Court File No. CV-15-11192-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C-43, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF NURSES FOR CANADA – EASTERN REGION AND VICTORIAN ORDER OF NURSES FOR CANADA – WESTERN REGION

Applicants

FACTUM OF THE UNITED NURSES OF ALBERTA
(Re: Pension Matters)
(returnable August 30, 2016)

PART I - NATURE OF THE APPLICATION

1. Five corporate entities operating under the name Victorian Order of Nurses ("VON") were under common direction and control prior to the commencement of these proceedings. These entities were:

a. Victorian Order of Nurses for Canada — Eastern Region ("VON East");

b. Victorian Order of Nurses for Canada - Western Region ("VON West");

c. Victorian Order of Nurses for Canada — Ontario Branch ("VON Ontario");

d. Victorian Order of Nurses for Canada Nova Scotia Branch ("VON Nova Scotia"); and

e. Victorian Order of Nurses for Canada ("VON Canada")

2. VON East and VON West have now been shut down and all VON East and VON West employees have been terminated.

3. Employees and former employees of the VON are members of the VON Canada Pension Plan (the "Plan"), which is a defined benefit plan. The Plan Administrator and Plan sponsor is VON Canada. In its capacity as Plan administrator, VON Canada has both a statutory and common law duty to ensure that all beneficiaries are treated with an even hand and to avoid conflicts of interest. All employees, irrespective of the Branch of VON they work under have equivalent contribution obligations and equivalent rights to pension benefits accrued during the course of their employment.

4. The most recent actuarial valuation of the Plan shows that, on a going concern basis, the Plan has a significant surplus of assets over liabilities (46 million dollars). On a solvency concern basis, the Plan is underfunded by four (4) percent. With a modest increase in interest rates, the solvency liability would be eliminated, all other factors remaining equal.

5. VON Canada had sought to reduce the accrued benefits of terminated employees who had worked for VON West and VON East and to reduce the benefits paid to those who are in receipt of pension benefits and who had worked for these branches. In effect, it sought an order to partially wind-up the Plan so as to crystallize the liabilities associated with the VON East and VON West Plan beneficiaries in contravention of pension legislation. That pension legislation, its application and the conclusion that a partial windup is not available are summarized in the

factum of the Superintendent of Financial Services, which the United Nurses of Alberts ("UNA") supports and adopts.

6. VON Canada withdrew its motion application. It has since filed a factum opposing the motion of the Ontario Nurses Association ("ONA"). While UNA may differ with the basis upon which VON Canada arrived at its conclusion to oppose the ONA motion, it concurs with its conclusion – that the ONA motion should be dismissed.

7. VON Canada had argued that a partial windup and the consequent reduction in benefits payable to VON West and WON East beneficiaries would be equitable by implying that the remaining Plan members would otherwise be jeopardized. To the contrary, remaining Plan members would be subject to the same contribution obligation and benefit accruals applicable today irrespective of the proposed segregation of assets. Under the Ontario *Pension Benefits Act* ("PBA"), the employer is required to make special payments to retire an unfunded liability. The remaining VON entities may have to contribute more to retire the unfunded liability. But VON Canada's fiduciary duty is not to the remaining employers. It is to the Plan beneficiaries.

8. Deciding on a course of action to facilitate employer interests over fiduciary duties is a blatant conflict of interest and constitutes a breach of the fiduciary duty owed to all Plan beneficiaries. Historically, windup deficits in this Plan were funded from Plan assets, not from reductions in Plan beneficiary benefits. Further, reducing accrued benefits is prohibited in an ongoing plan under the PBA.

9. ONA is the certified bargaining agent for 112 active members of a Plan that has over 5900 beneficiaries. It has requested that this Court order the transfer of assets and liabilities

associated with its members to a new pension plan and has invited other Plan members who are employees of VON Ontario and VON Nova Scotia to follow suit. The transfer requested should be denied for the following reasons.

a. Under pension law, beneficiaries of a Plan have no authority to seek a windup of the Plan, whether it is a partial or a full windup of the Plan. The transfer of assets and liabilities out of the Plan into a new plan in respect of ONA members would result in the windup of the Plan. In essence, ONA is seeking to do indirectly what it and VON Canada cannot do directly – determine the VON East and VON West pension benefit entitlements on a windup basis. It is an attempt to circumvent pension law.

b. ONA has characterized the issue as one of equity for Plan members. To the contrary, equity for Plan members is to treat terminated members the same regardless of where the termination occurred. To carve out former employees of VON West and VON East gives rise to a breach of fiduciary duty by the Plan Administrator on the basis that all Plan beneficiaries would not be treated with an even hand. It would also constitute an unlawful reduction of accrued pension benefits for these VON West and VON East Plan beneficiaries.

c. Under the Plan terms, there is no requirement for VON West and VON East to contribute to the retirement of the unfunded liability. The Plan requires VON Branches to top-up their contributions to the Plan to retire an unfunded liability in an amount determined in proportion to each Branch's share of the current service cost. VON West and VON East have no current service cost because they have no active employees accruing pension benefits. Therefore, these Branches have no contribution obligation under the Plan terms – a proportionate share of nothing is nothing. The solvency liability must be retired by the remaining participating employers of this Plan in accordance with the requirements of the PBA.

d. VON Ontario and VON Nova Scotia are not Applicants under this CCAA proceeding. This Court should focus on the legal obligations of the Applicants. To this end, it is the obligations of VON Canada vis-à-vis the Plan that are relevant, not the wishes of ONA in respect of an entity not included in the CCAA proceedings.

e. The Plan is not part of the VON Canada estate. It is a separate trust that imposes its own obligations and liabilities and is subject to comprehensive regulation under the PBA and, to the extent that benefits and entitlement issues arise, under other provincial pension regulatory regimes. The only relevant consideration for this Court is what should happen with respect to special payment obligations while the stay is in effect. ONA seeks to redesign the Plan. Plan redesign should

not be the subject of a CCAA Court order when the Plan itself is not part of the Applicants' estate. While section 11 of the CCAA conveys broad discretionary authority to a CCAA judge, that authority should not be exercised to modify the terms of a longstanding trust with its own obligations.

PART II - THE FACTS

10. The VON Canada Pension Plan is a multi-jurisdictional, defined benefit, single-employer pension plan ("SEPP") registered in Ontario. Membership of the VON Canada Pension Plan is not confined to employees and/or former employees of the Applicants. As of June 1, 2015, there are approximately 5,900 members of the VON Canada Pension Plan including 2,945 active members.[1]

11. UNA represents at least thirteen (13) past and present members of UNA who have worked with VON West. VON Canada indicated that five UNA members were enrolled in the Plan as of November 25, 2015, the date VON West employees were terminated.[2]

12. Ninety-four (94) employees of VON West and East who were also active members of the Plan were terminated on November 25, 2015, constituting 1.6% of the beneficiaries of the Plan.[3] This group comprises both union and non-union members.

13. Article 22 of the collective agreement between the Victoria Order of Nurses Edmonton Branch and the United Nurse of Alberta, Local #61 recognizes that the VON Pension Plan is maintained at the national level and that enrolment, participation and contributions by employees

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[1] Affidavit of Jo-Anne Poirier sworn May 30, 2016, (the "Poirier Affidavit") at paras. 14 and 18. Motion Record of the Applicants, Tab 2.
[2] Affidavit of Doug LeFaive sworn June 16, 2016, (the "LeFaive Affidavit") at para. 8. Responding Motion Record of UNA, Tab 1.
[3] Poirier Affidavit, paras. 30-31. Motion Record of the Applicants, Tab 2.

and the employer are determined in accordance with the terms and conditions of the Plan.[4] In other words, the terms of the Plan are established and administered by VON Canada, not pursuant to the collective agreement.

14. Consistent with its obligations under minimum pension standards, VON Canada advised UNA on December 4, 2015 that the Plan "is unaffected by the organizational restructuring and departing employees will receive 100% of their pension entitlement." VON Canada subsequently revised its position to state that pensions would be adjusted retroactively for VON West members based on the windup valuation of the portion of the Plan covering VON West Plan members.[5] As described above, VON Canada has now abandoned the windup option.

