

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Commercial Division)

No.: 500-11-048114-157

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

IN THE MATTER OF THE PLAN
OF COMPROMISE OR
ARRANGEMENT OF:

BLOOM LAKE GENERAL
PARTNER LIMITED, QUINTO MINING
CORPORATION, 8568391 CANADA
LIMITED, CLIFFS QUEBEC IRON
MINING ULC, WABUSH IRON CO.
LIMITED, WABUSH RESOURCES INC.

Petitioners

-and-

THE BLOOM LAKE IRON ORE
MINE LIMITED PARTNERSHIP,
BLOOM LAKE RAILWAY
COMPANY LIMITED, WABUSH MINES,
ARNAUD RAILWAY COMPANY,
WABUSH LAKE RAILWAY
COMPANY LIMITED

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

-and-

MICHAEL KEEPER, TERENCE WATT,
DAMIEN LEBEL AND NEIL JOHNSON

Petitioners-Mise-en-cause

BOOK OF AUTHORITIES

Factum of the Petitioners-Mises-en-cause as Representatives of Non-Union and Retired Employees of the Wabush CCAA Parties

in Support of Their Notice of Objection to the Wabush CCAA Parties' Motion for the Issuance of an Order Dated May 29, 2015

1	<i>IBM Canada Limited v. Waterman</i> , [2013] S.C.J. No. 70
2	<i>Canwest Publishing Inc. (Re)</i> , [2010] O.J. No. 943
3	<i>Target Canada Co. (Re)</i> , [2015] O.J. No. 1205

MONTREAL and TORONTO, June 15, 2015

KOSKIE MINSKY LLP & NICHOLAS SCHEIB
*Attorneys for the Petitioners-Mises-en-cause Michael
Keeper, Terence Watt, Damien Lebel and Neil Johnson*

TAB 1

**** Preliminary Version ****

Case Name:
IBM Canada Limited v. Waterman

IBM Canada Limited, Appellant;
v.
Richard Waterman, Respondent.

[2013] S.C.J. No. 70

[2013] A.C.S. no 70

2013 SCC 70

[2013] 3 S.C.R. 985

[2013] 3 R.C.S. 985

347 B.C.A.C. 43

452 N.R. 207

2013EXP-4007

2013EXPT-2316

J.E. 2013-2186

D.T.E. 2013T-851

235 A.C.W.S. (3d) 411

52 B.C.L.R. (5th) 1

9 C.C.L.T. (4th) 173

11 C.C.E.L. (4th) 169

8 C.C.P.B. (2d) 1

[2014] CLLC para. 210-008

[2014] 2 W.W.R. 452

2013 CarswellBC 3726

366 D.L.R. (4th) 287

File No.: 34472.

Supreme Court of Canada

Heard: December 14, 2012;

Judgment: December 13, 2013.

Amended Judgment: January 10, 2014.

**Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein,
Cromwell, Moldaver, Karakatsanis and Wagner JJ.**

(155 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Employment law -- Wrongful dismissal damages -- Deductions -- Appeal by IBM from British Columbia Court of Appeal judgment affirming decision granting Waterman damages equivalent to 20 months' salary dismissed -- After being dismissed, Waterman started drawing on pension and sued for wrongful dismissal -- Trial judge found that appropriate period of notice was 20 months -- IBM argued that pension benefits should be deducted from salary and benefits otherwise payable during this period -- Employee pension payment were a type of benefit that should generally not reduce damages otherwise payable for wrongful dismissal -- Pension benefits were a form of deferred compensation for employee's service and constituted a type of retirement savings -- They were not intended to be an indemnity for wage loss due to unemployment.

Appeal by IBM from a judgment of the British Columbia Court of Appeal affirming a decision granting Waterman damages equivalent to 20 months' salary. When IBM wrongfully dismissed its long-time employee, Waterman, he had to start drawing his pension. Waterman sued for wrongful dismissal and the matter proceeded to summary trial in the Supreme Court of British Columbia. The

trial judge found that the appropriate period of notice was 20 months. The question before the court was whether his receipt of the pension benefits reduced the damages otherwise payable by IBM for wrongful dismissal. IBM's position was that Waterman's pension benefits should be deducted from the salary and benefits otherwise payable during this period. The trial judge rejected this position. IBM's appeal from this decision was dismissed by the British Columbia Court of Appeal.

HELD: Appeal dismissed. The principle that the defendant should compensate the plaintiff only for his or her actual loss was not, on its own, an answer to the collateral benefit problem. There were exceptions to the strict application of this principle, the most important of which was the exception for private insurance. That exception applied not only to insurance benefits in the strict sense, but also to other benefits such as pension payments to which an employee contributed and which were not intended to be an indemnity for the type of loss suffered as a result of the defendant's breach. Given that there was double recovery and that the benefit would not have arisen but for IBM's breach, the court had to decide whether the benefit should or should not be deducted from damages otherwise payable by IBM. While considering the connection between the breach and the benefit helped to identify that there was an issue about whether the benefit should be deducted, principles of causation did not provide reliable markers of whether a benefit should be deducted or not. The nature and purpose of the benefit, on the other hand, was often a better explanation of why private insurance benefits should or should not be deducted. There was no single marker to sort which benefits fall within the private insurance exception. One widely accepted factor related to the nature and purpose of the benefit. The more closely the benefit was, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. Whether the plaintiff contributed to the benefit remained a relevant consideration, although the basis for this was debatable. In general, a benefit would not be deducted if it was not an indemnity for the loss caused by the breach and the plaintiff had contributed in order to obtain entitlement to it. There was also room in the analysis of the deduction issue for broader policy considerations. The compensation principle should not be applied strictly in this case because the pension benefits fell within the private insurance exception and should not be deducted from the wrongful dismissal damages. The court's decision in *Sylvester v. British Columbia* was distinguishable. The reasoning in *Sylvester* in fact supported the conclusion that Waterman's pension benefits should not be deducted from the wrongful dismissal damages otherwise payable by IBM.

Statutes, Regulations and Rules Cited:

Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17,

Employment Insurance Act, S.C. 1996, c. 23, s. 45

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Employment law -- Wrongful dismissal -- Damages -- Compensating advantage -- Dismissed employee drawing pension benefits upon dismissal -- Trial judge establishing appropriate notice period at 20 months without deduction for pension benefits -- Whether pension benefits constitute compensating advantage -- Whether pension benefits should be deducted from damages for wrongful dismissal.

Court Summary:

IBM dismissed W without cause on two months' notice. W was 65 years old, had 42 years of service, and had a vested interest in IBM's defined benefit pension plan. Under the plan, IBM contributed a percentage of W's salary to the plan on his behalf. Upon termination, W was entitled to a full pension, and his termination had no impact on the amount of his pension benefits.

W sued to enforce his contractual right to reasonable notice. The trial judge set the appropriate period of notice at 20 month and declined to deduct the pension benefits paid to W during the notice period in calculating his damages. The Court of Appeal dismissed the appeal.

Held (McLachlin C.J. and Rothstein J. dissenting): The appeal should be dismissed.

Per LeBel, Fish, Abella, **Cromwell**, Moldaver, Karakatsanis and Wagner JJ.: The rule that damages are measured by the plaintiff's actual loss does not cover all cases. The law has long recognized that applying the general rule of damages -- the compensation principle -- strictly and inflexibly sometimes leads to unsatisfactory results. Employee pension payments, including payments from a defined benefits plan, should generally not reduce the damages otherwise payable for wrongful dismissal. Pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment.

A compensating advantage arises if a source other than the damages payable by the defendant ameliorates the loss suffered by the plaintiff as a result of the defendant's breach of a legal duty. However, not all benefits received by a plaintiff raise a compensating advantages problem. A problem only arises with a compensating advantage when the advantage is one that (a) would not have accrued to the plaintiff but for the breach, or (b) was intended to indemnify the plaintiff for the sort of loss resulting from the breach.

The question is whether the compensation principle should be strictly applied and the compensating advantage should be deducted. Considerations other than the extent of the plaintiff's actual loss shape the way the compensation principle is applied. The deductibility of compensating advantages also depends on justice, reasonableness and public policy.

Benefits received by a plaintiff through private insurance are generally not deductible from damages

awards. While there is no single marker to sort which benefits fall within the private insurance exception, the more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. Whether the plaintiff has contributed to the benefit also remains a relevant consideration, although the basis for this is debatable. In general, a benefit will not be deducted if it is not an indemnity for the loss caused by the breach and the plaintiff has contributed in order to obtain entitlement to it. Finally, there is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply. While this exception is called the private insurance exception, it has been applied by analogy to a variety of payments that do not originate in a contract of insurance.

Although the courts have not relied on any broad "single contract" rule, where a cause of action and a benefit arise under the contract of employment, the terms of a contract and the dealings between the parties will inform the analysis.

A compensating advantage issue arises in this case: W received his full pension benefits and the salary he would have earned had he worked during the period of reasonable notice; had IBM given him working notice, he would have received only his salary during that period. However, the private insurance exception applies to benefits such as pension payments to which an employee has contributed and which were not intended to be an indemnity for the type of loss suffered as a result of the defendant's breach. As such, the compensation principle should not be applied strictly in this case.

In this case, the factors clearly support not deducting the retirement pension benefits from wrongful dismissal damages. W's contract of employment is silent on this issue, but it does not have any general bar against receiving full pension entitlement and employment income. W's retirement pension is not an indemnity for wage loss, but rather a form of retirement savings. While IBM made all of the contributions to fund the plan, W earned his entitlement to benefits through his years of service, as the plan's primary purpose is to provide periodic pension payments to eligible employees after retirement in respect of their service as employees. Thus, this case falls into the category of cases in which the insurance exception has always been applied -- the benefit is not an indemnity and W contributed to the benefit.

Although *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, is distinguishable on the facts, the factors it sets out support the conclusion that W's benefits should not be deducted from his wrongful dismissal damages. The pension benefits were clearly not an indemnity benefit for loss of salary due to inability to work, and W's interest in the pension bears many of the hallmarks of a property right. Looking at the contract as a whole, it is not a fair implication that the parties agreed that pension entitlements should be deducted from wrongful dismissal damages.

Finally, the broader policy concerns in this case support not deducting the pension benefits. The law

should not provide an economic incentive to dismiss pensionable employees rather than other employees. The other policy concerns raised by Justice Rothstein or present in *Sylvester* either do not arise here or are highly speculative.

Per McLachlin C.J. and **Rothstein J.** (dissenting): This case requires an assessment of W's loss under the terms of a single contract which gave rise to both a right to reasonable notice and a right to pension benefits. The private insurance exception has no application to such a case. Where a court is called upon to assess loss under a single contract, the plaintiff's entitlement turns on the ordinary governing principle that he should be put in the position he would have been in had the contract been performed. In this case, that means that the pension benefits W received must be deducted in calculating his damages for wrongful dismissal; not deducting would give W more than he bargained for and would charge IBM more than it agreed to pay.

The governing principle for damages upon breach of contract is that the non-breaching party should be provided with the financial equivalent of performance. Employer-provided benefits are integral components of the employment contract, so deductibility turns on the terms of the employment contract and the intention of the parties. Under the terms of W's employment contract, he would have been eligible to receive pension benefits only upon being terminated or retiring. Therefore, as in *Sylvester*, W's contractual right to wrongful dismissal damages and his contractual right to his pension are based on opposite assumptions about his availability to work. Damages cannot be paid on the assumption that he could have earned both.

