45] The appellant's second submission is that the trial judge erred in failing to find the class has a vested statutory right to premium-free MSP and EHB.
- [46] Class actions are creatures of statute, the Class Proceedings Act. They require prior authorization by the court. Subsection 4(1) of the Act sets out conditions that must be satisfied before an action can be certified as a class proceeding. A pivotal condition is that "the claims of the class members raise common issues": s. 4(1)(c). Further, an order certifying a class action must "set out the common issues for the class": s. 8(1)(e). It follows, in my view, that a trial judge on a common-issues trial cannot deal with an issue that has not been certified as a common issue.
- [47] In this case, the question whether the class had a vested statutory right to premium-free MSP and EHB insurance was not certified as a common issue, either initially or by subsequent amendment of the certification order. To that extent I agree with the respondent that this ground of appeal is not properly before this Court. However, the issue is common to all members of the class and could have been certified in the trial court as a common issue. Further, it is not an issue on which further evidence is required. Moreover, the question

whether rights to these benefits became vested under the legislative provisions was argued at trial and was decided by the trial judge as an aspect of the submission that the subclass had a contractual right to the benefits. As Roberston J.A. said, in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 at 764 (C.A.), *aff'd* [1994] 3 S.C.R. 1100,

An appeal provides both parties with the opportunity to reflect on, refine and reformulate substantive arguments which may or may not have been pursued below.

I regard the appellant's submission that the class had a vested statutory right to premium-free MSP and EHB insurance as a refinement and reformulation of the submission made at trial on behalf of the subclass. No prejudice will accrue to the respondent should we adjudicate this issue. Accordingly, I would order that the certification order be amended to include this as a common issue and I will deal with the appellant's submission on its merits.

[48] Whether a right to premium-free insurance was vested in the class depends on the proper construction of the legislative provisions that established the scheme. As I have noted, the trial judge undertook this statutory analysis in connection with her consideration of the question whether the subclass had established a contractual right to the benefits claimed. As I have also noted, her analysis is applicable, as well, to the claim of the class to vested statutory rights.

[49] It is not disputed that the judge acknowledged the correct approach to statutory construction when she said that "the words of each relevant Act are to be read in their entire context and for their ordinary sense with the purpose of each Act in mind" (at para. 33). She was there referring to *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, where Iacobucci J., writing for the Court, said, at 40-41,

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[50] The Supreme Court has commented many times since on the proper application of this approach. Recently, McLachlin C.J.C., writing for the majority in *R. v. A. (J.)*, 2011 SCC 28, [2011] 2 S.C.R. 440, provided this summary:

32 The proper approach to statutory interpretation was summarized in *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.): "The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole." The Court emphasized that while "[t]he relative effects of ordinary meaning, context and purpose on the interpretive process may vary, ... in all cases the court must seek to read the provisions of an Act as a harmonious whole" (para 10).

[51] The judge's analysis reflects this approach.

[52] She began by examining the legislative language in the context of its legislative and operative history. She noted (at para. 32) that there were three categories of statutes and associated regulations to be considered: (a) medical plan related, (b) benefit plan related, and (c) pension plan related, and she listed the relevant enactments. She said "the words of each relevant Act are to be read in their entire context and for their ordinary sense with the purpose of each Act in mind" (para. 33). She observed that the provisions governing benefit plans and medical plans were placed in one statute in 1979 - the PSBPA (at para. 34). She remarked that, from the inception of the legislative scheme in the PSMPPA (in 1955), premium payments by retirees were at the discretion of the Lieutenant Governor in Council and were set by regulation (at para. 35).

[53] Then, the judge turned to the legislation governing MSP insurance. She noted that, under the PSMPPA, the Lieutenant Governor in Council continued to have the discretion to establish rates and methods of contribution to premiums and that the discretion had been exercised to set premium contributions at varying amounts over the years prior to 1978, when they were set at "nil" by B.C. Reg. 361/78. She concluded,

[37] In my view, the wording of the PSMPPA, in granting the Lieutenant-Governor discretion to set premiums, and the fact that such premiums were set and increased over time before decreasing to nil militates against a finding that the benefits were contractually guaranteed or that their premium-free status was set in stone. I am further satisfied of this when I examine the PSBPA and its regulations.