15. The most recent valuation for funding purposes of the VON Canada Pension Plan reflects that it is in a surplus position on a going concern basis (as at June 1, 2015 the surplus was at $46 million). The estimated windup deficiency for the Plan was at $15 million as of the same date and was estimated to have increased to $20 million as of January 1, 2016, a deficit of approximately six percent (6%) of the assets of the Plan.[6]

16. Based on the June 1, 2015 valuation, the Plan was 96% funded on a solvency basis. An increase in the solvency valuation discount rates in the range of 0.3% to 0.4% would be enough to raise the transfer ratio from 96% to 100% as of June 1, 2015.[7] Whether special payments will be required into the future depends on a number of variables.[8] However, the characterization that

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[4] LeFaive Affidavit, para. 5. Responding Motion Record of UNA, Tab 1.
[5] LeFaive Affidavit, paras. 4, 6, 7. Responding Motion Record of UNA, Tab 1.
[6] Poirier Affidavit, paras. 32, 33. Motion Record of the Applicants, Tab 2.
[7] LeFaive Affidavit, para. 11. Responding Motion Record of UNA, Tab 1.
[8] The Ontario Government is currently reviewing solvency funding rules. One option under consideration is the elimination of solvency funding. See http://www.fin.gov.on.ca/en/pension/solvency/review-solvency-funding.html

special payments are subsidies for the VON West Plan members and former members is erroneous. Funding does not attach to specific members or groups of members. It is assessed on the Plan as a whole.

17. All employees, irrespective of the Branch of VON they work or have worked under, have equivalent contribution obligations and equivalent rights to pension benefits accrued during the course of their employment.[9]

18. The method of determining benefit entitlement on termination of employment for Plan members who work in Alberta is determined in accordance with the Plan, subject to the requirements of the Alberta *Employment Pension Plans Act* ("AEPPA") and, where applicable, for example, on matters such as funding, the PBA. Section 17.1 of the VON Plan permits amendments to the Plan, "but no amendment may adversely affect benefits accrued under the Plan up to the date of the amendment."[10] There is no scope under the Plan or under the AEPPA to reduce already accrued pension benefits in an ongoing Plan.[11]

19. Section 90 of the *Employment Pension Plans Regulation*[12], lays out the rules for the payment of commuted values on termination when the solvency ratio is less than one. The Plan Administrator is authorized to pay out the commuted value reduced by the solvency ratio. But, there is an obligation to pay out the balance of the commuted value benefit at its latest five years after the anniversary of the payment of the reduced commuted value. To do otherwise would amount to a reduction in an accrued benefit, which is contrary to both section 17.1 of the VON

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[9] Poirier Affidavit, paras. 17 - 28. Motion Record of the Applicants, Tab 2.
[10] Motion Record of the Applicant, Tab 2(f), p. 134.
[11] *AEPPA*, section 20
[12] Alta Reg 154/2014

Plan and section 20 of the AEPPA. Comparable rules are contained in the General Regulation under the PBA.

20. The Trust Agreement that funds the Plan is between the Applicant and Royal Trust Corporation of Canada (now through its corporate successor). VON Canada provides direction and control of the Fund and no distinction is made between the employees of the various VON entities. The Trust Agreement contains a number of relevant provisions including:

a. the first recital states that the Order (VON) has adopted the Plan for the purpose of providing the pension benefits and other benefits as described in the Plan "to its eligible employees";[13]

b. the Trustee is to make payments from the fund on the written direction of the Order (Article II, section 1(a));[14]

c. the Trustee is to purchase contracts and annuities as directed to do so by the Order (Article IV, section 2);[15]

d. no person entitled to benefits under the Plan shall have any claim against the Trustees or trust fund except by or through the Order (Article IV, section 3(f);[16]

e. the Order reserves the right to amend the Trust Agreement at any time, but no such amendment shall authorize or permit any part of the Trust Fund to be applied, paid or diverted to any purposes other than those provided for under the terms of the Plan or the Trust Agreement (Article V, section 1).[17]

21. The Plan language does not distinguish between VON Canada and the other VON entities for the purposes of Plan funding obligations, or for any other purpose. The Plan language also does not distinguish between employees of VON Canada versus employees of the other VON entities.

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[13] UNA Supplementary Motion Record, Tab 1(I), p. 48.
[14] UNA Supplementary Motion Record, Tab 1(I), p. 49.
[15] UNA Supplementary Motion Record, Tab 1(I), p. 57.
[16] UNA Supplementary Motion Record, Tab 1(I), p. 59.
[17] UNA Supplementary Motion Record, Tab 1(I), p. 61.

22. The Plan text has never contained a definition of "employer". The definition of "VON" in the Plan text is as follows:

> "VON" means the Victorian Order of Nurses for Canada, as incorporated under the Canada Corporations Act — Part II. For purposes of this Plan, VON shall also include provincial and local branches authorized to carry on the objects of VON;[18] [emphasis added]

23. No distinction is made as to what VON entity employs a Plan member. The term "employee" is defined under s. 1 of the Plan as follows:

> "employee" means a person employed by VON. In this Plan, an employee who reports for work or is paid from a location of VON situated in a given Province of Canada is said to be an employee in that Province.[19]

24. The definition of "pensionable service" includes "... the period of continuous employment with the VON while an active member of the Plan ...".[20] There is no reference to specific VON entities.

25. Employer remittance obligations also make no distinction between VON Canada and the other entities. For example:

> 5.4 Collection and Timing
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> The contributions made hereunder by the VON and the members shall be paid over to the Trustees before the end of the month following the month in respect of which the contributions are due.[21]

26. Section 5.3 specifies the employer contribution requirement. It describes special payment obligations as a shared responsibility between the VON entities.

> 5.3 VON CONTRIBUTIONS
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> Subject to the requirements of the *Pension Benefits Act* and the *Income Tax Act,* VON, along with participating provincial and local branches authorized to carry

[18] Motion Record of the Applicant, Tab 2(f), p. 76.
[19] Motion Record of the Applicant, Tab 2(f), p. 67.
[20] Motion Record of the Applicant, Tab 2(f), p. 83.
[21] Motion Record of the Applicant, Tab 2(f), p. 90; see also section 5.3, p. 89.

> on the objects of the VON, shall remit to the Plan amounts equal to contributions remitted by members in accordance with clauses 5.1 (a), (b), (c) and (d). In addition the VON, along with participating provincial and local branches authorized to carry on the objects of the VON, shall remit contributions which in the opinion of the Actuary are required to amortize any unfunded liability or solvency deficiency, determined in accordance with the provisions of the Pension Benefits Act, that may arise from time to time. VON, along with each participating provincial and local branches shall pay a proportionate share of such special payment contributions based on the ratio of their annual current service contributions to the total annual current service contributions of VON and the participating provincial and local branches.[22]

27. Plan eligibility is governed by s. 3.1 of the Plan. It states that "Every full-time employee may voluntarily become a member of the Plan on the first day following the month coinciding with or next following completion of six months of continuous employment with VON... ".[23] There is no reference to "employment" with a particular VON entity.

28. Plan administration decisions are made by the VON Canada Board factoring in advice provided by the VON Canada Pension and Benefits Committee ("PBC"). The terms of reference for the PBC clearly acknowledge that it is the VON Canada Board that is "ultimately responsible to plan participants" and bears responsibility to fulfil their "fiduciary and legal obligations with respect to the operation of the VON Pension Plan".[24]

29. The VON Canada Board of Directors made decisions with respect to the design and administration of the Plan unilaterally.[25] But this is somewhat of a misnomer since the members of the VON Canada Board of Directors were also members of the boards of the other VON entities. Jo-Ann Poirier described the VON governance structure at paragraph 12 of her affidavit

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[22] Motion Record of the Applicant, Tab 2(f), p. 89.
[23] Motion Record of the Applicant, Tab 2(f), p. 79.
[24] Affidavit of Derek McIntosh sworn August 6, 2016 ("McIntosh Affidavit"), Supplementary Motion Record of UNA, Tab 1, para. 3.
[25] McIntosh Affidavit, Supplementary Motion Record of UNA, Tab 1, para. 4.

sworn November 24, 2015 included in the Application Record in support of the application to commence CCAA proceedings as follows:

> ... VON Canada and the Regional Entities operate as an affiliated corporate group. Operationally, VON Canada is fully integrated with each of the Regional Entities. Each Regional Entity has a board of directors composed of the same individuals who comprise the VON Canada board. The members of each Regional Entity are VON Canada itself as well as the individual VON Canada directors. VON Canada's senior management team is also the senior management team of each of the Regional Entities. [Emphasis Added]

30. VON Canada was much more than an overhead center for the other VON entities. VON Canada's National Strategy is referred to as the "One VON" initiative. As explained in a letter to Ms. Virginia Bell of the VON West Island Branch dated March 20, 2006 from the Chair of the VON Canada Board, "the core principles of the National Strategy include, without limitation, (1) all staff transfer to VON Canada and (2) no local governance of operations."[26]

31. The VON Canada Board adhered to the National Strategy by revoking the membership of Branches that refused to comply fully with the National Strategy. VON Canada required all VON entities to "carry out the objects of VON Canada" and "manage and deliver all programs in compliance with the standards and guidelines of" VON Canada. The extensive level of rights, requirements and services extended by VON Canada to the other VON entities include:

- the right to use the VON name, and to hold itself out as associated with VON;
- the right to use VON emblems, logos, signs, and other insignia;
- insurance coverage;
- an accreditation process;
- finance supports, financial systems, investment and management services;
- IT support and systems;
- clinical advice and support and best practices;

[26] McIntosh Affidavit, Supplementary Motion Record of UNA, Tab 1, para. 6.

