

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Bennett v. British Columbia***,
2007 BCCA 5

Date: 20070102

Dockets: CA033624, CA033628

Brought under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50

Between:

Frederick Bennett

Respondent
(Plaintiff)

And

**Her Majesty the Queen in Right of the
Province of British Columbia**

Appellant
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine
The Honourable Mr. Justice Chiasson

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Place and Date of Hearing:

Vancouver, British Columbia
October 19 & 20, 2006

Place and Date of Judgment:

Vancouver, British Columbia
January 2, 2007

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Levine

Concurring Reasons by:
The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Madam Justice Newbury:

Introduction

[1] The respondent Mr. Bennett seeks to bring a class action on behalf of some 27,000 persons who, until

their respective retirement dates, were employed either by the Province of British Columbia or by Crown corporations or other Crown-related bodies. As such, they historically received certain benefits, namely premium-free MSP and extended health plan coverage, which the Province paid from the Consolidated Revenue Fund between 1978 and 2001, and thereafter from a separate fund. They contend that these benefits formed part of the consideration for their employment and therefore constitute contractual rights that vested and became legally enforceable upon their retirement.

[2] At least from 2000, the Province began discussions with its unions to change the arrangements with respect to retirees' benefits. Responsibility for the management and administration of government pensions was eventually transferred to a board of trustees established pursuant to an agreement between the Province, the British Columbia Government and Service Employees' Union (the "BCGEU"), the Union of Psychiatric Nurses, and the Professional Employees' Association. According to the Province, one of its objectives was to "ensure that all the post-retirement group benefits would be funded out of the employer contributions to [a fund called the 'Inflation Adjustment Account']". A statutory provision was enacted making the agreement binding on all retired employees. Mr. Bennett and other retired members of the Public Service Pension Plan (whom I shall refer to collectively as the "Retirees") were notified that their MSP and extended health plan benefits would no longer be paid in full. They took the view that this constituted breach of contract and breach of fiduciary duty on the part of the Province. Mr. Bennett commenced his action in August of 2004 and sought to have it certified under the **Class Proceedings Act**, R.S.B.C. 1996, c. 50.

[3] The Province defended on many grounds, including the assertion that the benefits in question were never the subject of the Retirees' terms of employment, but were "... extended by the Province without consideration, and without any intention to create a contractual relationship." As such, they could be diminished or eliminated at the will of the Legislature. In the alternative, the Province contended that even if the MSP and extended health benefits had been contractual, any claim the Retirees may have had was "compromised by the BCGEU" when the Province agreed to increase its contributions to certain employee benefits by 0.25%. In the words of the amended statement of defence:

Post-retirement group benefits, provided on a defined benefit basis, were never part of the compensation of employees of the Province. Before unionization, the Province provided for these benefits in a statutory scheme separate from that governing compensation. After collective bargaining, the Province refused to have such benefits in its collective agreements. By statute, *all* terms and conditions of employment of bargaining unit employees of the Province must be in collective agreements.

In any event, the 2000 Joint Trust Agreement made clear the basis on which the Province was providing post-retirement group benefits from that point on. The Province and other employers were obliged to provide a specific level of funding for post-retirement group benefits and inflation protection, while the Board, with representation from employee groups and the BCGREA, managed the funding in the interests of all the members. External factors have driven the costs of these benefits up, resulting in reforms, not by the Province, but by the Board.

Further, any claim was compromised by the BCGEU in October 2003 when the Province agreed to increase the employers' contributions to inflation security and post-retirement group benefits by 0.25% of salary.

The Province moved for the dismissal of the action, or for a stay, pursuant to Supreme Court Rules 14 and 19. Mr. Bennett applied to have the action certified as a class action, and counsel agreed that both motions could be heard at the same time.

[4] In support of its motions, the Province objected that the Supreme Court lacked jurisdiction to hear the case. It said Mr. Bennett's claim lay instead within the exclusive jurisdiction of a labour arbitrator appointed under one of the collective agreements to which most of the Retirees were bound until their respective retirement dates. About 75% of the Retirees had been members, for example, of the BCGEU. Its collective agreement specified that all differences "respecting the interpretation, application, operation, or any alleged violation" of a provision of the collective agreement would be resolved through the grievance procedure by an arbitrator or arbitration board. This principle is of course codified by s. 84(2) and (3) of the **Labour Relations**

Code, R.S.B.C. 1996, c. 244 as follows:

(2) Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.

(3) If a collective agreement does not contain a provision referred to in subsections (1) and (2), the collective agreement is deemed to contain those of the following provisions it does not contain:

(a) the employer must not dismiss or discipline an employee bound by this agreement except for just and reasonable cause;

(b) if a difference arises between the parties relating to the dismissal or discipline of an employee, or to the interpretation, application, operation or alleged violation of this agreement, including a question as to whether a matter is arbitrable, either of the parties, without stoppage of work, may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference to arbitration, and the parties must agree on a single arbitrator, the arbitrator must hear and determine the difference and issue a decision, which is final and binding on the parties and any person affected by it.
[Emphasis added.]

[5] The Chambers judge below declined to grant the Province's motions. He ruled that the Court had jurisdiction to hear the action and that certification of the class as proposed by the plaintiff pursuant to the **Class Proceedings Act** was the preferable way to determine the issues raised by the pleadings. For reasons indexed as 2005 BCSC 1673, he granted Mr. Bennett's application for certification and made the required orders defining the class, defining the common issues, and appointing Mr. Bennett as the representative plaintiff.

[6] The Province appeals from this order on the grounds that the Chambers judge erred in ruling that the court, rather than one or more labour arbitrators, had jurisdiction over the matters in issue for unionized employees, and erred in permitting those Retirees who were not employed directly by Her Majesty to be included in the class. Although the Province concedes that those Retirees who were not unionized (the "excluded employees") could pursue a civil action "for breach of obligations allegedly accrued in consideration for work", counsel suggested that their rights could be most efficiently determined "once the evidence of the understanding in relation to unionized employees [is] determined through labour arbitration."

[7] As will be seen below, I am of the view that the Chambers judge did not err on the central question of jurisdiction. I do agree, however, that those Retirees who were not employed directly by the Province were not properly included in that part of the action that is framed in contract and must be excluded from the plaintiff class for purposes of that aspect of the proceeding.

Legislative Framework

[8] Unfortunately, a rather complex and indeed confusing series of statutes, regulations and rules must be reviewed to elucidate the issues of jurisdiction and procedure raised by this appeal.

[9] As the plaintiff notes in his factum, the Province first began fully subsidizing the Medical Services Plan premiums of retired members of the Public Service Pension Plan in 1978. At that time, s. 4(2) of the **Public Services Medical Plan Act**, S.B.C. 1955, c. 63 stated that notwithstanding the provisions of the **Civil Service Superannuation Act**, S.B.C. 1935 c. 77, there would be deducted from the superannuation allowance payable to a "pensioner" (a person receiving a superannuation allowance under the **Civil Service Superannuation Act**) the monthly premium prescribed by regulation. Reg. 361/78 prescribed that the monthly premium for purposes of s. 4(2) was nil, with the apparent result that pensioners who were subject to the Act effectively paid no premiums.

[10] Beginning in 1981, retired government employees also received premium-free extended health benefits (“EHBs”) under a regulation passed pursuant to the **Public Service Benefit Plans Act**, S.B.C. 1976, c. 46. Section 2(1) thereof permitted the Provincial Secretary to make a contract or contracts with an insurer or insurers causing “any or all employees to whom this Act applies” to be insured. By s. 3(b), the Lieutenant-Governor in Council was empowered to “determine and establish the rate or rates and method or methods of contribution toward payment of premium to be made by persons insured” under the Act, and by s. 5, monies required to be paid by the Minister of Finance or on behalf of the Crown as employer under the Act were to be paid “from monies appropriated for that purpose by the Legislature or, if no appropriation is available for that purpose or if the appropriation is not sufficient, from the Consolidated Revenue Fund.” Reg. 34/81, promulgated January 26, 1981 and headed “Pensioners Extended Health Care Plan”, extended a particular group plan contract “to confer benefits on every person who receives on or after April 1, 1981, an allowance under the **Pension (Public Service) Act** and who elects to receive those benefits.” Section 3 of the regulation stated that persons to whom the contract applied would not be required to make any contribution towards payment of premium under that contract. The Province does not dispute that retired employees were included in this description.