[54] Next, the judge noted that the scheme had not changed under the PSBPA, and that the Lieutenant Governor in Council set premiums for EHB insurance at zero by B.C. Reg. 34/81 and later by B.C. Reg. 141/95 (at para. 38), and concluded,

[40] In my view, the permissive phraseology in the benefit plan and medical plan legislation leads to the conclusion that such programs -- established at the Lieutenant-Governor's discretion under regulations that changed over time -- were never guaranteed. The ordinary meaning of the words is clear: discretion lies in the Lieutenant-Governor's hands. The regulations form a vital part of the statutory context, and they demonstrate that the Lieutenant-Governor exercised the discretion granted by the legislation differently over time -- with premium rates sometimes at zero and sometimes greater. The purpose of both the benefit plan and medical plan Acts appears to be to infuse the Lieutenant-Governor with legal capacity to develop insurance programs for current and former civil servants.

- [55] The judge found support for this conclusion in the pension plan-related statutes and regulations. She observed that the 1994 amendment to the Pension (Public Service) Act, R.S.B.C. 1979, c. 318, delegated the authority to the Lieutenant Governor in Council to "make regulations 'prescribing group benefit entitlements that may be provided for pensioners, including extended health plans and dental plans' (s. 65(2)(m)) and 'prescribing terms and conditions under which the group benefit entitlements referred to in paragraph (m) may be provided and funded from employer contributions' (s. 65(2)(n))" (para. 41) and concluded,
- [42] Section 29 of the British Columbia Interpretation Act, R.S.B.C. 1996, c. 238, states that "[i]n an enactment 'may' is to be construed as permissive and empowering". The use of the permissive "may" throughout s. 65 indicates that the existence and content of all group benefit related regulations depended on the Lieutenant-Governor. Nothing in the legislation stated such benefits must be provided; nothing specified that any benefits the Lieutenant-Governor chose to provide must be premium-free.
- [56] Then, the judge noted that the discretion just mentioned had been taken from the Lieutenant Governor in Council in 2001 and subsequently delegated (after the end of the class period) to a board legislatively constituted to administer a "joint management agreement" in respect of pensions and post-retirement benefits.
- [57] Following this review of the legislative provisions, the judge concluded,
- [46] Looking at the entire context of the legislation and regulations, I have concluded that the Retiree Benefits were never guaranteed. Rather, their existence and/or form has depended entirely upon either the Lieutenant-Governor's discretion or the Board's discretion. This discretion has been exercised in different ways over time as is clear from the changing regulations. None of the relevant Acts show the Legislature intended to cement any form of post-retirement group benefits as guaranteed or as premium-free in perpetuity. ...
- [58] Next, the judge amplified her reasons for reaching this view of the legislative intent informing the scheme.
- [59] She referred to *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530, for the nature of vested rights and the criteria to be considered in the analysis. She said,
- [47] ... In the words of the Supreme Court of Canada, in *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530 at para. 30, "[v]ested rights result from the crystallization of a party's rights and obligations and the possibility of enforcing them in the future". A vested right is not contingent; it is guaranteed.
- ...
- [52] The majority of the Supreme Court of Canada laid down the following two part test for vested statutory rights at para. 37 of *Dikranian*:

- (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement.

To meet the first branch of the test, "the right must be vested in a specific individual" (at para. 39). In attempting to clarify the notion of concreteness, the Court at para. 40 gave the example of a contract and stated that the rights arising from a contract are usually created (and therefore concrete) at the same time the contract is created.