- government relations and branding;
- quality management;
- board, staff, and volunteer development;
- market and business development;
- public affairs and communications;
- fund development and fundraising;
- human resources and labour relations expertise and support;
- education and training;
- marketing and contract negotiation;
- legal advice;
- access to the Growth Agenda;
- VON standards manuals;
- accreditation with the Canadian Council on Health Services Accreditation; and
- access to national contracts such as flu clinics.[27]

32. The Board of VON Canada acknowledged its responsibility to all employees of VON both through its governing documents and through its resolutions regarding the Plan.[28] The Financial Services Tribunal considered funding obligations of the VON Plan in its 2009 decision. In that decision, the Tribunal reported that the VON Canada Board had paid out commuted values without reduction despite a solvency deficit in the period from January 1, 2003 to December 31, 2005 as demonstrated in the following passage:

> t) When a wind-up deficit arose in the Plan with the January 1, 2003 valuation, VON Canada in consultation with the Plan's actuaries determined that VON Canada and the Branches would pay a "surcharge" on the contributions that they would otherwise have been required to make in order to match employee contributions. The VON Canada BOD approved a resolution to allow VON Canada to pay, from January 1, 2003 to December 31, 2005, commuted values to terminating members at 100% of their entitlements despite the transfer ratio being

[27] McIntosh Affidavit, Supplementary Motion Record of UNA, Tab 1, paras. 7 – 9.
[28] Supplementary Motion Record of UNA, Tab 1A, pp. 7 – 9; Tab 1B, p. 16.

> less than 100%. This VON Canada BOD decision was not disclosed to the Branches until a formal communiqué from VON Canada was released by way of a memorandum to the Branches dated February 13, 2004. VON Canada also amended the Plan to reduce certain benefits in order to decrease the cost of the Plan.[29]

33. Consequently, even prior to the full implementation of the One VON initiative, VON Canada treated all Plan members' entitlements on an equivalent basis even when terminations occurred while the Plan was underfunded.

34. The definition of "employer" under the PBA contemplates the existence of more than one employer for the purposes of the Act:

> "employer", in relation to a member or a former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning.

35. VON Canada acknowledges that the Plan is not a multi-employer pension plan as defined in the PBA, is subject to the Pension Benefit Guarantee Fund and must comply with the rules respecting single employer plans under the PBA, which include full funding of the benefit promise and no reduction of accrued benefits.[30]

PART III - ISSUES AND THE LAW

36. The ONA motion to segregate the assets and liabilities of the Plan raises the following questions for the Court's consideration:

a. Does this Court have jurisdiction to amend the existing Trust Agreement and Plan, order a segregation of assets and liabilities of the Plan and a transfer of assets and liabilities to facilitate the creation of a new pension plan at the request of ONA, the representative of a small subset of Plan beneficiaries?

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[29] *Victorian Order of Nurses for Canada v. Ontario* (Superintendent Financial Services), 2009 ONFST 11 Decision No. P0304-2008-1, p. 13.
[30] *Ibid.* at pp. 12-13

b. Should the Court grant an order the implementation of which if initiated by the Plan administrator would be considered a breach of fiduciary duty?

c. Is the obligation to fund the solvency deficiency a liability of the remaining VON entities on a joint and several basis?

(i) What are the requirements imposed by the PBA?

(ii) Should the common employer doctrine be applied?

A. The Court does not have jurisdiction to order the creation of the ONA Pension Plan

37. The Trust Agreement executed between VON Canada and the Royal Trust Corporation of Canada in support of the Plan provides in Article V(1) of the Agreement "... that no such amendment shall authorize or permit any part of the Trust Fund to be applied, paid or diverted to any purposes other than those provided for under the terms of the Plan or this Trust Agreement...".[31] In other words, assets are to be held in trust to satisfy the obligations of the Plan, not to facilitate the wishes of 112 active members of the Plan to the detriment of other Plan beneficiaries in a Plan that has over 5,900 beneficiaries.

38. Marie Kelly, the Chief Executive Officer of ONA, acknowledges at paragraph 26 of her affidavit that "[t]he benefits and entitlements of those former employees of VON East and VON West who are members in the VON Canada Pension Plan would be dealt with following the transfer of assets and liabilities to the New VON Pension Plan probably by a full wind-up of the VON Canada Pension Plan."[32] [emphasis added] After transferring the commuted values of VON Ontario Plan members to a new plan, VON West and VON East Plan members would be

[31] UNA Supplementary Motion Record, Tab 1(I), p. 61.
[32] ONA Motion Record, Tab 2, p.

paid termination benefits out of the remaining assets and would receive less than their VON Ontario counterparts despite participating in the Plan on an identical basis.

39. Under pension law, beneficiaries of a Plan have no authority to seek a windup of a Plan, whether it is a partial or a full windup of the Plan nor do they have the authority to vary the terms of a Trust Agreement to facilitate the segregation of assets and liabilities and the transfer of a portion of the assets and liabilities from the Trust Fund. As is acknowledged by Marie Kelly, the transfer of assets and liabilities out of the Plan into a new plan in respect of ONA members would result in the windup of the Plan. In essence, ONA is seeking to do indirectly what Plan beneficiaries cannot do directly. It is a blatant attempt to circumvent pension law.

40. The rule in *Buschau v Rogers*[33] maintains that employees may not invoke the trust law principle of *Saunders v Vautier* in conjunction with the *Variation of Trusts Act* in order to initiate a windup of a pension plan. However, the Ontario Court of Appeal in *Lomas v Rio Algom*[34] interpreted *Buschau v Rogers*[35] more broadly, to find that employees cannot order a windup, nor can they compel a windup, be it partial or full, even when they allege a fiduciary/contractual duty is owed. Instead, the Courts have emphasized that the legislature has created a comprehensive scheme, and outside of an employer-initiated windup, the right has been granted to the Superintendent to initiate a wind-up in accordance with minimum pension standards legislation. The role of the Superintendent has been outlined under the federal legislation in *Buschau v Rogers,*[36] as well as under the Ontario provincial statute in *Lomas v Rio Algom.*[37]

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[33] 2006 SCC 28, [2004] SCCA No 350 .
[34] (2010) 99 OR (3d) 161, 2010 ONCA 175 (CanLII).
[35] *Supra,* note 33.
[36] *Ibid.*

41. In *Lacroix v Canada Mortgage and Housing Corp,*[38] the Ontario Court of Appeal confirms their finding in *Lomas v Rio Algom*[39] that for purposes of a termination or a windup there are no material differences between the two statutes, and the court has no ability to do indirectly that which it cannot do directly.