[11] According to Mr. Cook, the chairman of the Public Service Pension Board of Trustees, the MSP and extended health benefits (which I shall refer to collectively as the “Benefits”) made available to retirees were dealt with separately from the terms of the Public Service Pension Plan. Until 1960, the Plan was generally regulated by the various iterations of the **Civil Service Superannuation Act**, later called the **Public Service Superannuation Act** (beginning with S.B.C. 1973, c. 13), and then the **Pension (Public Service) Act** (beginning with R.S.B.C. 1979, c. 318). The latter statute was amended *inter alia* by the **Pension Statutes Amendment Act**, S.B.C. 1994, c. 54, which established a Public Service Pension Advisory Board. That body was required *inter alia* to report annually to the Treasury Board on the operation of the Plan and Fund. Section 61(2) of the amended statute authorized the Lieutenant-Governor in Council to make regulations for various matters, including:

- (d.) prescribing the manner of making application for and the granting of superannuation allowances and supplemental benefits allowances;
- (e.) prescribing forms to be used for purposes of this Act or the regulations;
- ...
- (g.) providing for the transfer and administration under this Act of the accounts and money transferred under this Act from the superannuation fund under the former Act to the fund under this Act;
- ...
- (m.) prescribing group benefit entitlements which may be provided for pensioners, including extended health plans and dental plans;
- (n.) prescribing terms and conditions under which the group benefit entitlements referred to in paragraph (m) may be provided and funded from employer contributions under section 4.2(e)(iii), (f)(iii), (g)(iii) and (h)(iii) [Emphasis added.]

Reg. 136/95 confirmed the identity of the MSP and EHB Plan contracts provided for pensioners pursuant to s. 61.

[12] As Mr. Bennett notes in his factum, pension and health benefits were consolidated in 1995 when Reg. 34/81 was repealed and replaced by a new “Pensioner Group Benefit Funding Regulation” (141/95) enacted pursuant to the **Public Service Benefit Plan Act**. Section 2(1) of the regulation confirmed that a “member” (a term that included any person receiving a superannuation allowance under the **Pension (Public Service) Act**) was required to make a “nil” contribution to the payment of premiums for MSP plan and EHB coverage. Thus in the plaintiff’s submission, entitlement to the Benefits was again “tied” to membership in the Public Service Pension Plan.

[13] Yet another legislative change occurred in 1999 when the **Public Sector Pension Plans Act**, S.B.C. 1999, c. 44 was enacted in succession to the **Pension (Public Service) Act**. The new statute established the “British Columbia Pension Corporation” consisting of a “pension management board”, the purpose of which was to provide plan administration services for various governmental pension plans, including the Public Service Pension Plan. Schedule C to the **Public Sector Pension Plans Act** continued the Plan and its membership and confirmed at s. 2(4) that any vested rights held by Plan members under the previous statute continued to apply, “in the same manner and to the same extent, under the Public Service Pension Plan”. Similarly, s. 9(1) continued the Public Service Pension Fund under the new Schedule and s. 9(4) specified that benefits payable thereunder and under the Pension Plan Rules “must be paid from the pension fund and, for this purpose, the pension fund must be considered one and indivisible.” Section 18(4)(f) of the Schedule required that the Pension Plan provide for post-retirement group benefits. Under Reg. 114/2000, the Fund was divided into three accounts – the basic account, the inflation adjustment account, and the supplemental benefits account. Sections 93 and 94 of the Regulation contemplated the funding of EHB and MSP premiums “by the employer or by the monthly premium deducted from the member’s pension, or both, in accordance with regulations made under the **Public Service Benefit Plan Act**.”

[14] It bears emphasizing before concluding this section that the Benefits were provided to the Province’s former union and non-union employees alike. From the early 1970s, when collective bargaining was introduced into the public service, the Benefits were kept separate and apart from the bargaining process. As stated by Mr. Straszak, the Assistant Deputy Minister for the Employee Relations Division of the British Columbia Public Service Agency, “... no collective agreement to which the Crown has been a party since the introduction of collective bargaining in 1974 has promised extended health benefits or medical services plan subsidies to employees after they retire. Neither has any Terms and Conditions of Employment document for excluded employees.” Since 1974, this separation has been reflected in s. 13 of the **Public Service Labour Relations Act**, S.B.C. 1973, c. 144, and successor provisions. Section 13 provided that:

Every collective agreement shall include all matters affecting wages or salary, hours of work, and other working conditions, except

- (a.) the principle of merit and its application in the appointment and promotion of employees, subject to section 34 of the *Public Service Act*;
- (b.) all matters included under the *Public Service Superannuation Act*;
- (c.) the organization, establishment, and administration of the departments and branches of the Government except the effect of reductions in establishment of employees which shall be negotiated by the parties;
- (d.) the application of the system of classification of positions or job evaluation under the *Public Service Act* and regulations; and
- (e.) the procedures and methods of training or retraining employees, other than those affected by section 18, and other than training programmes administered within a branch or department that apply to one occupational group only. [Emphasis added.]

Essentially the same provision remains in force today as s. 12 of the **Public Service Relations Act**, R.S.B.C. 1996, c. 388. (See *infra*, at para. 42.)

Legislative Changes, 2002 – 2003

[15] I have already mentioned that in late 2000, the government and three of its unions signed a “Joint Trust Agreement” which contemplated material changes in the pension arrangements applicable to retired persons. A recital to the Agreement stated that as a result of discussions initiated by the President of the BCGEU, the parties wished to provide *inter alia* for the joint management of the Public Service Pension Plan and Fund. Under the Agreement, a board entitled the “Public Service Pension Board of Trustees” was constituted,

consisting of 14 trustees, one of whom was required to be a retired employee appointed by the B.C. Government Retired Employees' Association. The board was to be given all the powers "necessary to enable it to administer the Pension Plan and manage the Pension Fund, subject only to the limitations set out in [the] Agreement, the Pension Plan Rules, the [**Public Sector Pension Plans Act**], the [**Pension Benefits Standards Act** R.S.B.C. 1996, c. 352] and all other applicable laws." Further, the board was to be authorized to:

... make plan rules, applicable generally or to a specified person or class of persons, prescribing the Pension Plan Rules. Without limitation, the Board may group or classify Employers and Plan Members in any way it considers necessary or desirable for the purposes of the Pension Plan, including the provision or payment of pension benefits under the Pension Plan. The Board may also provide in the Pension Plan Rules for different benefits and different levels of benefits for different groups or classes of Plan Members so as to take into account any variable affecting the administration or funding of the Pension Plan.

Section 15.7 of the Agreement required the board to:

- (a) change the Employer contribution rates currently provided in subsections 6(1)(a), (b) and (c) of the Statutory Pension Plan Rules from 7.75%, 9.25% and 1.25%, respectively, to 4.25%, 5.75% and 2.25%, respectively.
- (b) provide that the Employer portion of the cost of all of the post retirement group benefits currently provided in Part 12 of the Statutory Pension Plan Rules shall be paid in the same manner that the Employer portion of the cost of the dental plan benefits is currently paid under Section 92 of the Statutory Pension Plan Rules ...

According to Mr. Cook's affidavit, the effect of the Agreement was that the Benefits would be paid for from the supplemental benefits account effective April 1, 2001. (References elsewhere in the evidence to the inflation adjustment account may or may not be correct.)

[16] In October 2002, additional amendments to Reg. 141/95 had the effect of repealing the obligation of the Province to pay 100% of all MSP premiums for Retirees. A sliding schedule of part payments, based on years of service of retired employees, was introduced by Reg. 276/2002. The following year, amendments were made to the **Public Sector Pension Plans Act** to remove the requirement that the Province include the Benefits in the Pension Plan, although such payments were still "permitted" under s. 18 of Schedule C to that statute.

[17] Effective January 1, 2004, the board enacted new "Public Service Pension Plan Post-Retirement Group Benefit Rules" pursuant to part 2.1 of Schedule C. The preamble to the Rules describes in layman's terms the statutory changes:

Effective January 1, 2004, the *Pension Statutes Amendment Act*, 2003 amended Schedule C to the *Public Sector Pension Plans Act* to add a new Part 2.1 – Post Retirement Group Benefits. The new part confirms the authority of the Public Service Pension Board of Trustees to administer group benefits for retired plan members. Section 18.3 of Part 2.1 provides that the board may determine the type of group benefits, who will be eligible to receive benefits and the terms and conditions of coverage. In addition, section 18.3 authorizes the board to collect contributions for group benefit premiums and to determine contributions required from, and subsidy levels provided to, retired plan members.

Effective January 1, 2004, references to "pensioner" in the *Public Service Benefit Plan Act* were removed pursuant to the *Pension Statutes Amendment Act*, 2003, and the Pensioner Group Benefit Funding Regulation was repealed.

Beginning January 1, 2004, the Public Service Pension Plan Post Retirement Group Benefit

Rules, made under the authority of Part 2.1 of Schedule C of the *Public Sector Pension Plans Act* and Article 11 of the Public Service Pension Plan Joint Trust Agreement, constitute the rules for the provision of group benefits to retired members of the Public Service Pension Plan.