This conclusion is necessitated by the fact that the pension plan at issue here is a defined benefit plan. Unlike a defined contribution plan, a defined benefit plan guarantees the employee fixed predetermined payments upon retirement for life. Deducting the benefits would provide the wrongfully terminated employee with exactly what he would have received had the employment contract been performed: an amount equal to his salary during the reasonable notice period and thereafter defined benefits for the rest of his life.

This is materially different from a defined contribution plan, which provides an employee with a finite total amount or lump sum of retirement benefits. Deducting benefits that a wrongfully terminated employee receives from a defined contribution plan would leave the employee in a worse position than he would have been in had his employment contract not been breached.

In this case, W's wrongful dismissal had no impact on his pension entitlement, and he could not have received both his salary and his pension benefits had he continued to work for IBM through the reasonable notice period. Whether the benefit is non-indemnity or contributory does not answer the question of whether the plaintiff will be provided with the financial equivalent of performance or will receive excess recovery under the governing principle of contract damages.

Furthermore, the private insurance exception is not applicable to cases that involve a single contract that is the source of both the plaintiff's cause of action and his right to a particular benefit. In such circumstances, there is no justification for resorting to the private insurance exception because the

plaintiff's entitlement to the benefits is established based on the terms of his contract. If the plaintiff is entitled to the benefits under his contract, he will receive the benefits based on the ordinary governing principle that he should be placed in the position he would have been in had the contract been performed. There will be no need to reach the collateral benefit exception. A straightforward reading of *Sylvester* demonstrates that it is a fully applicable authority supporting the proposition that, under a single contract of employment, barring contractual provisions to the contrary, an individual cannot receive salary as if he is working and pension benefits as if he is retired. These are opposite, incompatible assumptions. Thus, applying *Sylvester* to this case, salary and pension income are not payable at the same time.

Cases Cited

By Cromwell J.

Distinguished: *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315; *Ratyck v. Bloomer*, [1990] 1 S.C.R. 940; **discussed:** *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; **referred to:** *Phillips v. Western Company of North America*, 953 F.2d 923 (1992); *United States v. Price*, 288 F.2d 448 (1961); *Sloas v. CSX Transportation, Inc.*, 616 F.3d 380 (2010); *Parry v. Cleaver*, [1970] A.C. 1; *Attorney General v. Blake*, [2001] 1 A.C. 268; *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601; *Redpath v. Belfast and County Down Railway* (1947), N.I. 167; *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812; *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654; *Grand Trunk Railway v. Beckett* (1887), 16 S.C.R. 713; *Quebec Workmen's Compensation Commission v. Lachance*, [1973] S.C.R. 428; *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756; *Chandler v. Ball Packaging Products Canada Ltd.* (1992), 2 C.C.P.B. 101, aff'd (1993), 2 C.C.P.B. 99; *Emery v. Royal Oak Mines Inc.* (1995), 24 O.R. (3d) 302; *Canadian Human Rights Commission v. Canada (Attorney General)*, 2003 FCA 86, 301 N.R. 321; *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1; *National Insurance Co. of New Zealand Ltd. v. Espagne* (1961), 105 C.L.R. 569; *Graham v. Baker* (1961), 106 C.L.R. 340; *Smoker v. London Fire and Civil Defence Authority*, [1991] 2 A.C. 502; *Hopkins v. Norcross plc*, [1993] 1 All E.R. 565; *Knapton v. ECC Card Clothing Ltd.*, [2006] I.C.R. 1084; *Gilbert v. Attorney-General*, [2010] NZCA 421, 8 N.Z.E.L.R. 72.

By Rothstein J. (dissenting)

Girling v. Crown Cork & Seal Canada Inc. (1995), 9 B.C.L.R. (3d) 1; *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; *Chandler v. Ball Packaging Products Canada Ltd.*, [1992] O.J. No. 3114 (QL); *Parry v. Cleaver*, [1970] A.C. 1; *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756; *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654; *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812; *United States v. Price*, 288 F.2d 448 (1961); *Phillips v. Western Company of North America*, 953 F.2d 923 (1992); *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601.

Statutes and Regulations Cited

Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17.

Employment Insurance Act, S.C. 1996, c. 23, s. 45.

Authors Cited

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Cassels, Jamie, and Elizabeth Adjin-Tettey. *Remedies: The Law of Damages*, 2 ed. Toronto: Irwin Law, 2008.

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Kaplan, Ari, and Mitch Frazer. *Pension Law*, 2 ed. Toronto: Irwin Law, 2013.

Marks, John. "Symmetrical Use of Universal Damages Principles -- Such as the Principles Underlying the Doctrine of Proximate Cause -- to Distinguish Breach-Induced Benefits That Offset Liability From Those That Do Not" (2009), 55 Wayne L. Rev. 1387.

McCamus, John D. *The Law of Contracts*, 2 ed. Toronto: Irwin Law, 2012.

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Swan, Angela, and Jakub Adamski. *Canadian Contract Law*, 3 ed. Markham, Ont.: LexisNexis, 2012.

Waddams, S. M. *The Law of Damages*, 5 ed. Toronto: Canada Law Book, 2012.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J. and Prowse and Levine JJ.A.), 2011 BCCA 337, 20 B.C.L.R. (5) 241, 308 B.C.A.C. 304, 521 W.A.C. 304, 336 D.L.R. (4) 481, [2011] 10 W.W.R. 425, 91 C.C.P.B. 60, 92 C.C.E.L. (3d) 289, [2011] B.C.J. No. 1453 (QL), 2011 CarswellBC 2023, affirming a decision of Goepel J., 2010 BCSC 376, 2010 CLLC para210-021, [2010] B.C.J. No. 510 (QL), 2010 CarswellBC 679. Appeal dismissed, McLachlin C.J. and Rothstein J. dissenting.

Counsel:

D. Geoffrey Cowper, Q.C., and Lorene A. Novakowski, for the appellant.

Christopher J. Watson and Matthew G. Siren, for the respondent.

[Editor's note: A corrigendum was published by the Court January 10, 2014. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The judgment of LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ. was delivered by

CROMWELL J.:--

I. Introduction

1 When IBM Canada Ltd. wrongfully dismissed its long-time employee, Richard Waterman, he had to start drawing his pension. The question before the Court is whether his receipt of those pension benefits reduces the damages otherwise payable by IBM for wrongful dismissal. The British Columbia courts decided not to deduct the pension benefits and IBM appeals.

2 The question looks straightforward enough at first glance. The general rule is that contract damages should place the plaintiff in the economic position that he or she would have been in had the defendant performed the contract. IBM's obligation was to give Mr. Waterman reasonable notice of dismissal or pay in lieu of it. Had it given him reasonable working notice, he would have received only his regular salary and benefits during the period of notice. As it is, he in effect has received both his regular salary and his pension for that period. It therefore seems clear, under the general rule of contract damages, that the pension benefits should be deducted. Otherwise, Mr. Waterman is in a better economic position than he would have been in had there been no breach of contract.

3 On closer study, however, the question raised on appeal is not as simple as that. The case in fact raises one of the most difficult topics in the law of damages, namely when a "collateral benefit" or a "compensating advantage" received by a plaintiff should reduce the damages otherwise payable by a defendant. The law has long recognized that applying the general rule of damages strictly and inflexibly sometimes leads to unsatisfactory results. The question is how to identify the situations in which that is the case.

4 In my view, employee pension payments, including payments from a defined benefits plan as in this case, are a type of benefit that should generally not reduce the damages otherwise payable for wrongful dismissal. Both the nature of the benefit and the intention of the parties support this conclusion. Pension benefits are a form of deferred compensation for the employee's service and

constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment. The parties could not have intended that the employee's retirement savings would be used to subsidize his or her wrongful dismissal. There is no decision of this Court in which a non-indemnity benefit to which the plaintiff has contributed, such as the pension benefits in issue here, has ever been deducted from a damages award.

5 I would dismiss IBM's appeal and affirm the result arrived at by the British Columbia courts.

II. Overview of Facts and Proceedings

6 When IBM dismissed Mr. Waterman without cause on March 23, 2009, he was 65 years old and had 42 years of service. He was a long-standing member of IBM's defined benefit pension plan, which I will refer to simply as "the plan". IBM contributed a percentage of his salary to the plan on his behalf and the plan guaranteed specific benefits, which became vested over time, upon retirement.

7 At the time of the termination, there was no longer a mandatory retirement policy in place for IBM employees. However, Mr Waterman was entitled to a full pension under the plan and his termination had no impact on the amount of his pension benefits. IBM told Mr. Waterman that on termination, he *would* be treated as a retiree and that he *must* begin receiving monthly pension payments as of that date.

8 An employee like Mr. Waterman, who is entitled to retire with his full pension but has not reached the age of 71, cannot receive both pension and employment income from IBM at the same time. That changes at age 71, when he or she must start drawing benefits and may continue working and earning employment income from IBM. We have not been referred to any provision in the plan that would prevent a retiree, regardless of age, from receiving benefits under the plan and employment income from a different employer.

9 Mr. Waterman sued for wrongful dismissal and the matter proceeded to summary trial in the Supreme Court of British Columbia. The trial judge, Goepel J., found that the appropriate period of notice was 20 months. IBM's position was (and is) that Mr. Waterman's pension benefits (approximately \$2,124 per month starting June 1, 2009) should be deducted from the salary and benefits otherwise payable during this period. The trial judge rejected this position: 2010 BCSC 376, 2010 CLLC para210-021.

10 IBM's appeal from this decision was dismissed by the British Columbia Court of Appeal. Writing for the court, Prowse J.A. relied on this Court's judgment in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315. However, she concluded that the distinctions between the benefits and the intentions of the parties in the two cases led to a different conclusion in this case: 2011 BCCA 337, 20 B.C.L.R. (5th) 241.

III. Positions of the Parties

11 On its appeal to this Court, IBM makes two main points. It submits, first, that the result reached by the British Columbia courts is at odds with the compensatory goal of damages for wrongful dismissal. IBM points out that even if it had given Mr. Waterman adequate working notice of his termination, he would not have received both his employment income and his pension benefits during the notice period. By awarding him damages for the full notice period without deduction of the pension benefits received during that period, the British Columbia courts have placed him in a better economic position than he would have been in had IBM performed the contract. Second, IBM maintains that the Court in *Sylvester* held that these sorts of benefits are part of an integrated employment relationship and unless deducted, the employee collecting them would receive greater compensation than would an employee lawfully dismissed with working notice.

12 Mr. Waterman urges us to reject IBM's position. He submits that the pension is the property of the employee that is earned through work and consists of a benefit that is part of the employee's remuneration package. The pension is like a "nest egg", RRSP or savings account, which IBM could not take advantage of to offset the damages awarded. Mr. Waterman could have transferred the value of his pension to another vehicle if he had left employment with IBM before reaching the age of 65 and his retirement savings would consequently have been out of reach. As for the intention of the parties, there is no provision in the pension plan expressly prohibiting concurrent reception of salary and pension benefits. It was therefore up to the courts to determine the parties' intention, which the Court of Appeal correctly did in its decision.

IV. Analysis

13 In my respectful view, both of IBM's main arguments must be rejected. The general principle of compensation is not a full answer to the issue. The question is whether this case falls within an exception to it and in my view it does. The Court's decision in *Sylvester* is distinguishable and, in fact, its reasoning supports the conclusion that the pension benefits should not be deducted.