42. In *Buschau,* the Court cited with approval the British Columbia Court of Appeal's remark that:

> If [Parliament] had contemplated granting additional rights to plan members to act on their own initiative to terminate pension trusts and distribute plan assets, it would have done so.[40]

43. The findings of the Supreme Court were summarized by the Ontario Court of Appeal in *Lomas v Rio Algom* speaking particularly to the long-term nature of the pension plan commitment:

> A pension plan, if not a permanent instrument, is at least a long-term one. The participation of any individual member is ephemeral -- members come and go while pension plans are expected to survive the flow of employees and corporate reorganizations. In an ongoing pension plan, a single group of employees should not be able to deprive future employees of the benefit of a pension plan. Thus, members often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust fund. They are not left without recourse should the employer infringe the PBSA because they can alert the Superintendent to their concerns.[41]

44. In *Lomas v. Rio Algom*, Gillese J.A. noted that:

> If the court were to order Rio Algom to commence wind up proceedings, it would violate the legislative scheme and amount to an unauthorized usurpation of the authority delegated to the Superintendent and Tribunal." [42]

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[37] *Supra,* note 34.
[38] (2012), 110 OR (3d) 81, 2012 ONCA 243 (CanLII).
[39] *Supra,* note 34.
[40] *Supra, n*ote 33 at para 86.
[41] *Supra,* note 34 at para. 42.
[42] *Supra,* note 34 at para 78.

45. ONA seeks to create a new pension plan for VON Ontario employees, an entity that is not joined as an applicant in the CCAA proceeding, to the detriment of other Plan beneficiaries, some of whom are intended to continue as Plan members and employees of VON Canada. To grant an order to an entity that is not part of this proceeding the implementation of which ONA has acknowledged will likely result in the termination of the VON Canada Pension Plan is both contrary to the case law summarized above and, on its face, beyond the scope of these proceedings.

46. While it is ONA initiating this proceeding, the plan sponsor of the new pension plan would presumably be VON Ontario under the direction and control of essentially the same board as VON Canada. ONA's motion is a thinly veiled attempt to accomplish what VON Canada could not accomplish through its now abandoned partial windup proposal.

B. The Court should not sanction a breach of fiduciary duty

47. ONA has characterized the issue of the solvency deficiency as one that leads to inequitable treatment of Plan members unless measures are taken either to reduce benefits of VON West and VON East Plan beneficiaries or assets and liabilities are transferred out of the Trust Fund in respect of ONA members who participate in the Plan on a going concern basis.[43]

48. VON Canada, on the other hand, has focused on "fairness considerations" with respect to future employer contribution obligations.[44]

49. As Plan sponsor and Plan administrator, VON Canada faces a dilemma – how to deal with a conflict of interest arising from its fiduciary obligations as the Plan administrator

[43] ONA Motion Record, Tab 2, para. 22.
[44] VON Motion Record, Tab 2, para. 41(b).

contrasted with its obligations from a corporate governance perspective. It is evident from the affidavit sworn by Jo-Anne Poirier that the dominant concern that motivated VON Canada to seek a partial windup was the possibility that VON Canada, VON Ontario and/or VON Nova Scotia may be obligated to remit special payments to pay down the solvency deficit and those payments may (marginally) reflect obligations related to employees who were terminated in VON West and VON East.

50. The Supreme Court of Canada has affirmed the principle that "an employer who is an administrator is forbidden to put itself in a material conflict of interest."[45] The Ontario Court of Appeal found that an insolvent employer, Indalex Ltd., was in a conflict of interest by neglecting its duties as plan administrator while making corporate decisions benefitting the company's shareholders and creditors. The unanimous Court of Appeal decision stated:

> ... the common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest.[46]

51. The Supreme Court of Canada considered the Court of Appeal ruling and held:

> [64] Only persons or entities authorized by the PBA can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the PBA is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

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[45] *Supra.*, Note 33 at para. 38
[46] *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6 var'g 2011 ONCA 265, para 141

> [65] Section 22(4) of the PBA explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.[47]

52. As trustees of the Plan, the VON Canada board of directors has a duty of even-handedness. This duty was described in *Boe v. Alexander* as follows:

> It is I think a primary principle, which need not be laboured by me, that one of the trustees' first duties was to hold the balance evenly between the beneficiaries and various groups of beneficiaries and to try to interpret the document and carry out its provisions in the spirit and letter in which it was expressed. They were not, nor are they now, entitled to favour one group of beneficiaries in any way as against another. They were obliged to treat all beneficiaries with fairness and impartiality, always attempting to carry out the expressed intention of the settlor.[48]

53. The VON Plan is registered in Ontario as a single employer defined benefit pension plan. In a multi-jurisdictional plan, benefit entitlement matters are determined under the legislation governing pensions in the Plan member's province of employment whereas funding, investment and reporting requirements are generally governed by the legislation in the province of registration. The method of determining benefit entitlement on termination of employment for VON West Plan members is determined in accordance with the Plan, subject to the requirements of the AEPPA.

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[47] *Ibid* at para 64-65.
[48] *Boe v Alexander*, 1987 CanLII 2596 (BC CA) at para 21.

54. The VON Plan provides a defined benefit in accordance with section 7.2 of the Plan. Termination benefits are defined under section 10. A member who terminates employment prior to retirement is entitled to her accrued pension payable at her normal retirement date. The member may also transfer the commuted value of that pension into another retirement vehicle prior to age 55. A terminated member who elects a deferred pension may commence her retirement benefit as early as age 50.

55. Section 17.1 of the VON Plan permits amendments to the Plan, "but no amendment may adversely affect benefits accrued under the Plan up to the date of the amendment." There is no scope under the Plan or under the AEPPA to reduce already accrued pension benefits.[49]

56. Section 90 of the *Employment Pension Plans Regulation*[50], lays out the rules for the payment of commuted values on termination when the solvency ratio is less than one. The Plan Administrator is authorized to pay out the commuted value reduced by the solvency ratio. But, there is an obligation to pay out the balance of the commuted value benefit at its latest five years after the anniversary of the payment of the reduced commuted value. To do otherwise would amount to a reduction in an accrued benefit, which is contrary to both section 17.1 of the VON Plan and section 20 of the AEPPA.

57. The Alberta Court of Appeal has upheld the prohibition against reducing already accrued benefits. While the facts differ from the issue at hand, *Halliburton Group Canada Inc. v. Alberta*[51], recognized that accrued rights cannot be reduced. There have been several Ontario

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[49] *AEPPA*, section 20.
[50] Alta Reg 154/204, section 90
[51] 2010 ABCA 254 (CanLII).

Financial Services Tribunal decisions that have considered section 14 of the PBA, the Ontario version of the prohibition against reducing accrued benefits with similar results.[52]

58. The Plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant in these circumstances:

> **22.** (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> (2) [Special knowledge and skill] The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
>
> (4) [Conflict of interest] An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

59. All employees of VON who participate in the Plan are subject to the same contribution requirements, benefit accrual rates and, ultimately, the same basis is applied to determine termination or pension benefits subject to the minimum standards required under the pension legislation of each jurisdiction. As the Superintendent has indicated in its factum, there is no legislative basis to process a partial windup that would result in a reduction of benefits payable to

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[52] For example, *McGrath v. Superintendent of Financial Services, OMERS Administration Corporation and OMERS Sponsors Corporation*, FST Decision No. P0335-2008-2 (Shilton) [McGrath]; *PPG Canada v. Superintendent of Financial Services*, FST Decision No. 0290-2007 (Holden); *Consumer Packaging Inc. v. Superintendent of Financial Services and United Steelworkers of America, Local 203G*, FST Decision No. POI 62-2001-2 (Milczynski); *Royal Ontario Museum Curatorial Association v. Ontario (Superintendent Financial Services)*, 2013 ONFST 9 (CanLII)

the Plan members terminated as a result of the windup while preserving full entitlement for other terminated Plan members.

60. In the absence of legislative authorization for a partial windup, VON Canada's proposal to implement a partial windup is not in accordance with the Plan administrator's fiduciary obligations to Plan members. The proposal was clearly motivated to insulate the remaining participating employers from remitting contributions to pay down the solvency deficiency for members that could be traced to VON West and VON east. Rather than protect Plan member interests, VON Canada advocated to protect participating employer interests. If the proposal had been implemented, some terminating Plan members would have had benefits reduced while others would have had full benefits paid – a clear violation of the duty to treat beneficiaries with an even hand.

61. The ONA proposed solution is a circuitous route to the same end. Aside from reasons explained in section A of this factum, the Court should refrain from ordering a transfer of assets and liabilities to create a new VON Ontario Plan because the Court would be facilitating what would otherwise be a clear breach of the Plan administrator's fiduciary and statutory duties. The Plan administrator has concluded that the partial windup option would be opposed by pension regulators and is not assured of success. It has stepped away from a proposal UNA would have challenged as in breach of the Plan administrator's fiduciary and statutory duties. The amendment advocated by ONA would, in effect, reduce accrued benefits for one group while providing full benefits on an ongoing basis for another, the very result pension regulators and UNA opposed when the VON Canada proposal was introduced.