Post-retirement group benefits are contingent benefits and are subject to the availability of funding. Coverage for these benefits can be increased, decreased or eliminated at the discretion of the Public Service Pension Board of Trustees. [Emphasis added.]

Sections 5 and 6 confirmed the changes begun in 2002, namely the reduction of the percentages of MSP and extended health plan premiums to be paid on behalf of Retirees, depending on their years of pensionable service. Section 18(4)(f) of Schedule C was deleted (by the ***Pension Statutes Amendment Act***, S.B.C. 2003, c. 62, s. 20). Section 18(7) of the amended schedule had already been enacted, purporting to bind the Retirees to the Joint Trust Agreement:

Despite subsection (2), the unionized employees, the non-unionized employees and the retirees not represented by the partners may benefit from and be made subject to the agreement and the partners have the power to enter into the agreement on behalf of those persons and, if entered into, the agreement is binding on those persons. [Emphasis added.]

The previous Pensioner Group Benefit Funding Regulation (141/95) was repealed by Reg. 484/2003.

The Plaintiff's Allegations

[18] Between approximately 1978 and 2002, then, the Province paid the entire monthly premiums necessary to fund the Benefits on behalf of the members of the Public Service Pension Plan. Mr. Bennett alleges that he and the other Retirees were induced to take or continue employment with the Province at a "much lower pay than was available in the free market, and forego overtime in exchange for the security and permanency of position", including the assurance of the Benefits post-retirement. At para. 24 of his amended statement of claim, he states:

The promise of Retiree Benefits was communicated widely and openly from early in its inception. The communications included the standard letters written to all employees just prior to retirement, information sheets, pamphlets and benefit booklets distributed to employees, all of which stated that the Retiree Benefits would be paid for by "the government", and that the coverage would be "premium-free" or "nil". The communications unequivocally promised the Plaintiff and Retired Members that the payment of EHB and MSP premiums by the Defendant was part of their retirement package.

[19] As an example, Mr. Bennett notes that in the 1980s the Province distributed to its employees a booklet entitled "Public Service Superannuation Plan" which stated that it had been "prepared with great care to provide [the recipients] with the essential details of the Public Service Superannuation Plan in a format that is clear and meaningful." Under the heading "Health Care Benefits", the booklet advised employees that:

You will probably wish to retain your health care coverage under the Medical Services Plan of British Columbia. An application form must be completed. The government will pay the monthly premium for you and your dependants after retirement.

You may also apply for continued, government paid, Extended Health Care Plan coverage after retirement. If you do not apply for coverage at the time of retirement, the Extended Health Care Plan is not available to you at a later date unless you can supply proof of continuous coverage from another extended health care plan. Pensioners who cease to reside in British Columbia, and thereby become ineligible for coverage, may later apply for coverage under the Extended Health Care Plan provided they apply within one month of their return to residence in British Columbia. [Emphasis added.]

Another booklet published by the Superannuation Commission and headed "Your Retirement Income" advised that "the Public Service Pension Plan provides 100% subsidized coverage for both B.C. Medical Plan and Extended Health Plan." Mr. Bennett deposes that similar representations were made at retirement seminars he attended in the mid-1990s, and by a staff person with whom he met individually to confirm the details of what retirement income he could expect if he retired.

[20] Shortly before he retired in 1996, Mr. Bennett received further correspondence and an application form for superannuation allowance for completion. Section 4 thereof instructed:

GROUP APPLICATION FOR MEDICAL PLAN COVERAGE

This form is to be completed and returned to the Superannuation Commission if you will be residing in British Columbia following retirement and elect group medical plan coverage. The government will pay the monthly premium for you and your dependents after retirement. A new identity card will be sent to you from the medical plan within approximately three months after the effective date of your pension. In the interim you may continue to use your previous plan number.

Your coverage under this plan will begin the first of the month following the month in which your pension is effective. For example, if you retire in February, your pension will be effective March 1 and your medical plan coverage will be effective from April 1. If you do not defer the payment of your pension there should be no interruption in your coverage.

If you do not wish to have this group medical plan coverage, please inform the Superannuation Commission.

EXTENDED HEALTH CARE PLAN COVERAGE

Complete, sign and return the Extended Health Care Plan card if you will be residing in British Columbia following retirement and elect coverage as described in the enclosed brochure. The Government will pay the monthly premium for you and your dependents after retirement. Dental coverage is not available.

Your coverage under this plan will begin the first of the month following the month in which your pension is effective. For example, if you retire in February, your pension will be effective March 1 and your extended health care plan coverage will be effective from April 1. If you do not defer the payment of your pension there should be no interruption in your coverage.

If you do not wish to have this Extended Health Care Plan coverage, please inform the Superannuation Commission. Coverage will not be available to you at a later date unless you can show that you have had continuous coverage under an extended health care plan.

Pensioners who cease to reside in British Columbia, and thereby become ineligible for coverage, may later apply for coverage under the Extended Health Care Plan provided they apply within one month of their return to residence in British Columbia. [Emphasis added.]

Mr. Bennett says that he was not told at any time that his employer's "promise" to pay the Benefits was subject to the discretion of the Legislature or "contingent on the internal organizational structure arranged by the Defendant to fund the benefits."

[21] In addition to his claim for breach of contract, Mr. Bennett alleges that the Province was in a position of trust and confidence in relation to the Retirees and therefore owed a fiduciary duty to them, which duty was breached by the introduction of the new arrangements and the alleged "underfunding" of the account from which the Benefits are now paid in part. The pleading continues:

The Retired Members are no longer active employees in a position to negotiate benefits with the

Defendant. They are in a position of particular vulnerability in relation to the Defendant's control over the provision of their benefits. They are also particularly vulnerable as a result of their advanced age and susceptibility to health problems, and their limited capacity to assume increased financial burdens as a result of their retired status.

The Defendant owed the Plaintiff and Retired Members a fiduciary duty with respect to their benefits. The Retired Members relied on their reasonable expectation that the Defendant would act in their best interest. The Defendant's unilateral reduction of the Retiree Benefits as discussed below, was and is contrary to their best interests and is a breach of the Defendant's fiduciary obligation to the Retired Members. [Emphasis added.]

[22] In summary, the plaintiff sought, *inter alia*, a declaration that the Retirees are entitled to receive the Benefits without alteration or amendment during their lifetimes; an order that the Province "sufficiently fund any accounts out of which the [Benefits] are to be paid"; damages for the amounts of monthly premiums which the Retirees have been obliged to pay; damages for breach of contract and/or breach of fiduciary duty in an amount to be determined; punitive damages; and an order certifying the action as a class proceeding and appointing Mr. Bennett as the representative plaintiff for the class.

The Chambers Judge's Decision

[23] The Chambers judge below, Mr. Justice Melvin, dealt with the question of jurisdiction at paras. 16 - 32 of his reasons. He began, correctly, with the decision of the Supreme Court of Canada in ***Weber v. Ontario Hydro*** [1995] 2 S.C.R. 929, about which more will be said below, and the judgment of this court in ***Fasslane Delivery Services Ltd. v. Purolator Courier Ltd.*** (2004) 30 B.C.L.R. (4th) 95, 2004 BCCA 300. Both of these were relied on by the Province for the proposition that since the case at bar arises out of the employment relationship, it must be referred to arbitration. The Chambers judge disagreed with this proposition. The crux of his reasoning was as follows:

In this respect, I disagree. It is to be noted initially that none of the collective agreements in existence dealt with retiree benefits, Medical Service Plan or Extended Health Plan. Secondly, it is to be noted that the retirees are not members of or parties to the collective agreement. Stopping there, it is clear that the collective agreement is silent. Consequently, as the silence of the collective agreement is acknowledged by all parties, the question arises as to how can it be interpreted or applied, or how can there be an alleged violation of the provision which is not contained in the agreement?

More importantly, however, in my view, the provincial legislation in force from time to time makes it abundantly clear that under no circumstances could the subject be contained in a collective agreement. In that respect, I refer to the *Public Service Labour Relations Act*, R.S.B.C. 1996, c. 388, s. 12(b):

12 Every collective agreement must include all matters affecting wages or salary, hours of work and other working conditions, except the following: ...

(b) all matters included under the Public Service Pension Plan, continued under the *Public Sector Pension Plans Act*, and the pension plan rules made under that plan; ...

In that respect, it is interesting to consider the position taken in written argument by the defendant; that is, the British Columbia Government Employees' Union attempted to introduce post-retirement group benefits into the collective agreement on two occasions, and the Province refused each time, at the risk of strike. As a result, it is submitted that retiree benefits have never been included in any collective agreement and instead were covered by statutory benefits. In my view, the position taken by the defendant in these circumstances is somewhat inconsistent with the submission that the matter should be dealt with as if it involved interpretation, application or alleged violation of a collective agreement.