14 There are three key matters that need to be considered in order to answer the question posed by the appeal. I will set them out here with a summary of my conclusions.

A. Why is there a "collateral benefit" problem in this case?

15 A collateral benefit is a gain or advantage that flows to the plaintiff and is connected to the defendant's breach. This connection may exist either because there is a "but for" causal link between the breach and the receipt of the benefit or the benefit was intended to provide the plaintiff with an indemnity for the type of loss caused by the breach. The problem raised by collateral benefits is the question of whether they should be deducted from the damages otherwise payable by the defendant on account of the breach. This case raises a collateral benefit problem because there is a "but for" causal link between the IBM's breach of contract and Mr. Waterman's receipt of the benefit. He would not have received the pension benefits and full salary in lieu of working notice "but for" the dismissal.

B. Is the compensation principle the answer to the problem?

16 The principle that the defendant should compensate the plaintiff only for his or her actual loss is not, on its own, an answer to the problem. There are exceptions to the strict application of this principle, the most important of which is the exception for private insurance and other benefits which, for this purpose, are considered analogous to private insurance. That exception applies not only to insurance benefits in the strict sense, but also to other benefits such as pension payments to which an employee has contributed and which were not intended to be an indemnity for the type of loss suffered as a result of the defendant's breach.

C. Does the Court's decision in *Sylvester* support IBM's position that the pension benefits must be deducted?

17 In my view, it does not. *Sylvester* is distinguishable. The reasoning in *Sylvester* in fact supports the conclusion that Mr. Waterman's pension benefits should *not* be deducted from the wrongful dismissal damages otherwise payable by IBM.

18 My more detailed analysis follows.

A. *Why Is There a Collateral Benefit Problem in This Case?*

19 It will be helpful to start by explaining what a collateral benefit problem is and why we have one here.

(1) What Is a Collateral Benefit Problem?

20 In general terms, there is a collateral benefit when a source other than the damages payable by the defendant ameliorates the loss suffered by the plaintiffs as a result of the defendant's breach of legal duty: J. Cassels and E. Adjin-Tettey, *Remedies: The Law of Damages* (2nd ed. 2008), at p. 416. For example, if an employee is wrongfully dismissed, but receives employment insurance benefits, those benefits are a collateral benefit. The problem is whether they should be deducted from the damages the defendant will pay for wrongful dismissal.

21 If we simply apply the compensation principle -- that the plaintiff should recover his or her actual economic loss but not more -- the answer is straightforward. If we do not deduct the collateral benefit, the plaintiff will be in a better position than he or she would have been in had the employment contract been performed. To apply the compensation principle, we should consider not only the plaintiff's losses but also any gains that flow from the defendant's breach. The collateral benefit problem asks whether we should apply the compensation principle and deduct or depart from it and not deduct.

22 There is considerable overlap between the collateral benefit problem and the questions of mitigation. The main distinction is this: mitigation is concerned with whether the plaintiff acted

reasonably after the defendant's breach in order to reduce losses. The collateral benefit question, in contrast, is concerned with whether some compensating advantage that was in fact received by the plaintiff, most often as a result of arrangements made before the breach, should be taken into account in assessing the plaintiff's damages: see A. I. Ogus, *The Law of Damages* (1973), at pp. 87-88.

(2) When Does a Collateral Benefit Problem Arise?

23 Not all benefits received by a plaintiff raise a collateral benefit problem. Before there is any question of deduction, the receipt of the benefit must constitute some form of excess recovery for the plaintiff's loss and it must be sufficiently connected to the defendant's breach of legal duty.

24 For example, there is no excess recovery if the party supplying the benefit is subrogated to -- that is, steps into the place of -- the plaintiff and recovers the value of the benefit. In those circumstances, the defendant pays the damages he or she has caused, the party who supplied the benefit is reimbursed out of the damages and the plaintiff retains compensation only to the extent that he or she has actually suffered a loss: see, e.g., *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, at pp. 386-88, per McLachlin J., as she then was, dissenting in part. (The employment insurance example that I mentioned earlier is now resolved in this way by statute: see below, at para. 44).

25 Even if there is some form of excess recovery, however, there is only a collateral benefit problem if the benefit is sufficiently connected to the defendant's breach. This requirement of sufficient connection serves a purpose with respect to collateral benefits that is analogous to that served by rules of causation and remoteness with respect to damages. Just as plaintiffs cannot recover all losses, no matter how loosely related to the defendant's breach or how far beyond the parties' reasonable contemplation, so too the defendant does not get credit for all benefits accruing to the plaintiff, no matter how loosely connected to the defendant's wrongful conduct.

26 Before turning to the nature of the required link, I note that scholars have objected to the term "collateral benefit" because it assumes the answer to the question. The word "collateral" suggests that the benefit should not be taken into account. But of course the legal problem is whether or not the benefit should be deducted. Scholars have suggested that the term "compensating advantages" is a better one and that is the term I will use in my reasons: see, e.g., Ogus, at pp. 93-94; A. Burrows, *Remedies for Torts and Breach of Contract* (3rd ed. 2004), at p. 156; S. M. Waddams, *The Law of Damages* (5th ed. 2012), at s. 15.700.

27 Another problem with the terms "collateral benefit" or "collateral source" is that they suggest that the test for whether a benefit is deductible is whether it is "collateral", that is, independent of the relation between the plaintiff and the defendant. Some of the American jurisprudence, for example, has recognized that this "independence" test is an oversimplification which does not explain the treatment of benefit in the cases: see, e.g., *Phillips v. Western Company of North America*, 953 F.2d 923 (5th Cir. 1992), at pp. 931-33. Moreover, it can lead to fruitless semantic debates about whether a benefit is or is not "collateral" or "independent" rather than furthering

principled analysis. As one court put it, that a benefit "comes from the defendant tortfeasor does not itself preclude the possibility that it is from a collateral source. The plaintiff may receive benefits from the defendant himself which, because of their nature, are not considered double compensation": *United States v. Price*, 288 F.2d 448 (4th Cir. 1961), at pp. 449-50; *Sloas v. CSX Transportation, Inc.*, 616 F.3d 380 (4th Cir. 2010), at p. 389. As we shall see, several factors other than the source of the benefit may be considered in order to determine whether it should be deducted.

28 Returning to the issue of connection between the benefit and the breach, the question is what sort of link is required before the issue about deduction arises. The cases suggest two answers. The advantage must either be one that (a) would not have accrued to the plaintiff "but for" the defendant's breach *or* (b) was intended to indemnify the plaintiff for the sort of loss resulting from it. If neither of these conditions is present, there is no issue about deduction. If either of these conditions is present, there is.

29 In relation to the "but for" connection between the breach and the advantage, consider this example. A plaintiff who has been injured by a defendant's negligence buys a lottery ticket, as is his usual practice, and wins a large sum of money. No one would argue that the amount of the winnings should be deducted from the damages payable by the defendant. There is no "but for" causal connection between the defendant's negligence and the plaintiff's purchase of the winning ticket: see *Burrows*, at p. 156.

30 Even if there is no "but for" causal link between a benefit and the breach, there may still be a problem about whether a benefit should be deducted. This will occur where the benefit and the breach are connected in the sense that the benefit is intended to indemnify the type of loss caused by the breach -- *Sylvester* is an example. Mr. Sylvester was unable to work and receiving disability payments under his employment contract when he was wrongfully dismissed. There was clearly no causal link between the employer's failure to give reasonable notice of termination (or payment in lieu of notice) and the receipt of the disability benefits. Nonetheless, the Court found that there was a compensating advantages problem. As Major J. pointed out, the disability benefits were intended to be a substitute for Mr. Sylvester's regular salary: para. 14. In other words, the benefit was intended to be an indemnity for the loss of the regular salary, precisely the sort of loss that resulted from the defendant's breach of the employment contract.

31 The existence of these sorts of links between the breach and the benefit identifies whether there is a compensating advantage problem. But the existence of such a link is not a reliable marker of whether a particular benefit should be deducted. Relying on strict principles of causation, for example, often conceals unarticulated policy concerns: see, e.g., *Parry v. Cleaver*, [1970] A.C. 1 (H.L.), at pp. 34-35, per Lord Pearce; *Ogus*, at pp. 225-26; *Ratyeh v. Bloomer*, [1990] 1 S.C.R. 940, at pp. 965-66. Similarly, the indemnity factor is not a reliable marker of which benefits are or are not deductible. This is clear, for example from the Court's decision in *Cunningham*. In issue were disability benefits provided for under collective agreements. They were clearly intended to provide

an indemnity for wage loss arising from an inability to work. Nonetheless, the Court held that the benefits should *not* be deducted.

32 To sum up, a potential compensating advantage problem exists if the plaintiff receives a benefit that would result in compensation of the plaintiff beyond his or her actual loss and *either* (a) the plaintiff would not have received the benefit but for the defendant's breach, *or* (b) the benefit is intended to be an indemnity for the sort of loss resulting from the defendant's breach. These factors identify a potential problem with a compensating advantage, but do not decide how it should be resolved.

(3) Why Is There a Problem About Deduction in This Case?

33 A compensating advantage issue arises in this case. First, there is an element of excess compensation. Mr. Waterman has received his full pension benefits and, in addition, the salary he would have earned had he worked during the period of reasonable notice (less an allowance for his earnings from other employment). Had IBM not breached the contract of employment and instead given him working notice, he would have received only his salary during that period and not his pension. Second, there is a "but for" causal relationship between IBM's breach of contract and Mr. Waterman's receipt of the pension benefits. One could say that it was the pension plan rather than IBM's breach of contract that gave rise to the benefit, but it is artificial to suggest that there is no "but for" causal link between IBM's breach of contract and Mr. Waterman's receipt of his pension benefits: "but for" the breach, there would have been no termination and, "but for" the termination, Mr. Waterman would not have started to collect his pension. Given that there was double recovery and that the benefit would not have arisen but for IBM's breach, we must decide whether the benefit should or should not be deducted from damages otherwise payable by IBM.

B. *Is the Compensation Principle the Answer to the Problem?*

34 IBM's first main point is that the compensation principle requires the pension benefits to be deducted. Mr. Waterman is better off as a result of the damage award than he would have been if IBM had given reasonable working notice. It follows, in IBM's submission, that the pension benefits must be deducted so that the damage award places Mr. Waterman in the economic position he would have been in had IBM given him reasonable working notice. This is essentially the position adopted by my colleague Rothstein J.

35 While I agree that the damage award is a departure from the compensation principle, this in itself is not an answer to the problem posed by the appeal. As I will explain, the compensation principle cannot be, and is not, applied strictly or inflexibly in a manner that is divorced from other considerations. The question is whether the compensation principle should be strictly applied in this case. In my view, it should not. To explain why, it is helpful to look first at why the compensation principle is not applied strictly, or at all, in various situations.

(1) When Does the Compensation Principle Not Apply Strictly?