C. Joint and Several Liability

(i) The PBA contemplates multiple employers in a SEPP and imposes joint and several liability to fund deficiencies

62. Funding requirements are determined under the PBA. The PBA is deemed remedial legislation which must be given "such fair, large and liberal interpretation as best ensures the attainment of its objects".[53]

63. The overall purpose of the pension benefits legislation is to protect employees' pension benefits. It is social welfare legislation. This has been stated in numerous cases and is well summarized in the unanimous decision in *Huus v. Ontario Superintendent of Pensions*:

> [25] I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees. Indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension. As explained by Cory, in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at 646:
>
> > In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour.
>
> [26] Similar statements have been expressed by this court in several cases. In *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 39 O.R. (3d) 38 at 43 (C.A.), Robins J.A. said:
>
> > [T]he Pension Benefit Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans....

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[53] *Legislation Act, 2006*, S.O. 2006, Chapter 21, Schedule F.

> [27] In *Firestone Canada Inc. v. Ontario* (Pension Commission) (1990), 1 O.R. (3d) 122 at 127 (C.A.) ("Firestone"), Blair J.A. stated that the PBA "is clearly intended to benefit employees" and "[i]n. particular. . . evinces a special solicitude for employees affected by plant closures".[54]

64. According to the principles of statutory interpretation social welfare legislation is:

> to be construed so as to advance the benevolent purpose of the legislation. If reasonable doubts or ambiguities arise, they are to be resolved in favor of the claimant. By providing benefits to the community or groups in the community, social welfare legislation achieves a fairer allocation of social goods and may improve the health, security or dignity of targeted members of the community. The courts primary concern is ensuring the intended benefits are received.[55]

65. As social welfare legislation the PBA must be construed to advance its benevolent purposes. The purpose of the PBA is to protect members and former members of pension plans.

66. ONA asserts that joint and several liability does not apply relying on the definition of "employer" under the PBA and the FST decision respecting the partial windup of certain branches of the VON. As noted in the VON FST decision, different approaches have been adopted with respect to the interpretation of the definition of "employer" under the PBA depending on the facts of the particular case. In the VON decision, the Tribunal focused on which entity actually paid remuneration and determined, based both on the Plan requirements and the PBA funding requirements, that VON Canada was not liable for the contributions that would be necessary to resolve the solvency deficiency in respect of members of branches that were wound up and had not joined together with VON Canada in the One VON initiative. However, had the windups occurred after the 2006 restructuring and after the branches had joined the One VON initiative, the decision may very well have been different as the following paragraph from the decision implies:

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[54] *Huus v. Ontario (Superintendent of Pensions)* 2002 CanLII 23593 (ON CA), paras. 25 – 27

[55] Ruth Sullivan, Sullivan on the Construction of Statutes, 5th ed. (Markham: Butterworths, 2008) at p 486-87.

> The Six Separate Branches submit that VON Canada has, at all times, exercised total control over both the Plan and the Branches. Based on our findings of fact above we find that VON Canada has not exercised control over the Branches to the extent that it would be an "employer" for PBA purposes in respect of Branch employees. We do find that it did exercise control over the Plan, both as plan sponsor and administrator however this is not, in our view, determinative as to which entity may be an employer under the PBA with related liability for funding obligations under the Funding Provisions.[56]

67. The VON FST decision must be put in today's context. VON Canada dictates policy for all VON entities. Human resources services are centralized. Policies and guidelines are determined by VON Canada and, when a branch has refused to adhere to these policies, VON has terminated the branch's membership. Consequently, certainly after 2006, if not in all years, there was no possibility for a branch such as VON West to operate independent from VON Canada.

68. UNA submits that section 1 of the PBA must be liberally construed to advance the benevolent purpose of the Act and must be understood in the context of the scheme and object of the PBA. The FST has determined that it must look at "a variety of precedents in a variety of legal contexts which require [the Tribunal] to consider the specific facts of each case in relation to the legislation at hand in deciding who the employer is".[57]

69. In *Dustbane*, the Tribunal found that relying solely on section 1 of the PBA is to rely on the "lowest possible standard in assessing" who the employer is under the Act.[58]

70. The Legislature must be presumed to have chosen its words deliberately, and to have intended them to have their ordinary meaning. For the purposes of the PBA, the Legislature has

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[56] *Victorian Order of Nurses for Canada v. Ontario, supra* note 29 at p 30.
[57] *Dustbane Enterprises Limited v. Ontario* (Superintendent Financial Services), 2001 ONFST 7 (CanLII), p. 7
[58] *Ibid.*, p. 6

acknowledged that there may be one or more employers, who have joint rights and obligations under the Act.

71. Joint and several liability among multiple "employers" in a single employer plan is consistent with the spirit and intent of the PBA. In *Dustbane*, the FST stated:

> One of the key aims of the Act is the protection of the benefits earned by plan members and beneficiaries. The Act lays down stringent wind up obligations for employers, and establishes a Guarantee Fund to protect members in the event of employer insolvency at wind up.[59]

72. The *Dustbane* FST decision was upheld by a Divisional Court judicial review stating that the "need to protect employees from pension deficits was an appropriate factor to consider" and further that adopting a "purposive approach" in accordance with the Supreme Court of Canada decisions in *Rizzo*, [1998] 1 S.C.R. 27, and *Bell ExpressVu*, [2002] S.C.J. No. 43 was appropriate.[60]

73. While the Plan text does not define the term "employer", VON is defined to include all of the provincial and local branches including VON Canada and is used in the context of this Plan as the term employer would otherwise be used in a typical pension plan.

74. The PBA states in subsection 55(2) that an employer required to make contributions under a pension plan shall make the contributions in the prescribed manner and at the prescribed times. The amounts and calculations for the contributions are left up to the individual plan. Section 4 of the General Regulation includes in the amount that is to be remitted by the employer(s) the contributions necessary to retire any unfunded liability.

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[59] *Ibid.*, p. 6

[60] *Dustbane Enterprises Limited v. Ontario (Superintendent of Financial Services)*, [2002] O.J. No. 2943, paras. 3-4.

75. In an ongoing Plan, special payments must be made by the employer(s) to eliminate going concern and solvency deficiencies. In the absence of special solvency relief measures, a solvency deficiency is amortized over five years. The sponsoring employer(s) is liable to make these special payments.

76. The Plan has been administered as a single employer plan. In accordance with the PBA and regulations, all required premiums have been paid to the Pension Benefits Guarantee Fund and funding compliance has been administered under single employer pension plan rules[61], meaning that, when there has been a funding deficit, special payments have been remitted to the Trust Fund in accordance with the PBA funding requirements.

77. VON Canada cannot contract out of the funding obligations imposed by the PBA on the employers in a single employer pension plan. It can allocate funding responsibility amongst employers under the Plan pursuant to the Plan terms, as it has done in section 5.2, which requires employers who have active Plan members to contribute to the fund the deficit on a pro rata basis based on their respective proportion of the current service cost. But this is an internal Plan mechanism that cannot override the funding obligations imposed by the PBA and its regulations. If the internal allocation is insufficient to remit the special payment amounts required, the employers are jointly and severally liable to remit the remainder.

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[61] *Victorian Order of Nurses for Canada v. Ontario (Superintendent Financial Services), Supra.*, at Note 29, pp. 12-13.

(ii) VON Canada, VON Ontario and VON Nova Scotia are common employers and should be jointly and severally liable for the obligations of the Plan

78. As stated in the affidavit of Jo-Anne Poirier, VON Canada is both the Plan sponsor and Plan administrator.[62]

79. As explained in the affidavit of Derrick McIntosh, the VON entities are under common direction and control. In the past, those branches that failed to comply with the policies and guidelines established by VON Canada were expelled from VON and ceased to participate in the Plan.

80. In *Downtown Eatery v. Alouche,*[63] the Ontario Court of Appeal discussed the common employer doctrine, as it exists at common law:

> As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. *What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.*[64]

81. From the Poirier affidavit we see that the directorships are the same across the VON entities. The materials attached to the McIntosh affidavit demonstrate that the One VON initiative was synonymous with no local governance, transfer of staff to VON Canada, strict adherence to the standards and guidelines of VON Canada, and agreement to carry out the objects of VON Canada. Paragraph 31 of this factum lists an extensive array of requirements,

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[62] VON Motion Record, Tab 2, para. 15
[63] 2001 CanLii 8538 (ON CA).
[64] *Ibid* at para. 30.

services and rights that flow from membership with VON Canada. VON Canada was firmly in control of VON operations across the five entities.

