



Pension and Employee Benefit Class Actions — The Defence Perspective

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INTRODUCTION

Pension and benefit plan administrators are becoming increasingly familiar with litigation and in particular, class proceedings. We have seen a tremendous increase in both the number of pension and the breadth of issues raised in those actions. In this paper I will address the following questions:

- What explains the rise in pension class actions?
- Are pension disputes really “tailor made” for class actions?
- Jurisdictional hurdles: when will arbitration prevail over a class action?
- How can a defendant minimize the cost of defending a class action?
- How can a defendant manage conflicts?
- What are some winning strategies for defendants in pension class actions?

WHAT EXPLAINS THE RISE IN PENSION CLASS ACTIONS?

There are a number of reasons why the number of pension class actions has risen in recent years. Some of the reasons set out below are unique to pension disputes while others help explain the rise in class actions generally.

First, class actions have only recently become an available means of resolving pension disputes with the relatively recent introduction of class proceeding legislation. Pension class actions, like all class actions, are increasing due to the number of provinces in which class proceeding legislation has been passed:

- Quebec was the country’s leader, passing its class proceeding legislation in 1978¹;
- Ontario passed the *Class Proceedings Act, 1992*² in 1992;

¹ Quebec *Code of Civil Procedure*, R.S.Q. c. C-25, Book IX.

² S.O. 1992, c. 6.

- in Western Canada, British Columbia was the first to pass class proceeding legislation with the creation of the *Class Proceedings Act*³ in 1995;
- Saskatchewan’s *Class Actions Act*⁴ and Newfoundland’s *Class Actions Act*⁵ were brought into effect in 2002;
- Manitoba’s *The Class Proceeding Act*⁶ was introduced in 2003;
- Alberta’s *Class Proceeding Act*⁷ was introduced in 2004.

Even if a jurisdiction has not adopted legislation specifically permitting class proceedings, the Supreme Court of Canada has held that the court hearing the case brought under the traditional representative proceeding rules must fill the void left by the legislators and import the concepts of threshold certification, notice, discovery that characterize the class proceedings legislation in other provinces⁸. As I will discuss in the next section of this paper, it is my view that pension actions benefit less from the introduction of class proceeding legislation than other actions. However, it cannot be denied that the introduction of the statutes identified above has led to an increase in the number of class actions commenced to resolve pension disputes.

Prior to the introduction of the statutes listed above, plaintiffs in each of those jurisdictions were forced to use the rules of court that existed in their respective jurisdictions to fashion an action that would bind all of the members of the “class”. Plaintiffs and their counsel were less likely to commence a large action using those rules of court because they were difficult to administer and did not give plaintiffs and their counsel the same degrees of protection that the statutes noted above

³ R.S.B.C. 1996, c. 50 (hereafter the “**BC CPA**”).

⁴ S.S. 2001, c. 12.01.

⁵ S.N. 2001, c. C-18.1.

⁶ C.C.S.M. 2002, c. C130.

⁷ S.A. 2003, c. C-16.15.

⁸ *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534.

now provide. Class proceeding legislation offers a number of procedural advantages that make it more likely that counsel will pursue an action.

Second, the introduction of legislation permitting class actions occurred at the same time that greater attention was paid to the administration of pension plans generally. What we now see in terms of pension regulation, with detailed pension statutes in every jurisdiction governing the more significant aspects of a pension plan's administration, is a relatively recent phenomenon. The "modern" period of pension regulation only began in the 1980's. For example:

- in British Columbia the *Pension Benefits Standards Act*⁹ came into effect on January 1, 1993;
- in Ontario the *Pension Benefits Act, 1987*¹⁰ came into effect on January 1, 1988;

Those statutes gave members' better protection and more certainty in respect of vesting and portability and introduced more restrictive rules for funding and locking-in. By changing the standards by which pension administrators would be judged and better protecting the rights of members, the creation of more rigorous pension standards legislation paved the way for an increase in pension litigation generally. When this trend was combined with the introduction class proceedings legislation, the natural result was the increase we have witnessed in pension class actions.