36 Considerations other than the extent of the plaintiff's actual loss shape the way the compensation principle is applied and there are well-established exceptions to it. For example, the rule that contract damages compensate only the plaintiff's actual loss is not the only rule that applies to assessing contract damages. As a leading English case put it, "Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick": *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.), at p. 278. In some cases, for example, an award of damages in contract may be based on the advantage gained by the defendant as a result of the breach rather than the loss suffered by the plaintiff: see, e.g., *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 25. The rule that damages are measured by the plaintiff's actual loss, while the general rule, does not cover all cases. In addition, through the doctrines of remoteness and mitigation, the compensation principle gives way to considerations of reasonableness in relation to whether the plaintiff's expectations of the contract and his or her conduct in response to the breach of it were reasonable.

37 Finally, there are well-recognized exceptions in which benefits flowing to plaintiffs are not taken into account even though the result is that they are better off, economically speaking, after the breach than they would have been had there been no breach. These exceptions are ultimately based on factors other than strict compensatory considerations. As Lord Reid put it in *Parry*, "[t]he common law has treated [the deductibility of compensating advantages] as one depending on justice, reasonableness and public policy": p. 13. Or, as McLachlin J. wrote, this issue raises a question of "basic policy": *Ratych*, at p. 959.

(2) What Factors Help to Identify When Compensating Advantages are Not Deducted?

38 What are some of these considerations of justice, reasonableness and policy? An answer may be found by looking at the two well-established situations in which compensating advantages are not deducted: charitable gifts and private insurance.

(a) *Charitable Gifts*

39 The first is the less controversial. The rule is that charitable gifts made to the plaintiff are generally not deductible from the plaintiff's damages even though they were made as a result of and in response to the injury or loss caused by the defendant's wrong: see, e.g., Waddams, at ss. 3.1550-3.1560; Cassels and Adjin-Tettey, at pp. 420-21. Two concerns explain the exception: first, that if these charitable gifts were deducted, "the springs of private charity would be found to be largely, if not entirely, dried up" and, second, that it rarely makes practical sense to spend the time and effort required to take these sorts of gifts into account (*Redpath v. Belfast and County Down Railway* (1947), N.I. 167 (K.B), at p. 170). See also Ogus, at p. 223; Waddams, at s. 3.1550; Cassels and Adjin-Tettey, at pp. 420-21; *Cunningham*, at p. 370.

40 These explanations of the exception suggest we may take into account the broader incentives created by deducting or not deducting a benefit as well as pragmatic considerations relating to whether the applicable rule is clear, coherent and easy to apply: *Cunningham*, at p. 388, per McLachlin J.

(b) *Private Insurance*

41 A second and more controversial exception relates to payments from the plaintiff's private insurance. The core of the exception is well established: benefits received by a plaintiff through private insurance are not deductible from damage awards. However, both the precise scope and the rationale of the exception have been the subject of judicial and scholarly debate. Its practical importance is limited given the widespread use of subrogation, which avoids the compensating advantage issue altogether. While the exception more typically arises in tort cases, it has also been applied in contract actions, including actions for wrongful dismissal: *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812. The approach in both areas of law is the same in principle, although the terms of the contract and the dealings between the parties will inform the analysis in contract cases.

42 One area of controversy relates to the sorts of benefits which fall within the private insurance exception. Does it apply to both indemnity and non-indemnity insurance? Does it extend to disability benefits, employment insurance or pensions payable on retirement? The Court has held that the answer to all of these questions is yes, but not, as we shall see, without well-reasoned dissent. In short, the so-called private insurance exception has been applied by analogy to a variety of payments that do not originate in a contract of insurance.

43 In *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654, the Court applied the insurance exception to prevent deduction of the present value of Canada Pension Plan benefits available to surviving dependents from the damages awarded in a fatal injuries claim. Spence J., for the Court, held that the payments were "so much of the same nature as contracts of insurance that they also should be excluded from consideration when assessing damages under the provisions of that statute": p. 670; see also *Grand Trunk Railway v. Beckett* (1887), 16 S.C.R. 713, at p. 714, and *Quebec Workmen's Compensation Commission v. Lachance*, [1973] S.C.R. 428, at pp. 433-34.

44 In *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756, Mr. Guy's injury led to his retirement and receipt of pension benefits. They were not deducted from damages for loss of earnings. Ritchie J., for the Court, viewed pensions, whether contributory or non-contributory, as flowing from the employee's work and part of what the employer was prepared to pay for the employee's services. He agreed with Lord Reid's conclusion, in *Parry*, as quoted by Spence J., in *Gill*, that "[t]he fact that they flow from past work equates them to rights which flow from an insurance privately effected by [the employee]": *Guy*, at p. 763. Similarly, in *Jack Cewe*, the Court did not deduct a dismissed employee's unemployment insurance benefits from his wrongful dismissal damages. The benefits, wrote Pigeon J., for the Court, were a consequence of the contract of employment making them similar to contributory pension benefits: p. 818. (The collateral benefit issue that arose in *Jack Cewe*

is now addressed by s. 45 of the *Employment Insurance Act*, S.C. 1996, c. 23, which states that a claimant who receives benefits and is subsequently awarded damages for the same period, "shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid".)

45 In *Ratych*, the Court found that sick leave benefits should be deducted from damages otherwise payable for loss of earning by the party whose negligence was responsible for the injuries. For the majority, McLachlin J. wrote that it may well be appropriate not to deduct benefits where the employee can show a contribution equivalent to payment of an insurance premium. In other words, benefits may not be deductible when they come about because the plaintiff has prudently obtained and paid for insurance. However, that was not the case in *Ratych*, making it a different situation than one in which the benefits flow from the employer/employee relationship: pp. 973-74. In *Cunningham*, disability insurance benefits payable under the terms of collective agreements were held not to be deductible because there was evidence that the plaintiffs had paid for these disability plans through reduced wages. The Court's earlier decision in *Ratych* was distinguished on this basis.

46 Finally, in *Sylvester*, non-contributory disability benefits received during the notice period were deducted from wrongful dismissal damages otherwise payable. The benefits were intended to be an indemnity for lost wages while the plaintiff was unable to work, the plaintiff had not contributed to acquire the benefit, and policy considerations favoured deduction.

47 The two cases in which the private insurance exception was *not* applied (*Ratych* and *Sylvester*) involved benefits that were intended to be an indemnity for the type of loss that resulted from the defendant's breach and to which the plaintiff had not contributed. Retirement pension benefits, which are not an indemnity for loss of wages resulting from inability to work and to which the employee contributes directly or indirectly, have been held by this Court and others to fall within the private insurance exception: *Guy*; *Gill*; *Chandler v. Ball Packaging Products Canada Ltd.* (1992), 2 C.C.P.B. 101 (Ont. Ct. J. (Gen. Div.)), *aff'd* (1993), 2 C.C.P.B. 99 (Ont. Ct. J. (Div. Ct.)); *Emery v. Royal Oak Mines Inc.* (1995), 24 O.R. (3d) 302 (Gen. Div.); *Parry*.

48 IBM relies on *Canadian Human Rights Commission v. Canada (Attorney General)*, 2003 FCA 86, 301 N.R. 321, but, in my view, this reliance is misplaced. The human rights complainant in that case, Master Corporal (retired) Carter, complained that his release from the Canadian Forces by virtue of his age constituted discrimination; in other words, his claim was not that his employer had failed to give him reasonable notice of termination, but that it could not lawfully terminate him. Following his release from service, a proper legislative basis for compulsory retirement was put in place, thus ending the discrimination. The question was whether the compensation awarded by the Human Rights Tribunal for lost wages during the period of discrimination should be reduced by the amount of pension benefits received during that period. The Federal Court of Appeal held that they should. However, it specifically declined to decide the case on the basis of the private insurance

exception: para. 20. Instead, it reasoned that Master Corporal Carter should be treated as a member of the regular force during the period of discrimination. But, by virtue of the applicable provisions of the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, a person may *either* be a member of the regular armed forces contributing to the superannuation account *or* a person who has ceased to be a member and entitled to benefits, but not both at the same time. On that basis, his claim for both pension benefits and his full salary was inconsistent with the nature of his claim and the governing legislation. This reasoning cannot apply to this case, however. The private insurance exception applies to wrongful dismissal actions: *Jack Cewe*. In addition, the contractual provisions here, unlike the statute that governed Master Corporal Carter's case, do not have any general bar against receiving full pension entitlement and employment income.

49 A second area of controversy concerns the basis of the private insurance exception. It has been explained on various grounds, which may be grouped under three main headings. One is concerned with the strength of the causal connection between receipt of the benefit and the defendant's breach, a second relates to the nature of the benefit, and a third concerns a variety of policy considerations that may be served by either deducting or not deducting the benefit.

50 Before turning to those issues, however, I must address a contention advanced by my colleague Rothstein J. He maintains that application of the collateral benefit or private insurance exception is not appropriate where the plaintiff's cause of action and his right to a particular benefit arise from the same contract. I respectfully do not accept that there is or should be any such categorical "single contract" rule in relation to compensating advantages. This proposition is not consistent with this Court's jurisprudence.

51 In *Jack Cewe*, unemployment insurance benefits were not deducted from wrongful dismissal damages. The Court held that the benefits were the "consequence of the contract of employment", making them similar to contributory pension benefits: p. 818. Thus, although the Court considered that the benefits and the claim for damages arose as a consequence of the same contract, the benefits were *not* deducted from the wrongful dismissal damages. Thus, my colleague's proposition is contradicted by a leading authority from this Court on the deduction of benefits from wrongful dismissal damages.

52 The *Sylvester* case, from this Court, does not lay down any such broad "single contract" rule. If that had been the Court's view, it would have provided a much simpler solution to the issue in *Sylvester* than the one it unanimously adopted. Of course, in *Sylvester*, the sick leave benefits and the claim for wrongful dismissal damages both arose from the contract of employment, but the Court did not rely on, or even mention, the broad "single contract" rule advanced by my colleague. On the contrary, Major J., writing for the Court, was careful *not* to articulate any broad "single contract" rule in relation to compensating advantages. He stated that

[t]here may be cases where an employee will seek benefits in addition to damages for wrongful dismissal on the basis that the disability benefits are akin

to benefits from a private insurance plan for which the employee has provided consideration. This is not the case here... . The issue whether disability benefits should be deducted from damages for wrongful dismissal where the employee has contributed to the disability benefits plan was not before the Court.

[Emphasis added; para. 22.]

Of course, whether the employee contributes to the benefits or not, they equally arise under the employment contract. The fact that the Court explicitly left this point open is inconsistent with the Court intending to adopt the broad "single contract" rule espoused by Rothstein J. *Sylvester* teaches that, where a cause of action and a benefit arise under the contract of employment, we must look first to that contract to determine the issue of whether an employment benefit should be deducted from wrongful dismissal damages. As in *Sylvester*, Mr. Waterman's contract of employment is silent on this issue, so we must attempt to discern the parties' intentions in light of the express terms of the contract of employment.

53 I return to the three areas of controversy in relation to the basis of the private insurance exception.

(i) Strength of Connection to the Defendant's Breach

54 The strength-of-connection factor has often been referred to in the cases. The argument is that private insurance benefits (and benefits considered analogous to them) should not be deducted because they result from the plaintiff's contract of insurance, not from the defendant's wrongful act. This was part of the reasoning in *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1, but at the distance of 140 years, this analysis seems artificial. Moreover, scholars have pointed out that decisions about legal as opposed to factual causation often simply disguise the true policy reasons underlying the decisions: see, e.g., Ogus, at p. 94; Burrows, at p. 162. In the leading English case on the private insurance exception, *Parry*, Lord Pearce commented that strict principles of causation do not provide a "satisfactory line of demarcation" between benefits that are and are not deductible: p. 34. While, as discussed, considering the connection between the breach and the benefit helps to identify that there is an issue about whether the benefit should be deducted, principles of causation do not provide reliable markers of whether a benefit should be deducted or not.