I am satisfied under the circumstances the court has jurisdiction and there is no exclusive jurisdiction in an arbitrator. [At paras. 25-8.]

[24] The Chambers judge went on to consider the Province's argument that if jurisdiction was concurrent, arbitration was the "preferable" means of resolving the claim because of, *inter alia*, the specialized expertise of arbitrators, the public policy in favour of deciding issues of unionized employees' contractual entitlements through grievance rather than civil litigation, and judicial economy. (Para. 29.) Melvin J. noted, however, that those Retirees who were excluded employees would not be entitled to participate in the grievance process. The same was true of certain executives of the three governmental unions in question who were members of the Pension Plan. He reasoned that the pursuit of a grievance would involve the union's grieving the Retirees' dispute with the employer, so that "... the retired employee (who is not a member of a collective agreement) would have to ask the union to grieve the union, as the union is the employer of this limited group of individuals. This peculiarity is not determinative of the issue but it points out some of the difficulties in the position taken by the defendant." (Para. 32.)

[25] Melvin J. next turned to the Province's argument that the proposed class of plaintiffs included a number of Retirees who had never been employed directly by the Province, the sole defendant in this action. Some of the Retirees had been employed by Crown corporations or other Crown agents, while others were employed by related entities, some of which are no longer associated in any way with the government. The Province contended that those Retirees could have no cause of action in contract against Her Majesty and that their respective former employers (of which there are 51) should have been named as defendants. The Chambers judge rejected this argument as well, reasoning that:

That position, in my view, ignores the creation of the relation and the funding of the plans. With reference to each of the 27,000 prospective class members, they are all parties to and beneficiaries under a pension plan which was under the direction and control from time to time of the defendant. During their employment period, they contributed to the pension plan. Although they may not have been direct employees of the defendant, they were either direct or indirect contributors through deduction of their cheques and payment by their employers to the plan under the direction and control of the defendant.

The plaintiff's action is not in relation to benefits which flow from employers, but is in relation to benefits that flow from the pension plan and retirement. All of these 27,000 persons participate in the plan; all rely on the same contractual basis of pamphlets, letters, brochures and memoranda as evidence of the existence of this benefit (health care). Under those circumstances, in my view, the relationship between the employee and the employer, and the nature of the employer *vis-à-vis* the defendant, is immaterial. The nexus between the retirees and the defendant is their participation in the plan under the direction and control of the defendant. [At paras. 34-5; emphasis added.]

[26] Melvin J. went on to review the requirements of s. 4(1)(a)-(e) of the ***Class Proceedings Act*** and concluded that they were met by the proposed action, which he noted was similar to those certified in ***Kranjcec v. Ontario*** (2004) 69 O.R. (3d) 231 (Ont. S.C.J.), and ***Ormrod v. Etobicoke (Hydro-Electric Commission)*** (2001) 53 O.R. (3d) 285 (Ont. S.C.J.). He defined the composition of the class as:

- (a) persons who are Residents of British Columbia and are members of the British Columbia Public Sector Pension Plan (the "Pension Plan") who retired on or before November 30, 2002 (the "Retirees"), and who were entitled to receive premium-free Medical Services Plan Benefits and Extended Health Care Benefits (the "Retiree Benefits") at their respective dates of retirement;
- (b) the surviving spouses and dependents of the Retirees who are Residents of British Columbia and who were entitled to receive premium-free Retiree Benefits as of November 30, 2002; and
- (c) the beneficiaries and/or estates of persons in paragraphs (a) and (b) above who died

prior to any settlement or judgment in this action.

and defined the common issues thus:

- a. Did the Defendant breach its contractual promise and fiduciary duty to provide and fund Retiree Benefits to the Class Members as alleged in the Amended Statement of Claim?
- b. If the Defendant did breach its contractual promise and fiduciary duty to the Class Members, what relief should be granted to the Class Members?
- c. Should punitive damages be awarded and if so, in what amount?

[27] Presumably, the Chambers judge did not mean to suggest that the existence of a “contractual promise” or “fiduciary duty” could be assumed. Perhaps, then, it would have been better to have phrased questions (a) and (b) as follows:

- a. Was the Defendant under a contractual obligation or a fiduciary duty to provide and fund Retiree Benefits to the Class Members as alleged in the Amended Statement of Claim, and if so, did the Defendant breach such obligation or duty?
- b. If the Defendant did breach a contractual obligation or fiduciary duty to the Class Members, what relief should be granted to the Class Members?

However, counsel before us proceeded on the assumption, as shall I, that at any trial of this action or in any arbitration of a grievance by the plaintiff, the central issue will be whether the Province was under a contractual obligation or a fiduciary duty to continue to fund the Benefits, or whether they were subject solely to the will of the Legislature and did not form part of the plaintiff’s contract of employment or ground any fiduciary duty.

ANALYSIS

[28] The Province submits that the Chambers judge erred in three respects on the question of jurisdiction. First, it is said that he “held that [the] silence of the collective agreement on the subject of retiree benefits means the dispute between the parties is non-arbitrable.” With respect, I do not read the Chambers judge’s reasons on this point (quoted above at para. 23) as doing more than raising the question of how the collective agreement could be “interpreted or applied, or how can there be an alleged violation of the provision which is not contained in the agreement?” I am not sure the Province provided a satisfactory answer to that question in this case. More important, the Chambers judge said, was s. 12(b) of the **Public Service Labour Relations Act**, which in his view made it “abundantly clear” that the subject of retiree benefits could not be dealt with in a collective agreement. The Province contends that the Chambers judge here misinterpreted s. 12(b) and that it does not prohibit including post-retirement benefits in a collective agreement. Indeed, the Province says, s. 12 (b) has “no application” to the Benefits, which are health benefits rather than pension benefits and are not “matters included under the Public Service Pension Plan.”

[29] Third, the Province challenges the Chambers judge’s “holding” that, to quote from its factum, “the dispute could not be arbitrated because the Plaintiff is no longer in the bargaining unit”. The Province responds that the relevant time to determine whether a post-retirement benefit is a vested right under an employment contract is at the time of retirement, at which time the plaintiff was in the bargaining unit. This is correct, but it does not detract from the fact that, as the Chambers judge noted in passing at his para. 25, “the [R]etirees are not members of or parties to the collective agreement.” Being no longer members of the union or subject to the collective agreement, they may well expect difficulties in enforcing any vested rights through a grievance procedure, as I will discuss below.

[30] Like the Chambers judge, however, I will begin my analysis of the question of jurisdiction by referring to **Weber**, *supra*, where the Supreme Court of Canada adopted the “exclusive jurisdiction model” of disputes arising out of collective agreements. At para. 52 of the Court’s reasons, McLachlin J. (now C.J.C.) laid out the

proper approach as follows:

In considering the dispute, the decision-maker must attempt to define its "essential character", to use the phrase of La Forest J.A. in *Energy & Chemical Workers Union, Local 691 v. Irving Oil Ltd.* (1983), 148 D.L.R. (3d) 398 (N.B.C.A.). The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement: *Energy & Chemical Workers Union, supra, per* La Forest J.A. Sometimes the time when the claim originated may be important, as in *Wainwright v. Vancouver Shipyards Co.* (1987), 38 D.L.R. (4th) 760 (B.C.C.A.), where it was held that the court had jurisdiction over contracts pre-dating the collective agreement. See also *Johnston v. Dresser Industries Canada Ltd.* (1990), 75 O.R. (2d) 609 (C.A.). In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.

and further:

This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts: Additionally, the courts possess residual jurisdiction based on their special powers, as discussed by Estey J. in *St. Anne Nackawic, supra.* [At para. 54; emphasis added.]

This reasoning has been applied by courts in this province on many occasions: see, e.g., *Fasslane Delivery Services Ltd. v. Purolator Courier Ltd.*, *supra*; *Haight-Smith v. Neden* (2002) 98 B.C.L.R. (3d) 260, 2002 BCCA 132; *Elkview Coal Corp. v. U.S.W.A., Local 9346* (2001) 92 B.C.L.R. (3d) 62, 2001 BCCA 488; *Haynes v. B.C.T.F.*, 2005 BCSC 627; and *Ancheta v. Joe* (2003) 11 B.C.L.R. (4th) 348, 2003 BCSC 93.

[31] Further elaboration of the 'Weber principle' was provided by Bastarache J. for the Court in *Regina Police Assn Inc. v. Regina (City) Board of Police Commissioners* [2000] 1 S.C.R. 360, 2000 S.C.C. 14:

To determine whether a dispute arises out of the collective agreement, we must therefore consider two elements: the nature of the dispute and the ambit of the collective agreement. In considering the nature of the dispute, the goal is to determine its essential character. This determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed: see *Weber, supra*, at para. 43. Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide: see, e.g., *Weber*, at para. 54; *New Brunswick v. O'Leary* [[1995] 2 S.C.R. 967] at para. 6. [At para. 25; emphasis added.]