Third, with the introduction of class proceeding legislation across the country we have seen traditional class action counsel, who previously litigated issues such as product liability, become interested in pension disputes. The size of the claims that can be advanced in a pension case make them an attractive target for traditional class action counsel. Part of this attraction stems from the fact that courts in Canada are willing to certify national classes in class proceedings. National classes necessarily increase the size of the potential award, making the action more attractive to plaintiff's counsel.

⁹ R.S.B.C. 1996, c. 352 (hereafter the "**BC PBSA**").

¹⁰ S.O. 1987, c. 35.

Fourth, most class proceeding regimes provide some assurance in respect of the funding of the action. Prior to the introduction of class proceeding legislation plaintiffs' counsel who structured an action as a representative proceeding had to be concerned with the risk of costs and the risk of not being adequately compensated for the work required to pursue the action. The class proceeding legislation that has been introduced in most Canadian provinces addresses these concerns, though to different degrees and in different ways. The BC CPA gives plaintiffs a complete immunity from costs from the application for certification all the way to an appeal arising from a class proceeding¹¹. Similarly, class counsel now have greater certainty that they will recover their fee if the action is successful making the class proceeding a more lucrative form of proceeding with an action.

Fifth, the nature of pension plan investments fuels pension plan litigation. Natural rises and dips in the market, the ever present need for administrators to make decisions about funding and solvency and the significant financial consequences of those decisions create perfect conditions for litigation.

Sixth, the increasing number of retirees creates a deep and increasingly sophisticated pool of potential plaintiffs willing and able to pursue litigation. Pension legislation has also put more power in the hands of members and retirees, making them more knowledgeable about how their plan is administered¹².

No one factor alone can account for the dramatic rise in pension class actions we have seen over the last decade. However, together I expect that these six factors are responsible for that increase.

ARE PENSION DISPUTES REALLY “TAILOR MADE” FOR CLASS ACTIONS?

Authors who speak with greater authority than I have noted that “pension and benefit matters are generally well-suited to class proceedings”¹³. While many pension and employee benefit disputes

¹¹ Section 37, BC CPA.

¹² For example, see section 69 of the BC PBSA which provides that if a pension plan has a certain number of members and a majority of members request it, the employer must establish a pension advisory committee to promote awareness and understanding of the plan among members and former members, and the committee must consist of at least one former member who is in receipt of benefits from the plan. Section 69 gives the committee the right to review financial, actuarial and administrative aspects of the plan.

¹³ Mr. Justice Warren Winkler, “Pensions, Benefits and the Canadian Class Action Experience”, *Employee Benefit Issues*, *Employee Benefits Issues*, 2003: p. 35.

may be well-suited to class proceedings, in this section I want to challenge what has become conventional wisdom about the marriage of class proceedings and pension disputes. It is my view that not all pension or employee benefit disputes are best resolved through a class proceeding, that certifying a pension dispute may actually add an unnecessary and complicating layer to an action that could be resolved quickly and efficiently using the traditional dispute resolution means.

Every jurisdiction in Canada has rules relating to “representative proceedings”, notwithstanding the introduction of class proceeding legislation in many provinces. The specific nature of the representative proceeding rules differ among provinces but they generally permit one individual to commence an action on behalf of numerous other individuals, and provide that the decision ultimately issued binds all the members of the “class” being represented. While it is a common refrain for class action defence counsel to argue that plaintiffs do not need to commence a class proceeding to obtain relief, it is my view that the argument has a special resonance in respect of pension disputes.