82. At common law, the focus of the common employer inquiry is on "the element of common control". This inquiry is similar to the test that has been developed by the Ontario Labour Relations Board, which is:

> a. there must be more than one corporation, firm, individual, association or syndicate involved;
>
> b. these entities must be engaged in associated or related businesses or activities, whether or not simultaneously; and
>
> c. these entities must be under common control or direction....[65]

83. All aspects of the Labour Relations Board criteria are satisfied: there are five corporations; all five are engaged in the provision of health care services or administrative support for the carrying out of these services and the four regional entities were under the common direction and control of VON Canada as evidenced with board composition dominated by VON Canada, membership composition dominated by VON Canada, the objects of VON Canada governing the other regional entities and adherence to streamlined policies and standards dictated by VON Canada.

84. The Labour Relations Board criteria is not directly applicable since this is not a Labour Board proceeding. However, the "appropriate in the circumstances" consideration that grounds the broad jurisdiction created by section 11 of the CCAA means that a CCAA judge would be

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[65] *Etobicoke Public Library Board*, [1989] O.L.R.B. Rep. Sept. 935, cited in *USWA v. SAAN Stores Ltd*, 2001 CanLii 9299 (ON LRB) at para 24.

free to look at this test as well when determining whether a related or common employer declaration was "appropriate in the circumstances".

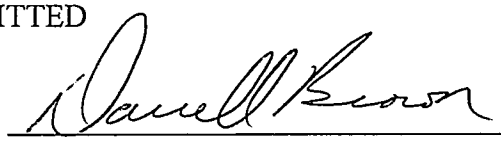
85. UNA asserts that a finding of common employer between VON Canada, VON Ontario and VON Nova Scotia is appropriate in the circumstances and in so finding it would be appropriate for this Court to order joint and several employer liability with respect to the Plan funding obligations.

PART IV - ORDER REQUESTED

UNA respectfully requests that this Honourable Court should dismiss the ONA motion to restructure the Plan in accordance with section 81 of the PBA and should order that funding the Plan is subject to the joint and several liability of the participating employers, including VON Canada, VON Ontario and VON Nova Scotia.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 25, 2016



DARRELL BROWN

GOLDBLATT PARTNERS LLP
Barristers & Solicitors
20 Dundas Street West, Suite 1100
Toronto, ON, M5G 2G8

Darrell Brown LSUC # 29398U
Tel: 416-979-4050
Fax: 416-591-7333

Solicitors for certain members of the United Nurses of Alberta

SCHEDULE "A"

LIST OF AUTHORITIES

1. "Review of Ontario's Solvency Funding Framework for Defined Benefit Pension Plans" *A Consultation Paper.* Ministry of Finance, Province of Ontario, July 2016.

2. *Victorian Order of Nurses for Canada v. Ontario* (Superintendent Financial Services), 2009 ONFST 11 [see Tab 12 of ONA Book of Authorities].

3. *Buschau v Rogers,* 2006 SCC 28.

4. *Lomas v Rio Algom,* (2010) 99 OR (3d) 161, 2010 ONCA 175 (CanLII).

5. *Lacroix v Canada Mortgage and Housing Cor,* (2012), 110 OR (3d) 81, 2012 ONCA 243 (CanLII).

6. *Sun Indalex Finance, LLC v. United Steelworkers,* 2011 ONCA 265.

7. *Sun Indalex Finance, LLC v. United Steelworkers* 2013 SCC 6.

8. *Boe v. Alexander*, 1987 CanLII 2596 (BC CA).

9. *Halliburton Group Canada Inc. v. Albert,* 2010 ABCA 254 (CanLII).

10. *McGrath v. Superintendent of Financial Services, OMERS Administration Corporation and OMERS Sponsors Corporation*, FST Decision No. P0335-2008-2 (Shilton).

11. *PPG Canada v. Superintendent of Financial Services*, FST Decision No. 0290-2007 (Holden).

12. *Consumer Packaging Inc. v. Superintendent of Financial Services and United Steelworkers of America, Local 203G*, FST Decision No. POI 62-2001-2 (Milczynski).

13. *Royal Ontario Museum Curatorial Association v. Ontario (Superintendent Financial Services),* 2013 ONFST 9 (CanLII).

14. *Huus v. Ontario Superintendent of Pensions,* 2002 CanLII 23593 (ON CA).

15. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: Butterworths, 2008)

16. *Dustbane Enterprises Limited v. Ontario* (Superintendent Financial Services), 2001 ONFST 7 (CanLII).

17. *Dustbane Enterprises Limited v. Ontario (Superintendent of Financial Services)*, [2002] O.J. No. 2943.

18. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.

19. *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] SCR 559.

20. *Downtown Eatery v. Alouche,* 2001 CanLii 8538 (ON CA).

21. *USWA v. SAAN Stores Ltd*, 2001 CanLii 9299 (ON LRB).

SCHEDULE "B"

RELEVANT STATUTES

Alberta Employment Pension Plans Act, SA, 2012 Ch E-8.1

Restrictions on amendments to reduce benefits

20(1) An amendment to the plan text document of a pension plan must not

> (a) reduce a person's benefits relating to employment in which the person engaged on or after the initial legislation date and before the later of the date on which the records referred to in section 18 are filed in relation to the amendment and the effective date of the amendment,
>
> (b) reduce a person's benefits in respect of remuneration, employment or membership before January 1, 1966 by taking into account the person's pension under the CPP Act or the QPP Act, or
>
> (c) reduce a person's ancillary benefits if the person has met all the requirements of the plan text document that are necessary to exercise the right to receive the benefit.

(2) Despite subsection (1), the administrator of a pension plan,

> (a) if the plan is either a negotiated cost plan or a jointly sponsored plan and the plan text document of the plan does not contain a target benefit provision, may, with the written consent of the Superintendent, amend the plan text document to reduce benefits if the circumstances of the plan require reduced benefits,
>
> (b) if the plan text document of the plan contains a target benefit provision, must, in the prescribed circumstances and within the prescribed period, amend the plan text document to do one or more of the following:
>
> > (i) reduce or eliminate the ancillary benefits under the plan in accordance with section 92(3);
> >
> > (ii) reduce the benefit that, under the target benefit provision, was intended to be paid, which reduction may, but need not, apply to accrued benefits;

(iii) increase the amount of the contributions payable under the plan,

or

(c) may amend the plan text document to reduce benefits if the amendment is for the purpose of compliance with the Income Tax Act (Canada).

Survivor's benefits if retired member dies after pension commencement

Companies' Creditors Arrangement Act, RSC 1985, C. C-36

PART V - General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances

Employment Pension Plans Regulation, Alberta Regulation 154/2014
Manner and extent of transfers

90(1) In this section, "transfer" means a transfer out of a defined benefit component of a pension plan under Divisions 4 and 8 of Part 8 of the Act or under section 89(1) or 110 of the Act.

(2) If, when a transfer is to be made in relation to a benefit, the solvency ratio of the defined benefit component is less than 1,

(a) the amount that may be transferred is the commuted value of the benefit multiplied by the solvency ratio of the defined benefit component, and

(b) the balance of the commuted value of the benefit, with interest calculated under section 73(3), must be transferred in accordance with subsection (3).

(3) The amount referred to in subsection (2)(b) must be transferred as follows:

(a) if, at the time of the transfer referred to in subsection (2)(a) or at any time in the 5 years after that date,

(i) the solvency ratio of the defined benefit component is 1 or more, or

(ii) the participating employer remits a contribution to the administrator or fundholder as required by section 56(1) of the Act, the amount of which is at least equal to the amount referred to in subsection (2)(b),

the whole of the amount referred to in subsection (2)(b) must be transferred at that time;

(b) if clause (a) does not apply in that 5-year period, the amount referred to in subsection (2)(b) must be transferred on the 5th anniversary of the transfer referred to in subsection (2)(a).

(4) Despite this section, the administrator need not effect a transfer referred to in subsection (3)(b) out of a defined benefit component if

(a) the administrator provides a written request to the Superintendent for consent to delay making the transfer and includes in that request his or her assessment that the transfer would in fact materially impair the solvency of the defined benefit component, and

(b) the Superintendent consents in writing to the delay.