[32] More recently, in *Bisaillon v. Concordia University* [2006] 1 S.C.R. 666, 2006 SCC 19, the Court again considered the *Weber* approach. LeBel J. for the majority suggested that an arbitrator's jurisdiction "depends on two factors. The first has to do with the subject or the nature of the dispute; this is the subject-matter aspect of the arbitrator's jurisdiction." The identification of the essential character of the dispute requires not only determining its legal nature, but also taking into account the facts surrounding the dispute between the

parties. Thus one must ascertain whether the “factual context so identified falls within the ambit of the collective agreement” – in other words, “whether the collective agreement implicitly or explicitly applies to the facts in dispute.” (Para. 32.) The second part of the **Weber** analysis was said to relate to the persons who are parties to the dispute – the “personal aspect of the arbitrator’s jurisdiction.” (At para. 29, quoting from Robert P. Gagnon, *Le Droit du Travail du Québec* (5th ed., 2003) at 506.)

[33] On the “subject-matter jurisdiction of grievance arbitrators”, LeBel J. noted courts had adopted a “liberal position”, giving such arbitrators “broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement”. (At para. 33.) In **J.M. Asbestos Inc. v. Lemieux**, [1986] Q.J. No. 613 (Q.L.), for example, the Quebec Court of Appeal had held that an arbitration board appointed under a collective agreement had the jurisdiction to hear a dispute between a unionized employee and his employer regarding the interpretation of pension plan provisions, even though the plan was in effect “long before the collective agreement was signed”. (**Bisaillon**, para. 35.) LeBel J. continued:

Another approach, one even more favourable to finding that a grievance arbitrator has jurisdiction, appears to be being developed in decisions of the Quebec Court of Appeal. For example, in *Hydro-Québec v. Corbeil*, (2005), 47 C.C.P.B. 200, [2005] Q.J. No. 8143 (QL), 2005 QCCA 610, the Court of Appeal held that an arbitrator had jurisdiction without relying on the existence in the collective agreement of any reference to the pension plan. In that case, the Court found the pension plan to form part of the employees’ remuneration and conditions of employment and, on that basis, to be an integral part of the collective agreement. (See also *Association provinciale des retraités d’Hydro-Québec v. Hydro-Québec*, [2005] R.J.Q. 927, [2005] Q.J. No. 1644 (QL), 2005 QCCA 304.) Since practically all collective agreements address employee remuneration, grievance arbitrators would, under this approach, almost automatically have jurisdiction in such cases. Similarly, M. Savard and A. Violette have expressed the view that the inclusion in a collective agreement of very general clauses, such as the classic clause recognizing the employer’s management rights, could confer jurisdiction over issues regarding the application and implementation of benefits plans, including pension plans. A grievance arbitrator would thus have jurisdiction over such issues even in the absence of an express reference to the pension plan in the collective agreement (“Les affaires Weber, O’Leary, et Canadien Pacifique Ltée: que reste-t-il pour les cours de justice?”, in *Développements récents en droit du travail* (1997) 49, at pp. 72-73). In the case at bar, however, there is no need to rule on the validity of this approach, since, as I will explain, the collective agreements in question make express reference to the Pension Plan. [At para. 38; emphasis added.]

[34] With respect to the “*in personam*” jurisdiction of grievance arbitrators, the majority endorsed the finding of the Quebec Court of Appeal in **Bisaillon** that the arbitrator responsible for hearing grievances arising out of the collective agreement in that case had “no jurisdiction to hear claims of persons to whom the agreement does not apply.” LeBel J. expressly agreed at para. 39 with the suggestion of authors R. Blouin and F. Morin (*Droit de l’arbitrage de grief* (5e éd., 2000) that a grievance will be possible “only to the extent that the disagreement involves parties with a connection to the agreement in question, that is, the employer and the certified union or the employees to whom the collective agreement applies.” (My emphasis.) Where this condition is not met, courts of law retain jurisdiction over the dispute, as the Court had acknowledged in **Weber** at para. 57. In McLachlin J.’s words, “What must be avoided ... is a ‘real deprivation of ultimate remedy’”.

[35] In **Bisaillon** itself, the petitioner was a unionized employee of Concordia University who sought to institute a class action against his employer in order to contest a number of decisions made with respect to the administration and use of the employees’ pension fund. The University was party to nine collective agreements each of which contained a commitment on its part to offer membership in the pension plan to the employees covered by the agreement in accordance with the conditions of the plan. Thus LeBel J. observed:

In these provisions, Concordia made a commitment to the unions to offer the Pension Plan to the employees covered by the agreements in accordance with the conditions of the plan. The unions thus obtained certain assurances with respect to the maintenance of the plan and the eligibility of the employees they represented. In effect, the parties decided to incorporate the

conditions for applying the Pension Plan into the collective agreement. In this context, the employer was not in the position of a third person, such as an insurer providing insurance benefits proposed by the parties to the collective agreement. On the contrary, Concordia appeared to retain effective control over the administration of the Pension Plan while committing itself, at least implicitly, to respect and fulfil various rights and obligations provided for in the plan or arising out of the legislation applicable to it. In so doing, it also recognized the *in personam* and subject-matter jurisdiction of the grievance arbitrator. [At para. 54; emphasis added.]

Applying the dual approach he had explained earlier in his reasons, LeBel J. concluded that the pension plan had become a condition of employment in which the employees had given up their right “to act on an individual basis, independently of the union representing them” and that since the disagreement had arisen out of the collective agreement, it should have been pursued through the grievance process. (Para. 57.) If Mr. Bisailon’s allegations were correct, the grievance arbitrator would have the necessary jurisdiction to declare the employer’s impugned decisions to be “null” and to provide an appropriate remedy. Accordingly, it was not necessary to exercise the Court’s “exceptional residual jurisdiction”. (Para. 55.)

[36] Bastarache J., dissenting along with McLachlin, C.J.C. and Binnie J. in **Bisailon**, took a more restrictive view of the exclusive jurisdiction of labour arbitrators. He emphasized that the mere fact that a dispute arises out of an employee’s conditions of employment is “insufficient to trigger the exclusive jurisdiction of the labour arbitrator” (at para. 73), and that where a collective agreement contemplates a benefit that is “external” to that agreement, scrutinizing the policy itself, whose “contours” have been determined elsewhere and which “implicates broader interests and individuals beyond the collective agreement, is another matter entirely.” Thus the minority would have ruled that arbitral jurisdiction did not extend to matters affecting the “substance” of the pension plan in question. (Para. 86.)

[37] Both parties to this appeal sought to rely on **Bisailon**, the Province for its “liberal” approach to arbitral jurisdiction and the majority’s suggestion that the grievance arbitrator might have jurisdiction over issues such as pension plans even in the absence of an express reference thereto in the collective agreement. Counsel for the plaintiff on the other hand emphasized that the Court stopped short of deciding that point, that it endorsed the “social dimension” of class actions (at para. 16 of **Bisailon**), and stated at para. 63 that modern civil procedure would not leave non-unionized employees “without effective recourse”. Most important, in Mr. Zigler’s submission, was the “dual” approach to jurisdiction taken by the majority. Applying it to this case, neither the subject-matter aspect nor the personal arbitral jurisdiction is met in the case at bar: the “factual context” of the dispute clearly falls outside the ambit of any collective agreement, and the Retirees are no longer parties “with a connection to the agreement in question”. (**Bisailon**, at para. 39.)

[38] Both counsel also drew support from an earlier decision of the Supreme Court of Canada, **Dayco (Canada) Ltd. v. CAW-Canada** [1993] 2 S.C.R. 230. In that case, the employer had provided for certain group insurance benefits to its employees under a series of collective agreements, the last of which expired in April 1985. In that year, the company closed its doors permanently after negotiating a shut-down agreement with active employees under which group insurance benefits would be discontinued six months after closing. The agreement was silent about retirees’ benefits. It was formally terminated in May 1985 and the company purchased an annuity to satisfy the outstanding pension obligations to active employees. The union launched a grievance on behalf of the retired employees and the company objected to the arbitrator’s jurisdiction on the theory that at the time the grievance was lodged, there was no collective agreement in place and it had no obligations to the retired workers on any basis other than the collective agreement. The arbitrator found that he had jurisdiction, a ruling ultimately affirmed by the Supreme Court of Canada.