I say this because of the nature of claims that dominate pension litigation. At the centre of most pension disputes is the claim that the sponsor of the plan either removed funds or failed to contribute funds as it was required to by the applicable law. Pension litigation plaintiffs are generally requesting that the sponsor pay or return money to the pension fund. However, doing so does not require that all members of the plan join in the litigation. If one member of the plan is successful in his or her request for a declaration as to the legality of the sponsor’s actions, the relief he or she obtains does not apply to him or her alone. Generally speaking and subject to the nature of the claim being advanced, a plaintiff in pension litigation is naturally representative even if he or she does not seek to certify the action as a class proceeding. For example, if the plaintiff successfully advances a claim alleging that the plan sponsor improperly paid administrative expenses from a plan that has been wound up and in respect of which the plan members have a right to share in any surplus funds, the remedy will likely be that the sponsor has to repay the expenses back to the pension fund. All members with a right to those surplus funds will then share in that victory even if the plaintiff did not take the additional step of certifying the action as a class proceeding.

Indeed, some of the most important pension cases we have seen have been argued on a representative basis without the benefit of class proceeding legislation. For example, the *Buschau v. Rogers Communications Inc.* decision, which was extensively litigated in British Columbia, at the

Supreme Court of Canada and now before the provincial pension regulator, was not commenced pursuant to the B.C. CPA. Rather, that litigation was structured as a representative proceeding.

Obviously the class proceeding legislation affords certain advantages that may make proceeding by way of a class proceeding the most appropriate option. However, where the claim is fairly straight forward, certifying the action as a class action may add an unnecessary and complicating step that focuses the parties' attention on the class action procedure rather than on the dispute itself. Again, due to the unique nature of pension disputes where a sponsor will often face the same exposure even if there exists only one plaintiff, thought should be given to the question of whether the procedurally complicated class action format is necessary. The unique nature of pension disputes means that the "certify and settle" dynamic that may prevail in respect of other class proceedings does not have the same force in respect of pension class actions where the result may be the same for the defendant regardless of whether the claim is advanced by a class or by a lone member of the plan.

In jurisdictions where the class proceeding legislation does not give plaintiffs immunity from costs, or where the plaintiffs have access to a fund to which they can apply to cover the costs of litigation¹⁴, this argument is even more persuasive. In British Columbia plaintiffs are immune from costs associated with a class proceeding, making a class proceeding more attractive than a representative proceeding. Further, recent cases have questioned the degree to which unsuccessful plaintiffs can seek payment of their costs from the pension fund (in jurisdictions where the plaintiffs are not immune from those costs, such as Ontario¹⁵ or where the action is in a jurisdiction where a class proceeding plaintiff is immune from costs but where the plaintiff has proceeded by way of representative proceeding¹⁶).

¹⁴ In Ontario plaintiffs in class proceedings have access to the Class Proceedings Fund of the Ontario Law Foundation for disbursements and an indemnity to protect them against negative cost awards: Winkler, Justice Warren, "Pensions, Benefits and the Canadian Class Action Experience", *Employee Benefits Issues*, 2003: p. 43.

¹⁵ *Kerry (Canada) Inc. v. DCA Employees Pension Committee* (2007) ONCA 605

¹⁶ See *Sneddon v. B.C. Hydro*, 2004 BCCA 454, where the Court of Appeal ruled that the unsuccessful plaintiffs were responsible for the Government's costs, both at trial and on appeal. Even though that case involved claims related to a trust the Court refused to order the plaintiffs' costs out of the pension fund.

Despite my view that not all pension or employee benefit disputes need to be resolved by way of a class proceeding (and in fact may be most easily resolved using other methods of dispute resolution), it is also my view that it is difficult for defence counsel to force a plaintiff to proceed by way of representative proceeding rather than class proceeding. As noted above, a representative proceeding does not give a plaintiff the immunity from costs as does the BC CPA or the right to access a class action fund to cover disbursements or a cost award. Further, a recent decision of the Ontario Court of Appeal narrowed the ability of defence counsel to argue that the plaintiff *must* proceed by way of representative proceeding rather than class proceeding. In *Potter v. Bank of Canada*¹⁷ the defendant relied on a provision in the Ontario *Class Proceedings Act* which stated that the statute did not apply to an action that “may” be brought by way of a representative proceeding. The nature of the claims advanced in *Potter* allowed the Bank of Canada to argue that they could be brought by way of a representative proceeding under the Ontario *Rules of Civil Procedure*¹⁸, and therefore, could not be brought as a class proceeding. While the Ontario Superior Court agreed with the Bank’s argument, the Ontario Court of Appeal did not. The Ontario Court of Appeal held that only where another piece of *legislation* (as opposed to a regulation) provides for a representative proceeding will the defendant’s argument prevail.