- [60] Then, she quoted from *B.C. Nurses' Union v. Municipal Pension Board of Trustees*, 2006 BCSC 132, a case involving a claim for premium-free post-retirement group benefits under a plan "the history of which mirrors that of the Pension Plan at issue here", in which the trial judge applied the Dikranian test for vested rights and concluded that, although the plaintiff had established the first part of the test, it had failed to show the right was "sufficiently constituted" because nothing in the governing legislation "purports to guarantee specific benefit or premium subsidy levels" and because the regulations governing premium contributions were "subject to periodic amendment" (at para. 53). She concluded,
- [54] ... [F]or the reasons outlined earlier, I find that the employment contracts at issue here did not guarantee premium-free Retiree Benefits. In other words, I find, just as Romilly J. did at para. 197, that "the plaintiffs have no contractual entitlement to the post-retirement group benefits."
- [55] Furthermore, I agree with the following statement at para. 161 of the BCNU judgment: "since their inception, post-retirement group benefits, including the content of those benefits, their terms and conditions, and subsidy levels, have been within the discretion of first the Province and then the Board. This is inconsistent with an intention to vest."
- [61] The appellant submits the right to premium-free insurance was vested because it crystallized in each individual class member when the member elected on retirement to receive the MSP and EHB insurance. He concedes the Lieutenant Governor in Council had discretion as to whether to implement these benefit plans and, having exercised the discretion and implemented the plans, discretion to prescribe the premium contributions to be made by members from time to time. He concedes, as well, that the respondent could not "guarantee" that premium contributions would never be changed. He acknowledges that the Legislature may take away any benefit or interest accrued or accruing to anyone under a statute so long as it does so clearly and plainly and in accordance with constitutional imperatives: *Authorson v. Canada (Attorney General)*, 2003 SCC 39 at paras. 39, 56-57, [2003] 2 S.C.R. 40.
- [62] Thus, it is not the appellant's position that the respondent could not change the premium contributions required of class members. Rather, it is his position that the respondent did not do so by clear and unequivocal language. It follows, he contends, that the trial judge erred in focussing on whether the insurance was "guaranteed ... premium-free in perpetuity". In so doing, he submits, she conflated the existence of discretion to prescribe

premiums from time to time with the exercise of the discretion. In his submission, the Lieutenant Governor in Council exercised the discretion when it prescribed a "nil" or "0%" premium for class members. Thus, he contends, the antecedent discretion became irrelevant to the question the trial judge should have considered, which was whether, at the time the Lieutenant Governor in Council altered the required premium contributions, the class members had a vested right to insurance without payment of premiums that had not been divested by subsequent legislation.

- [63] The meaning to be attributed to the judge's use of the word "guarantee" must be determined in the context of her reasons as a whole. She used the word in applying the meaning given to "vested" in *Dikranian* to the right claimed by the appellant. She said,
- [47] ... In the words of the Supreme Court of Canada, in *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530 at para. 30, "[v]ested rights result from the crystallization of a party's rights and obligations and the possibility of enforcing them in the future." A vested right is not contingent; it is guaranteed.

This passage makes it clear that she was considering whether, for the class, the right to premium-free MSP and EHB insurance was "tangible and "concrete" and "sufficiently constituted". If it was, class members were "guaranteed" premium-free insurance in the sense that the right to them was vested and could not be taken away except by clear and unequivocal language. Further support for this view can be seen in her statements that the benefits claimed were not "set in stone" (para. 37) and that "None of the relevant Acts show the Legislature intended to cement any form of post-retirement group benefits as guaranteed or as premium-free in perpetuity" (in para. 46).

- [64] That the judge did not use "guarantee" in the sense suggested by the appellant is further confirmed by her statement that
- [50] ... I note the existence of a principle of statutory interpretation that instructs courts to presume that a change in the law via statute does not interfere with vested rights unless explicit in that interference. In *Dikranian* at para. 32, the majority of the Supreme Court accepted Driedger's description of the presumption: "it was 'presumed', in the absence of a clear indication in the statute to the contrary, that Parliament did not intend prejudicially to affect the liberty or property of the subject." Our Provincial Legislature codified an aspect of this presumption against interference with vested rights in s. 35(1)(c) of the Interpretation Act which reads: "If all or part of an enactment is repealed, the repeal does not affect a right or obligation acquired, accrued, accruing or incurred under the enactment so repealed."...