(ii) The Nature and Purpose of the Benefit

55 The nature and purpose of the benefit, on the other hand, is often a better explanation of why private insurance benefits should or should not be deducted. Two factors relating to the nature of the benefit have been particularly important: whether the benefit is an indemnity for the loss caused by the defendant's breach and whether the plaintiff has directly or indirectly paid for the benefit.

56 I will not attempt to lay down general principles that will cover all possible types of benefits. However, as we shall see, a review of this Court's jurisprudence supports the following general propositions (subject, of course, to statutory or contractual provisions to the contrary).

- * Benefits have *not* been deducted if (a) they *are not* intended to be an indemnity for the sort of loss caused by the breach *and* (b) the plaintiff has contributed to the entitlement to the benefit: *Gill; Guy*.
- * Benefits have *not* been deducted where the plaintiff has contributed to an indemnity benefit: *Jack Cewe; Cunningham*.
- * Benefits *have* been deducted when they *are* intended to be an indemnity for the sort of loss caused by the breach but the plaintiff has not contributed in order to obtain entitlement to the benefit: *Sylvester; Ratych*.

57 The pension benefit in this case was not intended to be an indemnity for lost wages and Mr. Waterman contributed to the acquisition of his pension through his years of service. This, no doubt, is why it has never been argued that the benefits should be deducted under the principle of mitigation. The pension benefit, therefore, is the type of benefit which should not be deducted. The reasoning leading me to this conclusion follows.

58 I begin my review with the decision of the House of Lords in *Parry*, which is the foundation of much of the Canadian jurisprudence. Lord Reid ultimately based his conclusion that the benefit (a pension) should not be deducted based on its "intrinsic nature": "A pension is intrinsically of a different kind from wages... [W]ages are a reward for contemporaneous work, but ... a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind": p. 16. Lord Pearce also considered the nature and purpose of the benefit when he asked: "Is there anything else in the nature of these pension rights derived from work which puts them into a different class from pension rights derived from private insurance? Their 'character' is the same": p. 37. Lord Wilberforce also focused on the nature of the pension benefit, noting that it did not prevent the injured officer from taking other paid employment, whether it be for a wage that was less, equal to or more than his police officer's salary: p. 42.

59 The nature and purpose of the benefit was central to the minority's reasoning in *Cunningham*. While the majority was concerned with authority, fairness and deterrence, the minority refocused the analysis on the nature of the benefit, distinguishing between "indemnity" and "non-indemnity" insurance. The former should be deductible, while the latter should not:

This distinction is critical to a discussion of collateral benefits. If the insurance money is not paid to indemnify the plaintiff for a pecuniary loss, but simply as a matter of contract on a contingency, then the plaintiff has not been compensated for any loss. He may claim his entire loss from the negligent defendant without violating the rule against double recovery. [pp. 371-72]

60 Importantly, the minority judges accepted that the dominant tide of the jurisprudence in the common law world is that non-indemnity pension benefits should not be deducted: *Cunningham*, at p. 376. Although they mostly do not rely on the private insurance exception, Commonwealth decisions conclude that pension benefits should not be deducted from a damages award because

pension benefits are not meant to compensate the plaintiff for the injury or breach of contract or to act as wage replacement. See for example: *National Insurance Co. of New Zealand Ltd. v. Espagne* (1961), 105 C.L.R. 569; *Graham v. Baker* (1961), 106 C.L.R. 340; *Parry*; *Smoker v. London Fire and Civil Defence Authority*, [1991] 2 A.C. 502. In *Hopkins v. Norcross plc*, [1993] 1 All E.R. 565 (Q.B.), the High Court applied this reasoning to the deductibility of pension benefits in a wrongful dismissal suit. The reasoning is also consistent with the decision of the Employment Appeal Tribunal in *Knapton v. ECC Card Clothing Ltd.*, [2006] I.C.R. 1084. The non-deductibility of pension benefits was affirmed by the New Zealand Court of Appeal in *Gilbert v. Attorney-General*, [2010] NZCA 421, 8 N.Z.E.L.R. 72. This is consistent with the approach in *Guy*, discussed earlier, which concerned pension benefits that were clearly not intended to be an indemnity for loss of earnings due to an inability to work. They were held not to be deductible from damages for loss of earnings payable by those responsible for the plaintiff's inability to work.

61 The nature of the benefit was also an important factor in the Court's decision to deduct employer-funded disability payments from wrongful dismissal damages in *Sylvester*. The Court's analysis looked first to the nature and purpose of the benefit and, in particular, to the question of whether the benefit is in the nature of an indemnity for the sort of loss caused by the defendant's breach of contract. The fact that the benefit was intended to be an indemnity for wage loss was one of the reasons for the Court's conclusion that the benefit should be deducted.

62 Reliance on the distinction between indemnity and non-indemnity benefits is sound in principle. As McLachlin J. pointed out in her dissenting reasons in *Cunningham*, if the benefit "is not paid to indemnify the plaintiff for a pecuniary loss, but simply as a matter of contract on a contingency", the benefit cannot be seen as having compensated the plaintiff for that pecuniary loss: pp. 371-72. If that is the case, the arguments in favour of deducting the benefit are weaker in the sense that IBM is asking to deduct apples from oranges.

63 The fact that Mr. Waterman's pension comes from a defined benefit plan does not change its nature as a non-indemnity benefit.

64 The Court in *Sylvester* also considered another factor -- that the plaintiff had not contributed to obtain the benefit by paying for it directly or indirectly -- in support of its conclusion that the benefit should be deducted from the damages. This factor has often been mentioned and relied on in the cases.

65 For example, the Court first applied *Parry* in the 1973 case of *Gill*, and reaffirmed it in *Guy*. In both cases, the Court emphasized that the plaintiff had directly or indirectly paid for the benefit in question. As Ritchie J., writing for the Court, put it in *Guy*:

... this contributory pension is derived from the appellant's contract with his employer and that the payments made pursuant to it are akin to payments under an insurance policy. This view is in accord with the judgment of the House of Lords in *Parry v. Cleaver*, which was expressly approved in this Court in the

reasons for judgment of Mr. Justice Spence in *Canadian Pacific Ltd. v. Gill* ...
[p. 762]

66 This line of reasoning was repeated in *Jack Cewe*, which held that contributory unemployment insurance benefits were not deductible from wrongful dismissal damages. This factor was also an important one in *Cunningham*. As Cory J. put it, on behalf of the majority: "The application of the insurance exception to benefits received under a contract of employment should not be limited to cases where the plaintiff is a member of a union and bargains collectively. Benefits received under the employment contracts of non-unionized employees will also be non-deductible if proof is provided of payment in some manner by the employee for the benefits": p. 408 (emphasis added). The majority found that there was evidence of such payment and held that the benefit should not be deducted.

67 While the cases from this Court have referred to whether the plaintiff has directly or indirectly contributed to the benefit, there are strong arguments against giving this consideration much weight as an explanation of why particular benefits should or should not be deducted. As McLachlin J. pointed out in her dissent in *Cunningham*, reliance on this factor may be seen as inconsistent with legal principle and logic. With respect to legal principle, the defendant takes the plaintiff as he or she is and the plaintiff is compensated for his or her actual loss and no more. As a matter of logic, it does not seem right to say that deducting the benefits deprives the plaintiff of the contributions made to gain entitlement to those benefits -- whether deducted from damages or not, the plaintiff receives the benefits: *Cunningham*, at pp. 381-83; for a critique of reliance on this factor, see also Ogus, at pp. 226-27.

68 The pension benefits in issue in this case are not an indemnity for loss of wages and, as we shall see, pension benefits earned through years of service are invariably found to be contributory. The fact that the pension plan here is a defined benefits plan does not detract from that conclusion. As a result, the problem highlighted in the difference between the majority and the dissent in *Cunningham*, i.e. how to treat indemnity benefits to which the plaintiff contributed, does not arise in this case.

69 I conclude from this review that whether the benefit is in the nature of an indemnity for the loss caused by the defendant's breach and whether the plaintiff has directly or indirectly paid for the benefit have been important explanations of why particular benefits fall, or do not fall within the private insurance exception. The Court has been sharply and closely divided on the issue of the deduction for an indemnity benefit to which the plaintiff has contributed. However, there is no decision of the Court of which I am aware that has required deduction of a non-indemnity benefit to which the plaintiff has contributed, like the pension benefits in this case.

(iii) Broader Policy Considerations

70 Three main policy considerations have often been advanced to explain why a benefit should or should not be deducted: punishment, deterrence, and the provision of incentives for socially

responsible behaviour.

71 The private insurance exception has often been justified on the basis that deducting the benefit from the damages reduces their punitive and deterrent value. However, the notion that the exception was intended to have a punitive and deterrent value has been widely, and, in my view, soundly, criticized. Authors agree that punitive and deterrent value ought not to be relied on to explain why a benefit is or is not deducted: see J. G. Fleming, "The Collateral Source Rule and Contract Damages" (1983), 71 Cal. L. Rev. 56, at pp. 58-59; J. Marks, "Symmetrical Use of Universal Damages Principles -- Such as the Principles Underlying the Doctrine of Proximate Cause -- to Distinguish Breach-Induced Benefits That Offset Liability From Those That Do Not" (2009), 55 Wayne L. Rev. 1387, at p. 1420; J. M. Perillo, "The Collateral Source Rule in Contract Cases" (2009), 46 San Diego L. Rev. 705, at p. 716; Ogus, at p. 225; Burrows, at pp. 162-63. This view is supported by both the High Court of Australia and the House of Lords: see *National Insurance Co.*, per Dixon C.J, at p. 571, and *Parry*, at p. 33. In *Parry*, Lord Pearce put it this way at p. 33: "The word 'punitive' gives no help. It is simply a word used when a court thinks it unfair that a defendant should be saddled with liability for a particular item." I would add that it is hard to defend punishment and deterrence as rationales against the incisive critique advanced by McLachlin J. in her dissenting reasons in *Cunningham*, at pp. 383-84. I conclude that it is unsound to rely on a punitive or deterrent justification for the private insurance exception, particularly in breach of contract cases where fault is not an operating concept.

72 This is not to say, however, that the approach to damages does or should ignore the underlying purposes of the substantive obligations the breach of which they seek to remedy. If, for example, an important purpose of the law of contracts is to protect the reasonable expectations of the parties to a contract, it is appropriate to consider how well the award of damages furthers that purpose in a particular case: see, e.g., A. Swan and J. Adamski, *Canadian Contract Law* (3rd ed. 2012) at s. 1.27. This consideration may be taken into account along with the other principles of damages law in order to ensure that there is a good "remedial fit" between the breach of obligation and the remedy.

73 The private insurance exception has also been justified by the incentives it may provide. For example, deducting benefits that plaintiffs have provided for themselves might discourage plaintiffs from acting prudently in obtaining that sort of protection. This, however, has been a controversial explanation. The majority relied on it in *Cunningham*, but it was trenchantly criticized by the dissent and a similar critique has been made by scholars: see, e.g., Ogus, at pp. 226-27.