Therefore, while I remain of the view that not all pension and employee benefit disputes are best resolved as class proceedings, it will be difficult for defence counsel to successfully argue that the plaintiffs must opt for another form of proceeding (provided the test for certification is met).

JURISDICTIONAL HURDLES: WHEN WILL ARBITRATION PREVAIL OVER A CLASS ACTION?

Below I discuss the winning strategies defendants can employ when faced with a potential pension class proceeding. One of those strategies is to carefully consider whether there are any jurisdictional arguments that are appropriate in light of the nature of the claim. Whether there are any jurisdictional arguments available will depend on the history of the plan, the nature of the claim advanced, the jurisdiction in which it is advanced, the history of the dispute as well as a number of

¹⁷ [2006] O.J. No. 739 (hereafter “*Potter*”).

¹⁸ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

other factors. However, a strong jurisdictional argument with a good chance of success can be one of the most successful ways to disrupt an action sought to be certified as a class proceeding.

One of the more successful jurisdictional arguments that has been raised in pension disputes recently is that the action cannot proceed by way of class proceeding because the dispute must be resolved through arbitration. This jurisdictional argument seems to have particular resonance because it requires the court to balance the public policy behind two important forms of dispute resolution. A class proceeding is laudable as it helps ensure access to justice and judicial economy. Arbitration is laudable because it demonstrates the respect we have for private agreements and because of the efficiency that can accompany alternative dispute resolution.

In May of 2007 the B.C. Court of Appeal considered the balance between these goals when it issued its ruling in *Ruddell v. BC Rail Ltd.*¹⁹, an action commenced by retirees alleging that the defendant treated them unfairly in respect of an actuarial surplus that existed in the plan. In finding that the pension dispute in *Ruddell* had to be arbitrated the Court of Appeal effectively ruled that a wide range of pension disputes in British Columbia can be resolved through private arbitration rather than through a class proceeding, provided at least one of the parties elects for that form of dispute resolution. As noted above, when deciding whether to pursue a particular jurisdictional argument defence counsel must consider the merits of the argument. Prior to the Court of Appeal's decision in *Ruddell* B.C. Courts had been reluctant to order that an action, for which the plaintiffs sought certification, had to be resolved through arbitration. Prior to *Ruddell* the Courts in B.C. preferred the social purpose behind the BC CPA to the social purpose behind mandatory arbitration²⁰. The key, distinguishing factor that made the jurisdictional argument in *Ruddell* successful was that arbitration was not only required as per the provisions of the pension plan at issue. Section 62 of the BC PBSA requires all B.C. pension plans to include a provision for the arbitration of certain

¹⁹ 2007 BCCA 269 (hereafter "*Ruddell*"). Note that the plaintiff in *Ruddell* sought leave to appeal the decision to the Supreme Court of Canada, and was denied leave in November, 2007.

²⁰ *Mackinnon v. Money Mart*, 2004 BCCA 473.

kinds of disputes²¹. The existence of section 62 of the BC PBSA meant that the drafters of that statute intended to prefer arbitration to class proceedings in respect of pension disputes specifically.

Interestingly, in deciding that a class proceeding was not the preferable procedure²² for the dispute in *Ruddell* Madam Justice Saunders, writing for the Court, noted the “potentially broad application of the arbitration decision”. As I argued previously, the unique nature of pension disputes means that, while they may be well-suited to class proceedings, generally, a class proceeding may not be necessary to achieve the social purpose behind the class proceeding legislation. It is my view that the jurisdictional argument was successful in *Ruddell* because the action could be advanced by one individual while benefitting all members of what would have been the “class”, and because section 62 of the BC PBSA evidenced an intention to prefer the arbitration of pension disputes.