The passage in *Dikranian*, *supra*, to which the judge referred was this:

32 The principle against interference with vested rights has long been accepted in Canadian law. It is one of the many intentions attributed to Parliament and the provincial legislatures. As E. A. Driedger states in *Construction of Statutes* (2nd ed. 1983), at p. 183, these presumptions

were designed as protection against interference by the state with the liberty or property of the subject. Hence, it was "presumed", in the absence of a clear indication in the statute to the contrary, that Parliament did not intend prejudicially to affect the liberty or property of the subject.

This had already been accepted by Duff J. in *Upper Canada College v. Smith*, (1920), 61 S.C.R. 413, at p. 417:

. . . speaking generally it would not only be widely inconvenient but "a flagrant violation of natural justice" to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.

(See also *Acme Village School District (Board of Trustees of) v. Steele-Smith*, [1933] S.C.R. 47, at p. 51; *R. Sullivan, Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 569-70.)

[65] Thus, the judge used "guaranteed" to denote that there was no vested right to premium-free insurance within the meaning ascribed to "vested" in *Dikranian*. Accordingly, I would not give effect to this submission.

[66] The appellant submits further that the judge erred in stating that the purpose of the legislative scheme was "to infuse the Lieutenant-Governor with legal capacity to develop insurance programs for current and former civil servants" (at para. 50). In his submission, the purpose and object was to provide employment benefits and enhanced retirement security for the provincial civil service and for employees of related institutions in the province. As I understand his submission, he contends this incorrect articulation of the purpose of the legislative scheme led the judge to err in her statutory analysis.

[67] I agree that the judge stated the purpose of the legislative scheme narrowly but, while she could have stated it more broadly, I do not think her statement of the purpose affected her analysis in any substantive way. In this passage the judge simply articulated a central feature of the scheme to provide retirement security for these employees, which was the discretion conferred on the Lieutenant Governor in Council to fix premium contributions from time to time. The modern approach to statutory construction requires the courts to give a purposive interpretation to legislation: *R. v. A. (J.)*, supra. Moreover, as stated in the Interpretation Act, R.S.B.C. 1996, c. 238,

8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Thus, the judge correctly focussed on whether this discretion to set premium contributions was an important sign of legislative intent to be considered in the proper construction of the legislative scheme.

[68] Although the trial judge stated the purpose and object of the scheme too narrowly, the appellant states them too broadly. I agree that the legislative intent was "to provide employment benefits and enhanced retirement security for the provincial civil service and

for employees and related institutions in the province" but as it applied to retirees it was to do so through a contributory or subsidized scheme for MSP and EHB insurance. As I have noted, the plan was created at the outset as a contributory plan and the prescribed premium contributions to be paid by participating retirees, as well as the corresponding subsidy to be paid by the respondent, varied from time to time through subsequent years from 0% to 100% for defined groups of retirees. Thus, in conferring discretion on the Lieutenant Governor in Council to prescribe premium contributions from time to time, the Legislature clearly did not intend that once a premium contribution was prescribed for a group of retirees it became immutable for retirees in that group. Had the Legislature intended to create such a vested right it could have stipulated for it in the legislation.

[69] As the trial judge observed (at para. 65), to accede to the appellant's submission would be to create two classes of retirees, those who elected to receive the insurance at a time when the premium contributions were fully subsidized and those who elected to receive the insurance after the legislation changed to require retirees to make contributions to the premiums. It follows from the appellant's submission that, if the rates of contribution should change in future, new classes of retirees would be created with each change. That is not a reasonable intention to attribute to the Legislature in the absence of some clear indication in the legislation that it was intended that discrete groups of retirees would be treated differently depending on the timing of their election. I see no such indication.

[70] As a result, if members of the class had a vested right at all, which it is not necessary to decide, the right was to a contributory plan of MSP and EHB insurance with premium contributions of members, and corresponding subsidies of the respondent, in amounts prescribed from time to time by the Lieutenant Governor in Council. Accordingly, I have not been persuaded that the judge erred in concluding that the class failed to establish a vested statutory right to premium-free MSP and EHB insurance.

[71] For those reasons, I would dismiss the appeal.

"The Honourable Mr. Justice K. Smith"

I agree:

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Mr. Justice Groberman"

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