74 In my view, we should be cautious about relying too heavily on the incentives that may result from deducting or not deducting. There will sometimes be little basis in fact for supposing that either deducting or not deducting certain benefits will have any impact on people's behaviour. For example, do we think it likely that deducting insurance benefits will discourage people from buying insurance? The coverage is not limited to situations in which there will be legal recourse against a defendant. Even when legal recourse is available, it will likely require a longer and more expensive

process, as compared to making an insurance claim. Nor is it likely that people will be less ready to buy insurance if they are not doubly compensated in cases in which fault can be established. It seems to me that we should generally rely on these broader policy concerns only when they are directly related to the particular benefit in issue and when there is some reasonable basis in fact or experience to suppose that deducting or not deducting will actually serve the policy objective.

75 *Sylvester* provides an example of grounding policy considerations in the facts of the case. The result in that case was supported by the fact that deducting the disability benefits from wrongful dismissal damages ensured that all affected employees would receive equal damages: if the benefits were not deducted, a dismissed employee collecting disability benefits would receive more compensation than would the employee who is dismissed while working (para. 21). In the same paragraph, the Court considered the incentives created by the deduction or non-deduction of the disability benefits: failing to deduct the disability benefits could be an undesirable deterrent to employers establishing disability benefit plans. These concerns are directly related to the benefits in question and have a reasonable basis in fact.

76 From this review of the authorities, I reach these conclusions:

- (a) There is no single marker to sort which benefits fall within the private insurance exception.
- (b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.
- (c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.
- (d) In general, a benefit will not be deducted if it is *not an indemnity* for the loss caused by the breach and the plaintiff *has contributed* in order to obtain entitlement to it.
- (e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

(3) Application to This Case

77 Where would these factors lead us in this case? In my view, they clearly support not deducting the retirement pension benefits from wrongful dismissal damages. The retirement pension is not an indemnity for wage loss, but rather a form of retirement savings. While the employer made all of the contributions to fund the plan, Mr. Waterman earned his entitlement to benefits through his years of service. As the plan states, its primary purpose is "to provide periodic pension payments to

eligible employees ... after retirement ... in respect of their service as employees": art. 1.01, A.R., at p. 117. Thus, it seems to me that this case falls into the category of cases in which the insurance exception has always been applied: the benefit is not an indemnity and the employee contributed to the benefit. This result is consistent with the dominant view in the case law and among legal scholars: *Guy; Gill; Chandler; Emery; Parry; Ogus*, at p. 223.

78 To conclude, the compensation principle should not be applied strictly in this case because the pension benefits fall within the private insurance exception and should not be deducted from the wrongful dismissal damages.

C. *Does the Court's Decision in Sylvester Support IBM's Position That the Pension Benefits Must Be Deducted?*

79 I turn to IBM's second main argument, that the Court's decision in *Sylvester* supports its position that the pension benefits must be deducted here. In my view *Sylvester* does not support that result.

80 The issue in *Sylvester* was whether damages for wrongful dismissal should be reduced by the amount of disability benefits paid during the notice period from an employer-funded plan. The Court's analysis addressed three factors: the nature of the benefit, the intentions of the parties as reflected in the employment contract, and some broader policy considerations. When these factors are considered in light of the facts of this case, they lead to the opposite conclusion than they did in *Sylvester*.

81 The Court in *Sylvester* began by looking at the nature of the benefit. Was it intended to be a substitute (i.e. an indemnity) for wages payable during the period of reasonable notice? For two reasons, the Court determined that they were. First, the disability benefits were a wage replacement benefit. It was clear from the terms of the plans that the benefits were intended to continue the employee's earnings in the event the employee was unable to work due to illness or injury. Second, the disability benefits would be reduced by other income received by the employee, including other disability income, wage continuation plan benefits, pension benefits, workers' compensation benefits and salary from other employment: para. 14. They were therefore not freestanding entitlements -- they were linked to and defined by the extent of actual income loss. (As I have already noted, the Court was also careful not to opine on whether the result would be the same if the employee had contributed money or money's worth in order to obtain the benefit. The Court specifically left open the question of whether "disability benefits should be deducted from damages for wrongful dismissal where the employee has contributed to the disability benefits plan": para. 22.)

82 The benefit in issue in this case is of an entirely different nature. Unlike the disability benefits in *Sylvester*, the pension benefit is clearly not an indemnity benefit for loss of salary due to inability to work. The purpose of the pension benefits, as expressed in the plan documents, "is to provide periodic pension payments to eligible employees ... after retirement and until death in respect of

their service as employees": art. 1.01, A.R., at p. 117. The pension plan is, in essence, a retirement savings vehicle to which an employee earns an absolute entitlement over time. Benefits are determined by years of service and salary level. An employee who leaves employment after 10 or more years of service receives either a deferred pension or a transfer of the lump sum commuted value of the pension entitlement to a locked-in retirement vehicle. Pensionable earnings are credited at 100 percent of salary while on approved unpaid leave or short-term disability. Moreover, unlike the disability payments in *Sylvester*, pension payments or entitlements are not in general reduced by other income or benefits received by the recipient. Mr. Waterman could have retired, drawn his full pension, and drawn a full salary from another employer. Pension benefits are clearly not intended to provide an indemnity for loss of income.

83 There is an even more fundamental difference. As Prowse J.A. points out in her reasons in the Court of Appeal, pension benefits like those in issue here bear many of the hallmarks of a property right. They, as she put it, are regarded as belonging to the employee:

... although the payments under the [Defined Benefit Pension] Plan are made wholly by IBM, they are made "on behalf of" the employee. This is also reflected in IBM's [Defined Contribution] Plan, where employer contributions are attributed to a fund in the name of the employee. In both instances, the pension benefits are regarded as belonging to the employee. They have the right to designate beneficiaries of the benefit; they can elect to transfer their pension account to another locked-in RRSP or to another employer after 10 years of service upon leaving IBM; there is a provision for a lump-sum pay-out on retirement in the case of "small pensions" (of lesser magnitude than that enjoyed by Mr. Waterman (Article 10.08)); and, in many jurisdictions, their pension rights are divisible between spouses on marriage breakdown. [Emphasis added; para. 60.]

84 This view is supported by basic principles of pension law. Mr. Waterman's pension was vested. As A. Kaplan and M. Frazer explain in *Pension Law* (2nd ed. 2013), at p. 203:

Vesting is the "foundation stone" of employee protections upon which pension regulation is based An employee who is vested has an enforceable statutory right to the accrued value of his or her pension benefit earned to date, even if the employee terminates employment and plan membership prior to retirement age. It is the vesting of pension benefits that shift our perception of pensions from purely contractual entitlements to quasi-proprietary interests.

85 Pension benefits have consistently been viewed as an entitlement earned by the employee. As Lord Reid put it in *Parry*, at p. 16: "The products of the sums paid into the pension fund are in fact delayed remuneration for [the employee's] current work. That is why pensions are regarded as earned income." The pension is therefore a form of retirement savings earned over the years of

employment to which the employee acquires specific and enforceable rights. This is no less the case because the pension benefits were not reduced by the wrongful dismissal; had they been, there would be no collateral benefit problem and no question of deduction. It is useful to ask this question: In light of the contract of employment, would the parties have intended to use an employee's vested pension entitlements to subsidize his or her wrongful dismissal? In my view, the answer must be no. As Joseph M. Perillo writes:

Suppose an employer fires an employee without justification, breaching a contract of employment, and the employee turns to his or her savings account for living expenses. No one would argue that the employee's recovery against the employer should be diminished by the employee's withdrawals from savings. The savings account is a collateral source. To the extent that another collateral source resembles a savings account, the plaintiff should be able to recover damages without a deduction for the amount received from the collateral source. [Emphasis added; p. 706.]

86 My colleague Rothstein J. does not accept that the different nature of the benefits in issue here and in *Sylvester* is a relevant distinction between the two cases. However, Major J., writing for a unanimous Court in *Sylvester*, clearly thought it was. His first reason for deciding that the benefits ought to be deducted was that "the disability benefits were intended to be a substitute for the respondent's regular salary": para. 14. In other words, it was a key aspect of the Court's reasoning in *Sylvester* that the benefit in issue was intended to be an indemnity for wage loss. I find it impossible to dismiss the first reason the Court in *Sylvester* gave for its decision as irrelevant.

87 The Court in *Sylvester* then turned to the contract of employment. The goal was to see if it shed any light on the parties' intentions with respect to the receipt of both damages for wrongful dismissal and disability benefits. Contrary to the view of my colleague Rothstein J., the relevant question was *not* what Mr. Sylvester was entitled to under his contract in the event that his employer had not breached it. The question was whether the contract expressly or impliedly provided for him to receive both disability benefits and damages for wrongful dismissal: para. 13. Although the employment contract in *Sylvester* (as in this case) did not expressly address that question, it did so by implication. The receipt of both disability benefits and wages was not possible in any circumstances under the contract of employment. Moreover, other income of any nature had to be deducted from the amount of the disability payments. This suggested that the parties did not intend Mr. Sylvester to receive both disability benefits and damages representing lost wages during the notice period. As Major J. put it:

The respondent's contractual right to damages for wrongful dismissal and his contractual right to disability benefits are based on opposite assumptions about his ability to work and it is incompatible with the employment contract for the respondent to receive both amounts. The damages are based on the premise that he would have worked during the notice period. The disability payments are

only payable because he could not work. It makes no sense to pay damages based on the assumption that he would have worked in addition to disability benefits which arose solely because he could not work. This suggests that the parties did not intend the respondent to receive both damages and disability benefits.

[Emphasis added; para. 17.]

88 As I read *Sylvester*, this analysis does not suggest that we should focus narrowly on the precise provisions of the employment contract, unless of course they deal expressly with the issue of whether pension benefits should be deducted from wrongful dismissal damages. In the absence of such an explicit provision -- and, as in *Sylvester*, there is no explicit provision in this case -- we must look at the contract in an attempt to determine what the parties intended with respect to the receipt of both wrongful dismissal damages and pension benefits.

89 When we examine the employment contract in this case, the picture is much less clear than it was in *Sylvester*. It is true that because Mr. Waterman was between the ages of 65 and 71 at the time of his dismissal and qualified for his full pension, he could not in fact receive both employment income from IBM and pension benefits. However, looking at the contract as a whole, it is not a fair implication that the parties agreed that pension entitlements should be deducted from wrongful dismissal damages.

90 First, an employee who is dismissed before his date of retirement would receive, without deduction, wrongful dismissal damages and all of his or her entitlements under the plan (for example, a deferred pension or its commuted value transferred to a locked-in savings vehicle). No one has suggested that these amounts would in any way affect wrongful dismissal damages. In fact, the value of any pension entitlements lost during the notice period would be a compensable loss in an unjust dismissal action: see, e.g., J. R. Sproat, *Wrongful Dismissal Handbook* (6th ed. 2012), at pp. 6-51 to 6-52.6. Second, a retired employee would receive, in full, both his pension benefits and any employment income earned from another employer. There is nothing before us to suggest that a retired IBM employee could not obtain employment with another employer and keep both his or her pension income and the new employment income. Third, once an employee reaches age 71, he or she could receive in full both employment income *from IBM* and pension benefits: plan description, at p. 2 (A.R., at p. 103); plan art. 9.02 (A.R., at p. 132). In *Sylvester*, not only was it impossible *in all circumstances* to receive salary and disability benefits, it was clear that the amount of disability benefits would be reduced by any other income, whatever its source, received by the employee: para. 14. Unlike *Sylvester*, it cannot be said here that the rights to damages for unjust dismissal and to pension benefits are based on opposite or incompatible assumptions. This conclusion is also consistent with the understanding of vested pension entitlements as being akin to property rights which accrue over time for the employee's benefit.