Ruddell is not the only pension dispute in which arbitration was preferred to a class proceeding. The Supreme Court of Canada recently arrived at a similar conclusion in respect of a pension dispute, concluding that the dispute had to be resolved through labour arbitration rather than through a traditional class proceeding. In *Bisaillon v. Concordia University*²³ the majority of the members of the plan at issue were covered by one of nine collective agreements between Concordia University and the various unions representing its employees. Interestingly, not all the members of the proposed class were unionized. The respondent, a unionized employee, initiated an application to commence a class action concerning a number of administration decisions made in respect of the plan. One of the unions joined with Concordia to oppose the application on the basis that the dispute arose out of the collective agreement and therefore had to be arbitrated.

²¹ Disputes concerning the taking of a contribution holiday, the allocation of surplus assets upon the winding up of a pension plan and the payment or transfer of surplus assets are all subject to section 62 of the BC PBSA.

²² Section 4 of the BC CPA creates a five part test for certifying an action as a class proceeding: (i) the pleadings must disclose a cause of action; (ii) there must be an identifiable class of at least 2 persons; (iii) the claims of the class members must raise common issues, whether or not those common issues predominate over issues affecting only individuals members; (iv) the class proceeding must be the preferable procedure for the fair and efficient resolution of the common issues; and (v) there must be a representative plaintiff who would fairly and adequately represent the interests of the class, who has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding and who does not have, on the common issues, an interest that is in conflict with the interests of other class members. Defence counsel in *Ruddell* argued that the action failed the fourth requirement because arbitration was the “preferable procedure”.

²³ 2006 SCC 19.

The Supreme Court of Canada acknowledged the difficulties created by the fact that not all members of the proposed class were represented by the same union and further that some members of the proposed class were not members of any union. However, the Court was confident that those difficulties could be managed by the arbitrator, stating as follows:

I must admit that this solution is not free of procedural difficulties, particularly because of the multiplicity of possible proceedings and of potential conflicts between separate arbitration awards in respect of the different bargaining units. However, the potential difficulties are not sufficient to justify referring the matter to the Superior Court and holding that it has jurisdiction.

...

It is not a foregone conclusion that confirming the jurisdiction of grievance arbitrators would automatically lead to multiple arbitration proceedings. Various options remain open under the fundamental rules of labour law. Thus, it is possible in such situations that all, or at least a large number of the unions would decide to come to an agreement with the employer to submit the various grievances to a single arbitrator. In the instant case, it would be hard for the employer to oppose this approach, which I feel should have been the preferred one for all parties involved. **Moreover, should one arbitrator decide a grievance filed by one of the unions in the unions' favour, all the employees would benefit indirectly from the award, since all the money wrongfully taken from the pension fund would be returned.**²⁴

[emphasis added]

²⁴ Ibid. paras. 58 and 60.

As with the *Ruddell* decision the unique nature of pension disputes, where often a victory for one means a victory for all, helped the Supreme Court of Canada decide that arbitration was the proper means of resolving the dispute.

HOW CAN A DEFENDANT MINIMIZE THE COSTS OF DEFENDING A PENSION CLASS ACTION?

From my perspective, the most important way to minimize the cost of defending pension class actions is to carefully consider how to approach the defence of the case at the outset, before taking any step. The introduction of class proceeding legislation sets out a roadmap to follow when a plaintiff commences an action and then seeks to certify that action as a class action. Simply following that roadmap laid out in the class proceedings legislation without first determining whether the map is, in fact, the best map, does a disservice to the defendant.