[39] Much of the Court’s reasons were taken up with the question of the appropriate standard of review of the arbitrator’s determination of jurisdiction. The Court, *per* La Forest J., decided that the arbitrator was required to be correct. At 269, La Forest J. then turned to the question of the “survivability” of the group insurance benefits of retired workers, concluding that when an employee withdraws from the employment relationship (and *ipso facto*, the collective bargaining process), his or her accrued employment rights “crystallize into some form of ‘vested’ retirement right.” (At 272.) His Lordship rejected the employer’s contention that any breach of the collective agreement that occurs after its expiration is not arbitrable. Instead, he endorsed the respondent’s submission that “the time of breach is irrelevant, so long as the right being breached accrued during the currency of the collective agreement.” (At 274.)

[40] After reviewing both American and Canadian law, the Court also concluded that in both systems, retirement benefits are in the nature of accrued rights, that those benefits may (depending on the terms of the agreement) “vest”; and that such vested rights can be enforced by union grievance on behalf of retirees. (At 282.) With respect to the enforcement of retired workers’ rights, however, the law in Canada was not completely clear. I quote La Forest J. at some length because of the significance of his comments for the parties in the case at bar:

... In Canada, it is unclear whether either of these routes is open to retired workers, who may be completely reliant upon their former bargaining agent to bring a grievance on their behalf when an employer unilaterally revokes vested benefits. And the grievance route may be foreclosed, as the union may be unwilling to grieve the issue on behalf of the retirees. This may arise because of an inevitable conflict of interest facing the union. If it were successful in grieving under an old collective agreement on behalf of retired workers, the employer would face increased overall labour costs, perhaps leading to harder bargaining over current employees' compensation. The union may well be reluctant to carry forward a grievance on behalf of retirees, as success on that front might well be contrary to the interests of current members of the bargaining unit.

In these circumstances, Canadian retirees may well find themselves in possession of a right without a remedy. The grievance procedure may be foreclosed, as described above. Retirees may not be entitled to bring a claim against the union for unfair representation, as such rights in Ontario appear to be limited to current members of the bargaining unit: see s. 68 of the Act. Finally, Ontario's *Rights of Labour Act*, R.S.O. 1980, c. 456, s. 3(3), and like provisions in other jurisdictions, may foreclose the possibility of a court action by the retirees; see Adams, *Canadian Labour Law* (2nd ed., 1993), at ss. 7.40-7.90. This problem does not arise in this case, as the union here did pursue a grievance on behalf of the retired workers. But in another case it seems to me that such a remedial vacuum, arising because the retirees are not party to the arbitration procedures guaranteed by the Act, may possibly be justification for allowing a court action to proceed; see *St.-Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219* (1982), 142 D.L.R. (3d) 678 (N.B.C.A.), at pp. 686 and 691; and see [1986] 1 S.C.R. 704, at pp. 713 and 721. Indeed, counsel for the company submitted that a court action was not only possible, but that the courts were the only forum available to these retirees. But this submission was made in passing, and was not developed in argument. As such I do not propose to go into the issue, except to say that it would appear to be irrelevant in this case. Assuming a court action is available, I know of no reason or authority that would preclude arbitration as an alternative forum for the retirees.

There may, as well, be other means by which retirees could surmount the remedial roadblocks that appear to face them. The term “employee” in the Act may well encompass retired workers in some contexts, thereby allowing retirees to take advantage of the Act’s fair representation provisions. Finally, there is a possibility that the relationship between retired members of a bargaining unit and the bargaining agent for that unit is fiduciary in nature. If a union failed to consider the interests of retirees during collective bargaining, or refused to process a grievance on behalf of those retirees, such conduct might form the basis of a claim for breach of fiduciary duty.

To summarize, I am of the view that retirement rights can, if contemplated by the terms of a collective agreement, survive the expiration of that agreement. Moreover, although it is not strictly necessary to decide the point in this appeal, I would also find that these surviving rights vest at the time of retirement, and would survive subsequent collective bargaining that purported to divest such rights. As such, I have concluded that the arbitrator’s general propositions in this respect were correctly stated, and the arbitrator had jurisdiction to hear the union’s grievance. Of course, I make no comment on whether the terms of the agreement between the company and the union do in fact create such a vested right. That is a question for the arbitrator to decide when the arbitration hearing proceeds on the merits. [At 303-5; emphasis added.]

[41] The Province submits that taken together, **Weber**, **Dayco** and **Bisailon** supply a complete answer (in the affirmative), to the question of whether the case at bar is arbitrable. First, **Dayco** shows that post-retirement rights “vest” at the time of retirement and may form the subject of a grievance under a collective agreement,

even where the plaintiff or grievor is retired and therefore no longer a party to the collective agreement or represented by the bargaining agent. The question left open by the Court in *Dayco*, namely whether courts of law may acquire jurisdiction where the grievance procedure is “foreclosed”, was in the Province’s submission answered by the Court in *Weber*, where the “exclusive jurisdiction” model was adopted for all cases in which the “essential character” of the dispute arises from the interpretation, application, administration or violation of the collective agreement. Further, the Supreme Court in *Bisaillon* left open, but seemed to anticipate at para. 38, that even in the absence of an express reference to a pension plan in the collective agreement, a labour arbitrator might have jurisdiction, particularly where it forms part of employees’ remuneration or conditions of employment.

[42] The case at bar, however, has certain features that distinguish it from both *Dayco* and *Bisaillon*. Most noticeably, the Benefits have never been mentioned in, or the subject of, any collective agreement between the Province and its unions. Indeed, as has been seen, retired government employees became entitled to the Benefits some years before the provincial government ever took part in collective bargaining, and the Benefits were made available on retirement to all employees, not only those who were unionized. It is difficult to say, then, that the essential character of the dispute “concerns a subject-matter that is covered”, implicitly or explicitly, by the collective agreement. (*Regina Police, supra.*) Shortly after collective bargaining was introduced, the provision that is now found at s. 12 of the *Public Service Labour Relations Act* was enacted. I set out s. 12 for convenience:

Every collective agreement must include all matters affecting wages or salary, hours of work and other working conditions, except the following:

- (a) the principle of merit and its application in the appointment and promotion of employees, subject to section 4 (2) of the *Public Service Act*;
- (b) all matters included under the Public Service Pension Plan, continued under the *Public Sector Pension Plans Act*, and the pension plan rules made under that plan;
- (c) the organization, establishment and administration of the ministries and branches of the government, except the effect of reductions in establishment of employees, which must be negotiated by the parties;
- (d) the application of the system of classification of positions or job evaluation under the *Public Service Act* and regulations;
- (e) the procedures and methods of training or retraining all employees not affected by section 15, other than training programs administered with a branch or ministry that apply to one occupational group only.

I would not have thought that an ordinary reading of this provision would lead to the conclusion that the matters referred to in paras. (a) - (e) are prohibited from being included in collective agreements. On its face, this section simply seems to require that all matters affecting wages or salary, hours of work and working conditions must be included in collective agreements, with certain exceptions. Thus the Province contends that if a matter is not found within one of the exceptions, it must either be in a collective agreement or “not affect working conditions (i.e., not be a contractual entitlement.” On the other hand, the items described in paras. (a) and (c) are arguably matters that the Province would wish to insulate from the bargaining process as matters of fundamental political authority. If this is correct, presumably the same is true of para. (b).

[43] Counsel referred us to no case-law that would assist on the proper construction of the provision, but I note two cases in which this court seems to have regarded s. 12 or its predecessors as exclusionary. In *Government Employee Relations Bureau v. BCGEU* (1984) 58 B.C.L.R. 1, the Court *per* Taggart J.A. quoted what was then s. 13(d) and (e) of the *Public Service Labour Relations Act* and observed:

There is no question that by excepting those matters from collective agreements the Legislature has limited the ambit of collective bargaining. In doing so it has legislated with respect to one of the fundamental principles of labour relations *viz* the scope of collective bargaining and of the collective agreement that flows from it. [At 5; emphasis added.]

Similarly, in **BCGEU v. British Columbia (Government Personnel Services Division)** (1987) 12 B.C.L.R. (2d) 97, Hutcheon J.A. for the Court observed with respect to an argument made on behalf of the government concerning a “permissive power” given by s. 73(2) of the **Forest Act**, R.S.B.C. c. 1979, c. 140, that:

I do not think the analogy is apt. No doubt the legislature could exclude s. 73(2) from the collective bargaining process as it has done with a number of other subjects by s. 13 of the Public Service Labour Relations Act. Thus, for example, the principle of merit and its application in the appointment and promoting of employees is excluded (s. 13(a)). That exclusion has not been made in this case. [At 102; emphasis added.]

See also **Vancouver Hospital & Health Sciences Centre v. British Columbia Nurses' Union** (2005) 45 B.C.L.R. (4th) 235, 2005 BCCA 343, at para. 43.