91 I conclude that, unlike the situation in *Sylvester*, Mr. Waterman's receipt of pension benefits and wrongful dismissal damages is not based on opposite assumptions about his ability to work and it is not incompatible with the employment contract that he could receive both pension benefits and

employment income.

92 Finally, the Court in *Sylvester* turned to the broader policy concerns, notably that dismissed employees should be treated alike and that the incentives should encourage rather than discourage employers from setting up disability plans. As Major J. put it, at para. 21:

If disability benefits are paid in addition to damages for wrongful dismissal, the employee collecting disability benefits receives more compensation than the employee who is dismissed while working. Deducting disability benefits ensures that all affected employees receive equal damages ... If disability benefits are not deductible, employers who set up disability benefits plans will be required to pay more to employees upon termination than employers who do not set up plans. This deterrent to establishing disability benefits plans is not desirable. [Emphasis added.]

93 These factors are also relevant here, although, in this case, they support not deducting rather than deducting the benefits. Unlike in *Sylvester*, non-deduction in this case promotes equal treatment of employees. If deduction is permitted, an employee who is eligible to receive his or her pension but has not reached 71 years of age can, by means of wrongful dismissal, be forced to retire and draw on his or her pension benefits. By contrast, an employee who is not entitled to his or her pension receives either a deferred pension or the commuted value of it plus full damages for wrongful dismissal and an employee over the age of 71 receives both pension and employment income. Deducting the benefits only in the case of employees in Mr. Waterman's situation would constitute unequal treatment of pensionable employees. Moreover, deductibility seems to me to provide an incentive for employers to dismiss pensionable employees rather than other employees because it will be cheaper to do so. This is not an incentive the law should provide. While this is a broader policy consideration, it is directly related to the benefit in question and has a reasonable basis in fact.

94 My colleague Rothstein J. is of the view that there is no such incentive because "with respect to the cost of dismissing pensionable and non-pensionable employees, there is a difference only in form, not substance": para. 134. Respectfully, I cannot agree. The suggestion implicit in this is that there is a dollar for dollar correlation between the amount of the pension benefits that IBM claims should be deducted and the amount IBM contributed over time in order to fund those benefits such that it is not cheaper to dismiss a pensionable employee than one who is not eligible to collect a full pension. This proposition, however, is based on a considerable oversimplification of how pension benefits are funded and, in my respectful view, is not accurate.

95 My colleague Rothstein J. suggests that failure to deduct earned pension benefits from wrongful dismissal damages may disadvantage other employees in the future because it may "incentivize" employers to require an employee to work through the duration of the reasonable notice period to the potential disadvantage of employees. However, the risk of such an incentive

seems to me to be highly speculative. There are pluses and minuses for both the employer and employee of giving (and receiving) working notice. From the employer's perspective, it may not be advantageous to have the employee remain on the employer's premises during the period of working notice. In addition, the employer loses the benefit of the employee's efforts to mitigate damages by finding alternate employment, a benefit that is often unpredictable at the time of termination. The employer is always able to negotiate before firing an employee rather than firing without first negotiating. In light of these considerations, among others, it seems to me to be highly speculative to say that refusal to deduct pension benefits will encourage employers to give working notice rather than offer severance.

96 Finally, there is no parallel, from a policy analysis perspective, between this case and *Sylvester*. The Court in *Sylvester* was concerned that failure to deduct the non-contributory wage replacement benefits in issue there might make employers reluctant to fund wage replacement benefits. This concern does not arise here, given that the pension benefit is not intended to be an indemnity for wage loss and that the employees contribute to the cost of the pension benefits. Moreover, any employer who has this concern (and it must be said that the scarcity of reported cases on the point suggest that it arises very uncommonly) can address it by adding appropriate language to the pension plan text.

97 To conclude: in this case, the pension benefits are markedly different in nature than the disability benefits in issue in *Sylvester*, the intention of the parties in relation to the issue of deduction is much more uncertain in this case than in *Sylvester* and the broader policy considerations point in the opposite direction. Unlike the disability benefits in *Sylvester*, the pension benefits are not an indemnity for loss of earnings, they are not reduced by other benefits or income received and the employee over time receives a legal entitlement to the commuted value of the benefits. Unlike the situation respecting disability benefits in *Sylvester*, there is no general bar against an employee receiving both pension income and employment income and receipt of the benefits and income is not based on opposite or incompatible assumptions. Pension benefits are not reduced by other income. Not deducting the pension benefits serves the goal of equal treatment of employees and provides better incentives for just treatment of all employees.

98 I conclude, therefore, that *Sylvester* does not support IBM's position in this case, and that it, in fact, supports the conclusion that the pension benefits should not be deducted from the wrongful dismissal damages.

V. Disposition

99 I would dismiss the appeal with costs throughout.

The reasons of McLachlin C.J. and Rothstein J. were delivered by

ROTHSTEIN J. (dissenting):--

Introduction

100 Richard Waterman brought this suit alleging that his employer, IBM Canada Ltd., breached his employment contract by failing to provide him with reasonable notice of his termination. The trial judge found, and it is now undisputed that, Mr. Waterman was entitled to 18 months more notice than he was given, and that he is accordingly entitled to the salary he would have earned if he continued to work during that period. During the 18-month period, IBM paid Mr. Waterman monthly pension benefits under the assumption that he was retired. The sole issue in this case is whether the pension benefits that IBM paid to Mr. Waterman during the 18-month notice period must be deducted in calculating the appropriate damages award.

101 I agree with the majority that a straightforward application of the governing principle of contract damages -- that the non-breaching party be placed in the position he would have been in had the contract been performed -- leads to the conclusion that deduction is required (see para. 2). The parties agree that, had Mr. Waterman been given reasonable notice and worked through the reasonable notice period, he would have received his salary, but not his pension, until the notice period elapsed. Deducting the pension benefits IBM paid him during the reasonable notice period thus puts him in the position he would have been in had the contract been performed and failure to deduct gives him a windfall.

102 However, the majority accepts Mr. Waterman's argument that he should be allowed a windfall because his pension benefits are subject to the "private insurance" exception. I would reject that argument. This case requires the Court to assess Mr. Waterman's loss under the terms of a single contract which gave rise to both Mr. Waterman's right to reasonable notice and his right to pension benefits. The private insurance exception has no application to such a case. Where the Court is called upon to assess loss under a single contract, the plaintiff's entitlement turns on the ordinary governing principle that he should be put in the position he would have been in had the contract been performed.

103 It is important to note that not all pension plans are alike. Mr. Waterman's pension plan is a defined benefit plan, under which IBM undertook to provide Mr. Waterman with pension benefits from the time of his retirement until the time of his death, based on a predetermined formula. That is to say that, from Mr. Waterman's perspective, upon retirement, he would receive his defined benefits from an unlimited fund for the rest of his life. For this reason, Mr. Waterman's receipt of pension benefits during the reasonable notice period did not affect his future entitlement to pension benefits and deducting the benefits does not have the effect of taking anything away from Mr. Waterman. Rather, not deducting has the effect of giving Mr. Waterman more than he bargained for and charging IBM more than it agreed to pay.

Factual Background

104 Mr. Waterman was an employee of IBM for approximately 42 years. At the time he was terminated, he was 65 years old.

105 As an employee of IBM, Mr. Waterman became a member of the company's defined benefit pension plan. Under the terms of the plan, IBM was required to make contributions to the pension plan on behalf of its employees and, upon an employee's eligibility to receive benefits, IBM would provide the employee with monthly benefits according to a predetermined formula until the employee's death. An employee became eligible to receive his monthly benefits upon retiring after reaching the age of 65. An employee whose employment was terminated prior to the age of 65 could receive his pension benefits upon turning 65 or could elect to transfer the actuarial equivalent of his accrued pension to a new employer. An employee also became eligible to receive his benefits upon reaching the age of 71, independent of whether he had been terminated or retired, which, according to the parties, was necessary for the plan to comply with income tax regulations. At the time Mr. Waterman was terminated by IBM, the monthly payment he would receive upon becoming eligible had already been determined for several years.

106 IBM terminated Mr. Waterman in March 2009. It provided him with two months' working notice, after which it would consider him retired and begin paying him his pension benefits. The trial judge found, and it is now undisputed that, IBM was required to give Mr. Waterman an additional 18 months of notice.

107 The termination letter also offered Mr. Waterman a separation payment in exchange for a general release from liability. As explained later, the separation offer would have provided Mr. Waterman with more than he would have earned had he been given the full 20-month notice period and worked through the notice period. Mr. Waterman declined IBM's separation offer. He continued to work for IBM during the two-month notice period that he was given, and thereafter began collecting monthly pension benefits from IBM. On June 11, 2009, Mr. Waterman initiated this action to enforce his contractual right to be provided with reasonable notice of his termination.

108 In September 2009, Mr. Waterman obtained alternative employment as a part-time insurance salesman.

Procedural History

Supreme Court of British Columbia, 2010 BCSC 376, 2010 CLLC para210-021

109 After a summary trial, Goepel J. found that IBM breached Mr. Waterman's employment contract by failing to provide him with reasonable notice. Goepel J. held that IBM was required to provide Mr. Waterman with an additional 18 months of notice beyond the two months that had been provided. As a result, Mr. Waterman was entitled to the salary he would have earned and benefits he would have accrued if he had continued to work for IBM during that time.

110 Goepel J. did not deduct the pension benefits that IBM paid to Mr. Waterman during the notice period in calculating his damages. Goepel J. expressed the view that he was bound by the Court of Appeal for British Columbia's decision in *Girling v. Crown Cork & Seal Canada Inc.* (1995), 9 B.C.L.R. (3d) 1, in which it was held that pension benefits should not be deducted from

wrongful dismissal damages. He acknowledged the possibility that *Girling* was no longer an accurate statement of the law in light of this Court's decision in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, but found it incumbent upon him to follow *Girling* for reasons of judicial comity.

111 Based on this reasoning, Goepel J. awarded Mr. Waterman \$93,305 in damages, which reflected the salary and benefits he would have earned if he had worked through the additional 18 months of notice, less the income earned from his new employment during that period.

Court of Appeal for British Columbia, 2011 BCCA 337, 20 B.C.L.R. (5th) 241

112 Writing for a unanimous panel, Prowse J.A. dismissed IBM's appeal.

113 Prowse J.A. observed that the approach the Court of Appeal had previously taken in *Girling* was rejected by this Court's decision in *Sylvester*. In particular, *Sylvester* rejected the Court of Appeal for British Columbia's approach of treating agreements for employee benefits as contracts distinct from the employment contract. According to Prowse J.A., under *Sylvester*, Mr. Waterman's entitlement to both salary and payment of his pension benefits during the notice period turned on the construction of the contractual arrangement between the parties.

114 After reviewing the terms of Mr. Waterman's employment contract and IBM's defined benefit plan, Prowse J.A. found that there was no express provision addressing Mr. Waterman's rights in the event of wrongful dismissal. Prowse J.A. turned to consider what the parties would have intended had they put their minds to that circumstance. She concluded that, although there was no evidence regarding the parties' intention, had they considered the issue, they would not have intended for Mr. Waterman's pension benefits to be deducted from wrongful dismissal damages.