Taking the time early in the process to carefully consider the claim, the statutory regime, arguments that have been raised in other cases (even if unsuccessful), and the progress of the dispute to date allows counsel to develop a strategy for the litigation that suits that claim. For example, above I discussed how a defendant can employ a jurisdictional argument such as the requirement to arbitrate the dispute, to disrupt a class proceeding. However, before raising such a jurisdictional argument counsel must first consider whether that argument makes sense in light of the nature of the dispute. If little advantage is to be gained by raising the jurisdictional argument, because it is unlikely to succeed or because it will not deter the plaintiff(s) from proceeding, defendant's counsel should seriously consider whether or not to raise that argument. Similarly, where the defendant is of the view that the plaintiff's claim has little merit it may be in the defendant's interest to proceed by way of certification if doing so is a cost-effective way of responding to the dispute.

It is also important to use the most important resource you have at your disposal: your client. While counsel may be the expert at the law that relates to pension disputes and class proceedings, at the outset of an action the client is the only expert about how the plan is structured and administered and the nature of the action or inaction that led to the claim being commenced. Make sure that you have contact with the appropriate individuals within the organization. While instructions must come from in-house counsel, most large pension plans have an internal staff responsible for the day-to-day administration of the plan. Those individuals will be invaluable when assessing the merits of the claim, possible arguments to make at an early stage and later in the proceeding during the document

discovery process and beyond. For example, the possibility of raising a limitations argument will depend on when the plaintiff knew or ought to have known about the events that led to the action. Having direct contact with the individuals who administer the plan will allow you to probe that question in a way that may not be possible if your contact is limited to in-house counsel or other senior member of the organization.

Another tip is to be well aware of any indemnification or insurance your client may have. While fiduciary liability insurance has become common for administrators of pension plans, if there is no such coverage in place it may still be useful to consider whether there are any D&O insurance policies that may apply. If the action concerns decisions made by the Pension Committee charged with administering an employer sponsored plan, the D&O insurance designed to cover the officers who serve on that Committee may be sufficiently broad to provide coverage in respect of the action.

Similarly, if your client was an agent of the administrator of a plan, the contract that governed that agency relationship may give your client a right to indemnification in the event of a suit.

HOW CAN A DEFENDANT MANAGE POTENTIAL CONFLICTS IN THE PLAINTIFF CLASS?

One of the reasons that class proceedings may not be the correct procedure for the resolution of a dispute is whether there are potential conflicts within the Plaintiff class. In pension and benefit class actions, this is an important question because many claims arise from alleged generational inequities within the pension plan. For example, in *Ruddell* a claim was made alleging uneven treatment of retirees because the plan administrator had used the actuarial surplus to fund a contribution holiday for the plan sponsor and the current employees. The retirees argue that this is unfair because they receive no benefit from this holiday.

This type of inter-generational fairness questions can give rise to conflicts within the Plaintiff class. They also provide an example of the scrutiny defence counsel should give to the class definition because it may provide an avenue to question whether certification of the class is proper. If the defence can be successful in dividing the Plaintiff class in a number of conflicting sub-groups, the proceeding may become unworkable or unprofitable for the Plaintiff's counsel.

Again, using *Ruddell* as the example, it was argued in the British Columbia Court of Appeal that the duty of impartiality imposed a duty not to treat each beneficiary equally but rather to consider each

beneficiary and all relevant considerations.²⁵ Given this test, it was argued the past pattern of increases and decreases in pension benefits was a relevant fact for the plan administrator to have considered in the exercise of its discretion. In this case, there had been a long history of prior contribution holidays, and various other benefit enhancements. It was argued that some members of the Plaintiff class had been provided with some of these benefits and some had not. Accordingly, the plan administrator had to look at various sub-groups and each sub-group would argue that those benefits may or may not have been a relevant consideration for the plan administrator. In fact, these sub-groups would conflict because they may have different arguments concerning which benefits are relevant (i.e. a benefit enjoyed by sub-group A but not by sub-group B).

Given its finding that the proceeding was to be referred to arbitration, the British Columbia Court of Appeal did not rule on the issue of conflicts within the Plaintiff class. However, this remains an area to be investigated whenever certification of a pension and benefit class proceeding is sought.

WHAT ARE SOME WINNING STRATEGIES FOR DEFENDANTS IN PENSION CLASS ACTIONS?