[44] Even if one assumes that s. 12 is prohibitive or ‘exclusionary’, the Province notes that para. (b) does not refer to post-retirement benefits generally, but to the Public Service Pension Plan. Mr. Morley emphasizes that it was not until April of 2001 that the Benefits were provided under the Plan. As has been seen, they were paid under the authority of the **Public Service Benefits Plan Act** from 1978 (in the case of MSP premiums) or 1981 (in the case of EHB benefits), until 2001. In response, the plaintiff relies on the fact that the **Public Service Pension Plans Act** was amended to contemplate the Benefits as part of the Pension Plan, that historically they were at least “tied” to membership in the Plan, and that the various letters, booklets and brochures provided by the Province (through the Superannuation Commission) to retiring employees over the years, seemed to represent the Benefits as part and parcel of the Plan.

[45] It is not for this court to make findings concerning the allegedly contractual terms of employment between the Province and Mr. Bennett and the plaintiffs he represents nor whether the Benefits were “matters included” under the Pension Plan. The important point for our purposes is that in fact, none of the collective agreements entered into by the Province with its unions dealt with post-retirement benefits. They were always the subject of statute or regulation. Indeed, the Province notes that in 1977 and 1979, the BCGEU attempted to obtain the Province’s agreement to the inclusion of certain post-retirement benefits in the collective agreements then being negotiated, but the Province refused to do so.

[46] Not surprisingly, the Province argues that the “silence” of a collective agreement on a given matter does not preclude that matter being arbitrable, citing not only **Bisaillon**, but **Loyalist College of Applied Arts and Technology (Board of Governors) v. Ontario Public Service Employees Union** (2003) 63 O.R. (3d) 641 (Ont. C.A.), at para. 37; **Claxton v. BML Multi Trades Group** (2003) 27 C.C.E.L. (3d) 161 (Ont. C.A.), a decision of Abella J.A., as she then was; and **Fasslane Delivery**, *supra*. I have no doubt that this argument is correct, but it does not follow that every matter arising between an employee and an employer is arbitrable, the labour arbitrator having (the Province emphasizes) the jurisdiction not only to resolve employment disputes but to also decide whether any given dispute lies within his or her jurisdiction. **Weber**, **Fasslane** and **Claxton** make it clear that the question is whether the dispute in its “essential character” arises from the collective agreement. As Ryan J.A. noted in **Mainland Sawmills Ltd. v. I.W.A. Canada, Local 1-3567 Society** (2005) 36 B.C.L.R. (4th) 310, 2005 BCCA 89, a “bare allegation” that a collective agreement is in place will not suffice to remove a dispute from the court’s jurisdiction. (Para. 24.) Even when an arbitrator does determine that he or she has jurisdiction over a particular grievance, **Dayco** confirms that that determination must be correct.

[47] In my respectful view, it simply cannot be said that the essential character of the dispute in this case arises from the interpretation, application, administration or violation of a collective agreement. At least until 2001, the Benefits were never the subject of collective bargaining. They were made available to union and non-union employees alike even before collective bargaining became the norm in the Province’s civil service. The Retirees’ claim to the Benefits is a matter lying outside the ambit of any collective agreement to which the Province is party – although not, perhaps, outside the employment relationships it had with the Retirees. Consistent with this, the determination of Mr. Bennett’s claim will involve arguments as to contract formation, Crown obligation, and statutory interpretation, which are not in my respectful opinion matters that necessarily engage or require the expertise of labour arbitrators.

[48] My conclusion in this regard is reinforced by a consideration of the second aspect of the analysis referred to in **Bisaillon** – the “personal aspect of the arbitrator’s jurisdiction”. Although it is true in theory that a retired person can seek to force his or her former union to represent him or her in advancing a claim, and that

there may be recourse against a union that fails to carry out its duty *vis-à-vis* a retired member (as to which see **Cominco Pensioners Union v. Cominco Ltd.**, June 13, 1979, B.C.L.R.B. No. 49/79 at 15), it stretches credulity to imagine that in this case the unions would not find themselves in a serious conflict of interest. This is especially true of the BCGEU, which the Province says has purported to “compromise” the Retirees’ claims – although no explanation was proffered as to how the union could do so on Mr. Bennett’s behalf when it no longer represents him or other Retirees. Like the Manitoba Court of Appeal in **Bohemier v. Centra Gas Manitoba** (1999) 170 D.L.R. (4th) 310, then, I conclude that “... retired employees, being non-parties to the [collective] agreement, have a right to an independent cause of action in court for an alleged violation of their ... rights.” (Para. 33.) The Court was discussing pension rights, but the same is true of the health benefits which are the subject of this case.

[49] Even if I regarded labour arbitration as an avenue of concurrent jurisdiction, I would agree with the Chambers judge that a class action is clearly preferable in this case, given the desirability of dealing with the claims of both unionized and non-unionized former employees of the Province. This augments the usual considerations regarding judicial economy and access to justice which make the case eminently suitable for a class action: see **Ormrod v. Etobicoke**, *supra*, at para. 35.

Plaintiffs Not Employed by the Province

[50] Setting aside the question of jurisdiction, the Province also contends that the Chambers judge erred in allowing persons who were not employed directly by the defendant Her Majesty the Queen to be included in the plaintiff class. (I will refer to these potential plaintiffs as the “Other Retirees”). They make up about one-third of the plaintiff class and were employed by a large number of disparate entities including Coast Capital Savings, the Oak Bay Lodge Society, St. Paul’s Hospital and the British Columbia Excluded Employees’ Association. Considering for the moment the claim only in contract – and Mr. Zigler was clear that this was the primary theory of the claim – it is plain and obvious to me that a contractual claim by the Other Retirees against the Province is bound to fail. On this point, Mr. Prowse referred us to **Washer v. British Columbia Toll Highways and Bridges Authority** (1965) 53 D.L.R. (2d) 620 (B.C.C.A.), which was an action brought for wrongful dismissal by a former employee of the Toll Authority, a Crown corporation. By the terms of its constating statute, the Authority was also an agent of the Crown. Nonetheless, the Court rejected the contention that the plaintiff himself was therefore a servant of the Crown who held office only during the Crown’s pleasure. Bull J.A. reasoned as follows:

... It was urged that as the appellant was a Crown servant or agent, its employees must of necessity have that status inasmuch as their functions and duties must be in pursuance of the purposes of the appellant which “exercises” its powers “only as agent for Her Majesty” and is such an agent “for all purposes”: s. 4 of the Statute above. To follow this proposition to its logical conclusion would mean that the respondent was not the employee of the appellant at all, but the employee of the Crown engaged by its agent the appellant. This, of course, is not the case, it being clear beyond doubt that by virtue of s. 12 of the Statute the appellant employs and has its own servants as it deems necessary to carry out its purposes, albeit such purposes are for the Crown.

It was also submitted that as the appellant is a Crown agency carrying out governmental functions it is consequently entitled to Crown immunities, prerogatives and privileges. These, it is said, would include the inherent right of the Crown to terminate the employment of its servants at pleasure, without notice or cause. No authority was cited to us to support this proposition. There is no question that as a Crown agency, the appellant would have certain immunities, prerogatives and privileges inherent in the Crown. An example would be immunity from suit, except that that immunity has been specifically removed by s. 8 of the Statute. But in my respectful opinion the position of the respondent and the Crown must be dealt with not on the basis of an assumed delegation of royal prerogatives, but on the proper construction of the Statute, and the Regulations passed thereunder, as a whole as to whether or not it was intended that he and the other employees of the appellant were engaged as and were to be servants of the Crown. [At 627-8; emphasis added.]

In the result, the Court held that the plaintiff had been “only a servant of a Crown corporation which was an agency of the Crown” such that the Crown’s right of dismissal at pleasure was not inherent in his engagement by the Toll Authority. *Washer* was relied on and approved by the Supreme Court of Canada in *Northern Pipeline Agency v. Perehinec* [1983] 2 S.C.R. 513 at 536.

[51] Plaintiff’s counsel did not bring to our attention any authority that would suggest that under the *Class Proceedings Act*, it is not necessary for each member of the plaintiff class to have a *lis*, or cause of action, against the defendant. On the contrary, s. 4(1)(a) requires that the pleadings disclose a cause of action, and the criterion of Supreme Court Rule 19(24)(a) is routinely applied in this context. Mr. Waldmann suggested in oral argument that in return for the alleged “promises” to provide the Benefits, the Province benefited indirectly from the services provided by the Other Retirees to their respective employers; but while I accept that ‘A’ may validly contract with ‘B’ to provide a benefit to ‘C’, it was not suggested anywhere in the pleadings or in argument that the Other Retirees were in fact engaged by their respective employers on behalf of the a third party, the Province. The lesson of *Washer* is that those employers had their own workforces, and were not acting as agents of the Crown in hiring and remunerating the Retirees. Thus I disagree with Melvin J.’s comment that the plaintiff’s action “is not in relation to benefits which flow from employers, but ... benefits that flow from the pension plan and retirement.” (Para. 35.) This runs contrary to what I see as, and what counsel presented as, the central theory of this part of the case – a contract of employment, the consideration for which was each Retiree’s services until retirement. That contract had to be one between employer and employee.