Legislation Act, 2006, S.O. 2006, Chapter 21, Schedule F

Rule of liberal interpretation

64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

Pension Benefits Act, R.S.O. 1990, c. P.8

Interpretation
Definitions
1. (1) In this Act,

"employer" means, in relation to a member, former member or retired member of a pension plan, the person or persons from whom or the organization from which the member, former member or retired member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning; ("employeur", "employé", "emploi")

Care, diligence and skill
22. (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person. R.S.O. 1990, c. P.8, s. 22 (1).

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess. R.S.O. 1990, c. P.8, s. 22 (2).

Member of pension committee, etc.
(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan. R.S.O. 1990, c. P.8, s. 22 (3).

Conflict of interest
(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund. R.S.O. 1990, c. P.8, s. 22 (4).

Funding

55. (1) A pension plan must provide for funding sufficient to provide the pension benefits, ancillary benefits and other benefits under the pension plan in accordance with this Act and the regulations. R.S.O. 1990, c. P.8, s. 55 (1); 2010, c. 9, s. 39 (1).

Payment by employers, etc.

(2) An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,

(a) to the pension fund; or

(b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan. R.S.O. 1990, c. P.8, s. 55 (2); 2005, c. 31, Sched. 18, s. 6 (1); 2010, c. 9, s. 39 (2).

Payment by members

(3) Members of a pension plan that provides contributory benefits shall make the contributions required under the plan in the prescribed manner and at the prescribed times. 2005, c. 31, Sched. 18, s. 6 (2).

Same, jointly sponsored pension plans

(4) Members of a jointly sponsored pension plan shall make the contributions required under the plan (including their obligations in respect of any going concern unfunded liability and, except in the case of plans described in subsection 1 (2.1), in respect of any solvency deficiency) in

accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times. 2010, c. 24, s. 16.

Pension Benefits Act, R.R.O. 1990, Regulation 909

Funding of Pension Plans
Payments — General

4. (1) Every pension plan shall set out the obligation of the employer or any person or entity required to make contributions on behalf of the employer and, in the case of a jointly sponsored pension plan, the obligation of the members of the pension plan, if applicable, to contribute both in respect of the normal cost and any going concern unfunded liability and solvency deficiency under the plan. O. Reg. 116/06, s. 4 (1).

(2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan or, if a person or entity is required to make contributions under the pension plan on behalf of the employer, that person or entity and, if applicable, the members of the pension plan or their representative shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

(a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;

(b) all contributions required to pay the normal cost;

(c) all special payments determined in accordance with section 5;

(c.1) all special payments determined in accordance with sections 5.6, 5.6.1 and 5.6.2; and

(d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1. O. Reg. 712/92, s. 3 (2); O. Reg. 73/95, s. 2 (1); O. Reg. 116/06, s. 4 (2-4); O. Reg. 239/09, s. 2; O. Reg. 329/12, s. 2 (1); O. Reg. 161/16, s. 1.

(2.1) Despite subsection (2), an employer required to make contributions under a designated plan or an individual pension plan shall not be required to make a payment to the pension fund or to an insurance company, as applicable, that is not an eligible contribution. O. Reg. 73/95, s. 2 (2); O. Reg. 178/12, s. 3 (1).

(2.2) Despite subsections (1) and (2), the amount of contributions required to be made to a pension plan that provides defined benefits may be determined by using an actuarial cost method other than a benefit allocation method if,

(a) the actuarial cost method that is used is consistent with accepted actuarial practice; and

(b) the rules set out in subsection (2.3) are satisfied. O. Reg. 116/06, s. 4 (5).

(2.3) For the purposes of clause (2.2) (b), the rules are as follows:

1., 1.1 Revoked: O. Reg. 329/12, s. 2 (2).

1.2 If, at the valuation date of a report filed under section 3, 13 or 14, the amount determined under clause (a) of the definition of "going concern assets" in subsection 1 (2) is not less than the going concern liabilities determined using a benefit allocation method, the present value of the required contributions for the five-year period referred to in paragraph 1.3 must not be less than the present value of the contributions for that period that would be made in respect of the normal cost for the plan if the benefit allocation method were used, after the application of any actuarial gains to reduce the normal cost in accordance with subsection 7 (3).

1.3 The five-year period referred to in paragraph 1.2 must begin,

i. in the case of a pension plan that is not a jointly sponsored pension plan, on the valuation date, or

ii. in the case of a jointly sponsored pension plan, on a date not later than 12 months after the valuation date.

2. If, at the valuation date of a report filed under section 3, 13 or 14, the amount determined under clause (a) of the definition of "going concern assets" in subsection 1 (2) is less than the going concern liabilities determined using a benefit allocation method, the present value of the required contributions, which are determined under the actuarial cost method used by the plan, must not be less than the sum of the present value of the normal cost and the present value of the special payments determined in accordance with section 5 that would be required to liquidate any going concern unfunded liability determined using the benefit allocation method.

2.1 The present values referred to in paragraphs 1.2 and 2 shall be determined without reference to paragraphs 7 and 10 and without reference to subsections (2.7) and (2.7.1).

3. The rate or rates of interest to be used in calculating present values referred to in paragraphs 1.2 and 2 shall be the rate or rates used in the report for the going concern valuation.

3.1 For the purposes of paragraphs 1.2 and 2, the going concern valuation prepared using the benefit allocation method shall use the same rate or rates of interest as those used in the going concern valuation prepared using the actuarial cost method used by the plan.

4. In the case of a pension plan that is not a jointly sponsored pension plan, the present values referred to in paragraph 2 shall be calculated using whichever of the following periods is longer:

i. The period that begins on the valuation date and continues until the end of the remaining amortization period of the going concern unfunded liability that has the longest remaining amortization period.

ii. The period of five years that begins on the valuation date.

4.1 In the case of a jointly sponsored pension plan, the present values referred to in paragraph 2 shall be calculated using whichever of the following periods is longer:

i. The period that begins on a date not later than 12 months after the valuation date and continues until the end of the remaining amortization period of the going concern unfunded liability that has the longest remaining amortization period.

ii. The period of five years that begins on a date not later than 12 months after the valuation date.

5. In the case of a jointly sponsored pension plan,

i. Revoked: O. Reg. 329/12, s. 2 (7).

ii. the present values referred to in paragraph 1.2 shall be calculated based on the sum of the projected pensionable earnings for each year in the five-year period referred to in that paragraph,

iii. the present values referred to in paragraph 2 shall be calculated based on the period used for the purposes of paragraph 4.1 and the sum of the projected pensionable earnings for each year in that period, and

iv. the actuarial assumptions used to determine the sums referred to in subparagraphs i, ii and iii of the projected pensionable earnings shall be consistent with those used in the report for the going concern valuation based on the benefit allocation method.

6. Subject to paragraph 7, the required contribution rate for a jointly sponsored pension plan shall be determined as a level percentage of pensionable earnings for each class of members, subject to any variation that is necessary in order to take into account integration with the Canada Pension Plan or the Quebec Pension Plan.

7. If the required contribution rate set out in a report filed under section 3 or 14 in respect of a jointly sponsored pension plan is higher than the required contribution rate determined in the last report filed under section 3, 13 or 14, the required contribution rate may be increased each year for up to three years, commencing not later than 12 months after the valuation date, by at least one third of the difference between the two contribution rates, but only if,

i. the contribution rate after that period is a level percentage of pensionable earnings, subject to any variation that is necessary in order to take into account integration with the Canada Pension Plan or the Quebec Pension Plan, and

ii. the present value of the required contributions using the increased rates is not less than,

A. the present value of the contributions that would be made in respect of the normal cost for the plan if the benefit allocation method were used, after the application of any actuarial gains to reduce the normal cost in accordance with subsection 7 (3), if paragraph 1.2 applies, or

B. the sum of the present value of the normal cost and the present value of the special payments determined in accordance with section 5 that would be required to liquidate any going concern unfunded liability determined using the benefit allocation method, if paragraph 2 applies.

8. For the purposes of paragraph 7, the determination of whether the required contribution rate set out in the report is higher than the required contribution rate determined in the last filed report shall be made without taking into account the ability to increase required contribution rates each year for up to three years under that paragraph, and without taking into account the ability to carry forward amounts under paragraph 10 to reduce those increases.