The recurring theme is that defence counsel cannot accept without question, the idea that pension and employee benefit disputes are perfectly suited to class proceedings. The unique nature of these kinds of disputes and the existence of other means of resolving these disputes creates arguments that should be considered when defending against this kind of action.

If class counsel has elected to proceed by way of class action, the first step defence counsel should take is considering whether it has a good argument that the matter cannot or should not be resolved through a class proceeding. As noted above, considering whether there is a preferable procedure such as arbitration may be a strong argument depending on the nature of the dispute and the statutory scheme relevant to the plan. Another interesting though perhaps narrow argument was successful in *MacDougall v. Ontario Northland Transportation Commission*²⁶, where the plaintiffs took issue with certain plan amendments that had been made that related to ownership of surplus,

²⁵ *Neville v. Wynn*, 2005 B.C.S.C. 483; 2006 BCCA 460

²⁶ [2007] O.J. No. 573 (S.C.J.) (hereafter “*MacDougall*”).

contribution holidays, the payment of administrative expenses and enhanced retirement benefits. The plaintiffs sought to strike out the amendments but did not seek a monetary remedy.

In *MacDongall* the Court held that the class proceeding was not the preferable procedure because the plaintiffs did not seek a monetary award. Because of the nature of their claim the plaintiffs could have used the alternative methods of resolving the dispute without having to engage in the complications created by the class proceedings legislation. The plaintiffs could have sought a simple declaration as to the legitimacy of the amendments allowed the Court to avoid resolving what appeared to be conflicts within the class, between active and retired members who had different interests in the action. Therefore, if the plaintiffs are not seeking a monetary award, defence counsel should first consider whether it can raise the argument made in *MacDongall*.

If the *MacDongall* argument is unavailable defence counsel should still consider whether the plaintiff has satisfied the requirements for certification. Though the threshold for certifying a class proceeding is generally described as low, there still remain important tests that must be met. The first test for certification is whether the pleadings disclose a cause of action. Defence counsel must review carefully how plaintiff's counsel has framed the case. As with the *MacDongall* decision, the nature of the relief sought may be incredibly important when determining whether a cause of action has been plead. In the case of *Williams v. College Pension Board of Trustees*²⁷, the action involved a claim that the Board of Trustees breached their fiduciary duties when they allocated an actuarial surplus in a particular manner. Because of the statutory scheme unique to the plan at issue, if the Trustees breached their fiduciary duties they lacked the necessary jurisdiction to effect the impugned amendments. However, the plaintiffs did not seek to vacate the Trustees' decision. Rather, they were content to leave the decision in place, but sought damages for the alleged breach of trust. The B.C. Court of Appeal concluded that the plaintiffs' claim was illogical. If the Trustees breached their fiduciary duties they lacked the jurisdiction to make the impugned decision, rendering it a nullity for which no damages could lie. The only remedy would be to unwind the decision and return all the parties to their original positions. Because of the relief sought by the plaintiffs the Court of Appeal's decision meant that they had failed to plead a cause of action.

²⁷ 2007 BCCA 19 (hereafter "*Williams*").

As a final note, it is important to identify and distinguish arguable defences from winnable ones. There may be a number of technical arguments that defence counsel could raise to try to forestall a class proceeding. However, if arguable but ultimately un-winnable defences are mixed with strong, winnable ones, the impact of the strong, winnable ones may be lessened. It is my view that defendants are better served by counsel who can identify those few, strong points that have a realistic chance of defeating the class proceeding than taking a shot-gun approach in the hopes that one of the arguments finds favour with the court.

CONCLUSION

Pension and benefit class proceedings have continued to grow. Although there has been some judicial reluctance to certify all of the innovative claims that have been filed, the sheer magnitude of the potential monetary claims that can be made will continue to make pension and benefit class proceedings an attractive option for Plaintiff counsel. Plan sponsors, administrators, trustees and service providers should continue to govern their conduct with this fact in mind.

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