[52] As regards the claim for breach of fiduciary duty, I note para. 32 of the amended statement of claim:

Further, or in the alternative, the Defendant breached its fiduciary duty owed to the Retired Members. The Defendant was and is in a position of trust and confidence in relation to the Retired Members. The Plaintiff and Retired Members understood that certain benefits had been promised to them and they reasonably expected the Defendant to act in their best interests with respect to the promised benefits.

I find it difficult to discern a breach of duty other than a possible breach of contractual promise here, and no allegation of negligent mis-statement was made. However, since a court at this stage must be slow to “drive the plaintiff from the judgment seat”, I consider that the Other Retirees should be permitted, with the remaining plaintiffs, to refine and pursue a claim in the law of fiduciary obligation against the Province as the party which over the years administered and funded the Pension Plan and paid for the Benefits. I make no prediction as to whether such claim, or any other claim advanced by Mr. Bennett, is likely to succeed.

Disposition

[53] For these reasons, I would allow the appeal only to the extent of excluding from the plaintiff class, in respect of the claim in contract, those Retirees who were not employed by Her Majesty the Queen in Right of the Province. This would have the consequence of creating a sub-class of plaintiffs, consisting only of those Retirees who were employed by the Province, who may pursue the contract claim. The claim for breach of fiduciary duty may of course be pursued on behalf of the entire class of Retirees. In all other respects, I would dismiss the appeal, with thanks to counsel for their able submissions.

“The Honourable Madam Justice Newbury”

I Agree:

“The Honourable Madam Justice Levine”

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[54] I have had the opportunity to read the very comprehensive and helpful Reasons of Madam Justice Newbury. I agree with her conclusions, but do so following a slightly different route.

[55] The respondent claims certain post-retirement benefits and damages based on breach of contract and breach of fiduciary duty.

[56] A core premise of the appellant's case is stated in its statement of defence: "[b]y statute, *all* terms and conditions of employment of bargaining unit employees of the [appellant] must be in collective agreements" (emphasis in original). This contention is repeated in the appellant's reply factum: ". . . as a matter of general labour law, *all* contractual rights accruing to a unionized employee at work must be found in a collective agreement . . ." (emphasis in original).

[57] Building on this core premise, the appellant notes that the respondent was a unionized employee of the appellant and was covered by collective agreements containing a statutorily mandated arbitration commitment. As noted by Newbury J.A., the relevant commitment to arbitrate derives from ss. 84(2) and (3) of the ***Labour Relations Code***, R.S.B.C. 1996, c. 244, which applies to the appellant and its unionized employees pursuant to s. 23 of the ***Public Service Labour Relations Act***, R.S.B.C. 1996, c. 388 ("***PSLRA***").

[58] The appellant denies that the respondent has the contractual or fiduciary rights he claims, but states that whether contractual or based on an alleged fiduciary relationship, the rights, if any, derive from the respondent's position as an employee and proceedings concerning them must be arbitrated, not litigated.

[59] For the reasons that follow, I disagree with the appellant's core premise that all of the respondent's contractual rights must be contained in a collective agreement.

[60] In its factum, the appellant put its proposition as follows:

In [*Isidore Garon Itée v. Syndicat du bois ouvré de la région de Québec inc.*, [2006] 1 S.C.R. 27, 2006 SCC 2], released shortly after the chambers judge's decision, the Supreme Court of Canada made this clear, summing up two fundamental principles of Canadian collective bargaining law [at paras. 9, 25 and 26] as follows:

For half a century, the interplay between the rights arising out of an individual employment relationship and the rights arising out of collective labour relations has been marked by two trends in the case law, which appear to have met head on in this appeal. According to the first line of cases, ***the general law and individual negotiation have no place in matters relating to conditions of employment in the collective labour relations context (3.1)***. In the second line of cases, ***the minimum employment standards set out in various employment-related statutes, the substantive rights and freedoms provided for in human rights legislation and the principles of the Canadian Charter of Rights and Freedoms have been incorporated into collective agreements (3.2)***. To determine which of the rules from the case law – exclusion or inclusion – will guide the decision in the instant case, the basis for those rules must be explained [...]

The first principle can be restated as holding that all conditions of employment for unionized employees must arise out of collective bargaining.

[...] Underlying the first line of cases is the desire to give precedence to collective bargaining for all conditions of employment. If the right claimed can be characterized as a condition of employment, it cannot be negotiated individually by the employer and the employee. The union alone performs this task, and it must do so for the employees collectively.

As the Court remarks, a "condition of employment" is any provision that has "a real connection with the

contract of employment.”

In other words, it is a basic principle of labour law that collective agreements are *comprehensive* expressions of the contractual rights and obligations of unionized employers and employees with respect to each other. A corollary of this principle is that *if* a benefit of some kind is not provided for, either expressly or impliedly, in the collective agreement, then it is *not* a contractual right. Employers, unions and employees all rely on this principle.

(Emphasis in original.)

[61] There also is some support for the appellant’s position in the Supreme Court of Canada’s decision in ***Bisailon v. Concordia University***, [2006] 1 S.C.R. 666, 2006 SCC 19:

Our system of collective representation proscribes the individual negotiation of conditions of employment. A screen is erected between the employer and the employee in the bargaining unit ... (at para. 25)

...

The system of collective representation thus takes certain individual rights away from employees. In particular, employees are denied the possibility of negotiating their conditions of employment directly with their employer ... (at para. 26)

[62] I do not read these decisions as foreclosing parties, unions and employers, from agreeing to have matters concerning the employment relationship dealt with outside a collective agreement and certainly not as foreclosing a legislature from legislating this result.

[63] In this conclusion, I am supported by the comments of McLachlin J., now C.J.C., in ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929. In discussing the commitment to arbitrate “differences”, she stated in para. 45: “[t]he word ‘differences’ denotes the dispute between the parties, not the legal actions which one may be entitled to bring against the other”. She added in para. 49: “. . . one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute”. The question is whether, “. . . the difference between the parties arises from the collective agreement. . .” (para. 50). That is, there may be differences that arise in an employment relationship that do not arise from a collective agreement.

[64] It is clear from the written and oral submissions of the parties that the claims advanced by the respondent based in contract and fiduciary relationship are alleged to derive from his employment relationship with the appellant. The question is whether these claims can arise only out of a collective agreement.

[65] Section 12 of the ***PSLRA*** requires that all matters affecting working conditions must be included in a collective agreement, except *inter alia* “(b) all matters included under the Public Service Pension Plan, continued under the *Public Sector Pension Plans Act*, [S.B.C. 1999, c. 44] and the pension plan rules made under that plan”.

[66] Although the matter remains an open question, I agree with Madam Justice Newbury that the plain reading of this legislation suggests that the matters covered by the subsections of s. 12 are not prohibited from inclusion in a collective agreement. I agree with her observations concerning the relationship between the benefits claimed by the respondent and s. 12(b), and with her statement: “[i]t is not for this court to make findings concerning the allegedly contractual terms of employment between the Province and Mr. Bennett and the plaintiffs he represents nor whether the Benefits were ‘matters included’ under the Pension Plan”.

[67] By definition, the matters included in s. 12(b) are “matters affecting . . . working conditions” because as such they are excepted from the requirement that matters affecting working conditions must be included in a collective agreement. This exclusion is not incompatible with either the respondent’s assertion that the matters addressed in s. 12(b) are the subject of a contract separate from the collective agreement or the appellant’s contention that they are not.

[68] What is clear and is common-ground is that the benefits pursued by the respondent are not dealt with in the collective agreement.

[69] While, as a general proposition, matters concerning working conditions in a unionized setting are found within the four corners of collective agreements, the law does not preclude parties from agreeing to exceptions or prevent a legislature from legislating exceptions.

[70] The appellant's core proposition that all matters concerning the respondent's working conditions must be in a collective agreement is not sustainable on the facts of this case.

[71] The parties agree that the rights asserted by the respondent are not found in a collective agreement. The respondent is entitled to bring an action to establish that he otherwise has a contractual right or a right derived from a fiduciary relationship to the benefits he claims. The appellant asserts and is entitled to seek to establish that the respondent has no such rights and that the benefits were provided at the legislative discretion of the appellant. In the words of McLachlin C.J.C., ". . . the difference between the parties [does not arise] from the collective agreement . . ."

[72] I also would dispose of this appeal on the basis proposed by Madam Justice Newbury.

"The Honourable Mr. Justice Chiasson"