9. The present values referred to in subparagraph 7 ii shall be calculated using the same period as was used to calculate the present values referred to in paragraph 1.2 or 2, whichever is applicable.

10. If paragraph 7 permits the required contribution rate to be increased each year for up to three years and the amount of any increase in the first or second year exceeds one third of the difference between the required contribution rate set out in the report and the required contribution rate determined in the last filed report, the excess may be carried forward to the following year or years and used to reduce the increases in the following year or years, as long as the present value of the required contributions using the increased rates, as adjusted, is not less than the present value referred to in sub-subparagraph 7 ii A or B, whichever is applicable. O. Reg. 116/06, s. 4 (5); O. Reg. 570/06, s. 2 (1-10); O. Reg. 178/12, s. 3 (2, 3); O. Reg. 329/12, s. 2 (2-9).

(2.4) If, in accordance with subsection (2.2), the amount of contributions required to be made to a pension plan that provides defined benefits is determined by using an actuarial cost method other than a benefit allocation method, the payments to the pension fund or to an insurance company, as applicable, shall not be less than the sum of,

(a) the required contributions determined using the actuarial cost method; and

(b) all special payments determined in accordance with section 5 with respect to any solvency deficiency. O. Reg. 116/06, s. 4 (5).

(2.5) If the amount of contributions required to be made to a pension plan that provides defined benefits is determined in accordance with subsection (2.2) using an actuarial cost method other than a benefit allocation method, the contributions shall be deemed to be the contributions required to be made under this Regulation and the definitions in section 1 shall apply with necessary modifications. O. Reg. 116/06, s. 4 (5).

(2.6) If a report filed under section 3 or 14 discloses, in respect of a jointly sponsored pension plan for which a benefit allocation method is used to set contribution rates, that an increase in the normal cost is required or that an increase is required in the amount of contributions that were previously reduced under subsection 7 (3), payment of that increase shall commence on a date not later than 12 months after the valuation date. O. Reg. 570/06, s. 2 (11).

(2.7) If a report filed under section 3 or 14 discloses that there is a going concern unfunded liability that is required to be liquidated in respect of a jointly sponsored pension plan for which a benefit allocation method is used to set the contribution rates, the special payments in respect of the going concern unfunded liability, as determined in accordance with subsection 5 (1.2), may be increased each year for up to three years, commencing not later than 12 months after the valuation date, by at least one third of the special payments, but only if,

(a) the special payments after that period are a level percentage of pensionable earnings for each class of members, subject to any variation that is necessary in order to take into account integration with the Canada Pension Plan or the Quebec Pension Plan; and

(b) the present value of the special payments, including the increased special payments, over the amortization period is not less than the amount of the going concern unfunded liability. O. Reg. 570/06, s. 2 (12); O. Reg. 178/12, s. 3 (4).

(2.7.1) If subsection (2.7) permits the special payments in respect of the going concern unfunded liability, as determined in accordance with subsection 5 (1.2), to be increased each year for up to three years, and the amount of any increase in the first or second year exceeds one third of the special payments, the excess may be carried forward to the following year or years and used to reduce the increases in the following year or years, as long as the present value of the special payments, including the increased special payments, as adjusted, over the amortization period is not less than the amount of the going concern unfunded liability. O. Reg. 570/06, s. 2 (13).

(2.8) In the case of a jointly sponsored pension plan, contributions referred to in subsection 39 (3) of the Act include contributions made by a member in respect of any going concern unfunded liability or solvency deficiency. O. Reg. 116/06, s. 4 (5); O. Reg. 178/12, s. 3 (5).

(3) Where there is a prior year credit balance, the employer may apply the prior year credit balance to reduce the payments required under clauses (2) (b), (c), (c.1) and (d). O. Reg. 712/92, s. 3 (1); O. Reg. 329/12, s. 2 (10).

(3.1) Subsection (3) does not apply if the pension plan provides defined benefits and a benefit allocation method is not used to set contribution rates. O. Reg. 116/06, s. 4 (6).

(4) The payments referred to in subsections (2) and (2.4) shall be made by the employer or, if a person or entity is required to make contributions on behalf of the employer, by that person or entity and, if applicable, by the members of the pension plan within the following time limits:

1. All sums received by the employer from an employee, including money withheld by payroll deduction or otherwise from the employee, as the employee's contribution to the pension plan, within thirty days following the month in which the sum was received or deducted.

2. Revoked: O. Reg. 116/06, s. 4 (8).

3. In the case of a pension plan that provides defined benefits, employer contributions in respect of the normal costs reported under clause 13 (1) (a) or 14 (7) (a) for each period covered by a report beginning on or after the 1st day of January, 1988, in monthly instalments within thirty days after the month for which contributions are payable, the amount of the instalments to be either a total fixed dollar amount, a fixed dollar amount for each employee or member of the plan or a fixed percentage either of the portion of the payroll related to members of the plan or of employee contributions.

3.1 Where all the pension benefits provided under the plan are defined contribution benefits, employer contributions for the plan's fiscal year, in monthly instalments within 30 days after the month for which contributions are payable, the amount of the instalments to be either a total fixed dollar amount, a fixed dollar amount for each employee or member of the plan or a fixed percentage either of the portion of the payroll related to members of the plan or of employee contributions.

4. Revoked: O. Reg. 116/06, s. 4 (8).

5. All special payments determined in accordance with section 5, subsection 31 (5) and subsection 35 (5), other than a payment made under paragraph 4, in equal monthly instalments in accordance with the times for payment set out in sections 5, 31 and 35.

6. All special payments determined in accordance with subsections 31 (1) and (2), section 32 and subsection 35 (3), by annual instalment in accordance with the times for payment set out in sections 31, 32 and 35. O. Reg. 712/92, s. 3 (1); O. Reg. 386/04, s. 1; O. Reg. 116/06, s. 4 (7).

(5) Subject to subsections (10) and (11), if the period covered by a report filed under section 3, 13 or 14 or submitted under this section has ended, and no report covering a subsequent period is filed under section 14 or submitted under this section, the employer or, if a person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall continue to make payments in accordance with the report most recently filed or submitted under section 3, 13 or 14 or this section. O. Reg. 116/06, s. 4 (9); O. Reg. 178/12, s. 3 (6).

(6) The Superintendent may cause a report on a plan to be prepared where,

(a) a report required under section 3, 13 or 14 on the plan has not been filed within one year after the time required by this Regulation; and

(b) the Superintendent is of the opinion that the preparation of a report in accordance with subsection (7) is necessary to ensure that the plan is sufficiently funded to provide the benefits under the plan. O. Reg. 712/92, s. 3 (2); O. Reg. 307/98, s. 2 (1); O. Reg. 144/00, s. 4 (1).

(7) A report under subsection (6) must contain the information required by section 3, 13 or 14, whichever applies. O. Reg. 144/00, s. 4 (2).

(7.1) A report under subsection (6) must be prepared by an actuary chosen by the Superintendent and must be submitted by the actuary to the Superintendent. O. Reg. 144/00, s. 4 (2).

(8) If, during the preparation of a report on a plan, under this section, the Superintendent forms the opinion that the report is no longer necessary to ensure that the plan is sufficiently funded to provide the benefits under the plan, the Superintendent may cause work on the report to cease and the actuary need not submit the report to the Superintendent. O. Reg. 712/92, s. 3 (2); O. Reg. 307/98, s. 2 (3).

(9) If a report is submitted to the Superintendent under subsection (7.1), the employer or, if another person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall make payments in accordance with the report. O. Reg. 116/06, s. 4 (10).

(10) Except as provided in subsection (11), if a payment requirement set out in a report submitted under subsection (7.1) concerning a plan differs from a payment requirement set out in a report filed by the administrator, the employer or, if another person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall make payments in accordance with the higher requirement. O. Reg. 116/06, s. 4 (10).

(11) If, in the opinion of the Superintendent, a payment in accordance with the higher requirement under subsection (10) is not necessary to ensure that the plan is sufficiently funded to provide benefits under the plan, the payments shall be made in accordance with the lower requirement. O. Reg. 116/06, s. 4 (10).

(12) Revoked: O. Reg. 144/00, s. 4 (3).

(13) This section does not apply to a pension plan described in subsection 6 (1) unless it is a jointly sponsored pension plan. O. Reg. 116/06, s. 4 (11).