115 Prowse J.A. also concluded, at para. 62, that "the pension benefits in issue are also properly characterized as a form of non-deductible, non-indemnity insurance", as described by McLachlin J., as she then was, in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359.

Issue

116 The only issue before this Court is whether the pension benefits IBM paid to Mr. Waterman during the reasonable notice period should have been deducted in calculating his damages.

Analysis

117 My analysis proceeds in two stages. First, I consider whether it is necessary to deduct the pension benefits Mr. Waterman received during the reasonable notice period in order to put him in the position he would have been in had the contract been performed -- i.e. had he been given reasonable notice and worked through the end of the reasonable notice period. Second, I consider whether there is a basis for applying the private insurance exception, which allows a plaintiff to

receive excess compensation in certain circumstances. I conclude that, to put Mr. Waterman in the position he would have been in had the contract been performed, the pension benefits he received must be deducted. The private insurance exception is not applicable to this case.

Contract Damages for Wrongful Dismissal

118 The governing principle for damages upon breach of contract is that the non-breaching party should be provided with the financial equivalent of performance (J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 871). With respect to wrongful dismissal, damages should "represent the salary the employee would have earned had the employee worked during the notice period, less any amounts credited to mitigation" (*Sylvester*, at para. 1). I agree with the majority that applying this rule leads to the deduction of the pension benefits in this case.

119 In *Sylvester*, this Court considered whether disability benefits received by a wrongfully terminated employee during his reasonable notice period should be deducted from damages for wrongful dismissal. Major J., writing for a unanimous Court, held that deduction was required. He explained that employer-provided benefits should not be considered as "distinct from the employment contract, but rather as integral components of it" (para. 13). As such, "[t]he question of deductibility ... turn[ed] on the terms of the employment contract and the intention of the parties" (para. 12).

120 Major J. went on to explain that damages for wrongful dismissal were "based on the premise that the employee would have worked during the notice period" (para. 15). The employee's "contractual right to damages for wrongful dismissal and his contractual right to disability benefits [were] based on opposite assumptions about his ability to work and it [was] incompatible with the employment contract for the respondent to receive both amounts" (para. 17). Based on this analysis, Major J. concluded: "It makes no sense to pay damages based on the assumption that [the plaintiff] would have worked in addition to disability benefits which arose solely because he could not work" (para. 17).

121 It follows from a straightforward application of *Sylvester* that deduction is required in this case. In particular, Mr. Waterman's wrongful dismissal damages must be "based on the premise that the employee would have worked during the notice period" (*Sylvester*, at para. 15). Under the terms of Mr. Waterman's employment contract, he would have been eligible to receive pension benefits *only* upon being terminated or retiring. Therefore, as in *Sylvester*, Mr. Waterman's contractual right to wrongful dismissal damages and his contractual right to his pension are based on "opposite assumptions" about his availability to work (para. 17). It thus "makes no sense" to pay damages on the assumption that he could have earned both (*ibid.*).

122 This conclusion is necessitated by the nature of the pension plan at issue in this case -- a defined benefit plan. This plan is materially different from a defined *contribution* plan, and the distinction between these two types of pension plans is at the heart of my disagreement with the majority.

123 A defined contribution plan "operates in much the same way as group registered retirement savings plans", in that it provides an employee with a finite total amount or lump sum of retirement benefits (A. Kaplan and M. Frazer, *Pension Law* (2nd ed. 2013), at p. 89). It would be inappropriate to deduct pension benefits that a wrongfully terminated employee receives from a defined contribution plan because deduction would leave the employee in a worse position that he would have been in had his employment contract not been breached.

124 In particular, in the case of a defined contribution plan, if the employee's employment contract is performed (i.e. he is given reasonable working notice of his termination and he continues to work through the notice period), he would expect to receive his salary through the notice period and the full lump sum he would have accrued in his savings account or defined contribution plan by the end of the reasonable notice period, including whatever additions should have been made to the plan during that notice period. If, instead, the employee is wrongfully dismissed and draws benefits from his finite lump sum during the reasonable notice period, deducting the pension benefits would leave the employee with an amount equal to his salary through the notice period and the lump sum, less the amount he had withdrawn during the notice period. He would thus be awarded *less* than he was entitled to under his employment contract.

125 Throughout Mr. Waterman's argument before this Court, he has made submissions that his pension operates like a savings account. He is not alone in this respect. The Court of Appeal, at para. 48, quoted with approval language from Kent J. in *Chandler v. Ball Packaging Products Canada Ltd.*, [1992] O.J. No. 3114 (QL) (Gen. Div.), that pension payments should be viewed "as akin to a registered Retirement Savings Plan" (para. 4).

126 The majority too accepts the analogy. It holds that "[p]ension benefits ... constitute a type of retirement savings" (para. 4; see also para. 85). It quotes, with emphasis, the following language from J. M. Perillo, "The Collateral Source Rule in Contract Cases" (2009), 46 San Diego L. Rev. 705, at p. 706:

Suppose an employer fires an employee without justification, breaching a contract of employment, and the employee turns to his or her savings account for living expenses. No one would argue that the employee's recovery against the employer should be diminished by the employee's withdrawals from savings. The savings account is a collateral source. To the extent that another collateral source resembles a savings account, the plaintiff should be able to recover damages without a deduction for the amount received from the collateral source.
[Emphasis added by Cromwell J., at para. 85.]

These references may wrongly suggest that Mr. Waterman's pension benefits came from a finite account and thus came at a cost to him. If Mr. Waterman had needed to draw from his own savings due to his wrongful dismissal, the amount he withdrew would have to be reflected in the damages award in order to put him in the position he would have been in had the contract been performed.

However, analogizing Mr. Waterman's pension to a savings account misconceives the nature of the defined benefit pension plan at issue in this case.

127 Unlike a defined contribution plan, the defined benefit plan at issue in this case is fundamentally different from a savings account. The defined benefit plan did not provide Mr. Waterman with a finite lump sum that was partially depleted by the pension funds he received during his reasonable notice period. Rather, the plan guaranteed him fixed predetermined payments upon retirement for as long as he would live. For that reason, deducting Mr. Waterman's pension benefits in this case does not have the effect of "taking away" benefits that he would have been entitled to had IBM not breached the contract. On the contrary, deducting provides him with exactly what he would have received had the employment contract been performed: an amount equal to his salary during the reasonable notice period and thereafter defined benefits for the rest of his life.

128 The different outcome in the cases of defined benefit and defined contribution plans turns on a straightforward application of the governing principle of contract damages -- that the non-breaching party should be placed in the same position he would have been in had the contract been performed. It has nothing to do with the collateral benefit, compensating advantages or private insurance exception. As my colleague correctly observes, those exceptions are relevant only where the plaintiff experiences "excess recovery" (para. 23). However, as the analysis above demonstrates, there is no excess recovery when pension benefits received from a *defined contribution plan are not* deducted or where benefits received from a *defined benefit plan are* deducted. In each case, the result is to put the employee in the position he would have been in had the contract been performed.

129 At the time Mr. Waterman was wrongfully dismissed, the amount of pension benefits he was to receive upon retirement had already been determined for some time and could not have gone up if he had continued to work for IBM. If Mr. Waterman's pension benefits could have increased during the notice period, his wrongful dismissal damages would have compensated for this loss. However, in this case, Mr. Waterman's wrongful dismissal had no impact on his pension entitlement and, as the parties agree, there is no need to make adjustments to his damage awards based on pension entitlements that would have accrued had he worked through the reasonable notice period.

130 The majority states that the fact that Mr. Waterman's pension comes from a defined benefit plan does not change its nature as a contributory, non-indemnity benefit (paras. 63 and 68). However, the nature of the benefit as non-indemnity or contributory does not answer the question of whether the plaintiff will be provided with the financial equivalence of performance or will receive excess recovery. With respect, the majority reasons conflate the analysis of contract damages for wrongful dismissal with what considerations should apply with respect to the private insurance exception to contract damages. Under the governing principle of contract damages, the fact that the pension plan at issue is a defined benefit plan leads to the conclusion that the benefits must be deducted from Mr. Waterman's wrongful dismissal damages.

131 As an aside, not distinguishing between defined benefit and defined contribution plans may

also be why the majority's policy concern about making pensionable employees cheaper to dismiss is incorrect. The majority suggests that deducting the benefits IBM paid to Mr. Waterman during the reasonable notice period would "provide an incentive for employers to dismiss pensionable employees rather than other employees because it will be cheaper to do so". The majority states that "[t]his is not an incentive which the law should provide" (para. 93).

132 This incentive argument is based on a false premise: that deducting pension benefits from reasonable notice damages would make it cheaper to dismiss a pensionable employee than a non-pensionable employee. That is not the case. The pension benefits that Mr. Waterman received during the notice period did not come out of thin air. With a defined benefit pension plan, the employer is solely responsible for providing the employee with the guaranteed defined benefits. In the event the payment of the defined benefits results in an actuarial deficit in the pension fund, the employer will be required to top up the fund to meet its statutory obligation to keep it fully funded. Alternatively, if the fund is operating at an actuarial surplus despite payment of the benefits, the contribution holiday that the employer may otherwise be able to take -- i.e. the break from its regular contributions to the pension fund -- would be reduced. In this way, withdrawal of the benefits from the pension fund, like any other payment, affects the employer's bottom line.

133 The majority alleges that this analysis is an oversimplification and is inaccurate (para 94). This assertion seems to misunderstand the impact of IBM having paid pension benefits to Mr. Waterman. The analysis has nothing to do with funding the benefits over time. Rather, the analysis is simply how the pension benefits paid by IBM impacted IBM's obligation to ensure the actuarial solvency of the pension fund, such that it would be necessary to either top up the pension fund or to refrain from taking a contribution holiday to the extent of those pension benefit payments.

134 It follows that, with respect to the cost of dismissing pensionable and non-pensionable employees, there is a difference only in form, not substance. That is to say, in the case of an employee who is not eligible to receive his defined pension benefits, the employer compensates a dismissed employee by paying him damages equal to the salary he would have earned during the reasonable notice period. In the case of an employee who is eligible to receive his defined pension benefits, the employer pays: (1) pension benefits from the employer's pension fund, which it is responsible for maintaining, and (2) damages equal to the salary the employee would have earned during the notice period less what it has already paid from the pension fund. In both cases, the cost to the employer is the same: an amount equal to the salary the employee would have earned had he worked through the reasonable notice period. There is thus no incentive to terminate pensionable employees.

135 The majority emphasizes Mr. Waterman's "specific and enforceable rights" in relation to his pension (para. 85). It is not disputed that Mr. Waterman's pension benefits are vested and that this gives him specific and enforceable rights. However, his specific and enforceable rights remain subject to the provisions of the plan text which govern the conditions under which benefits will be paid. As a result, even though Mr. Waterman's pension plan had vested, he could not have

demanded to receive both his salary and his pension benefits had he continued to work for IBM through the reasonable notice period.

Applicability of the Private Insurance Exception

136 The majority agrees that putting Mr. Waterman in the position he would have been in had the contract been performed would lead to the conclusion that the pension benefits must be deducted (para. 2). According to the majority, however, the pension benefits that IBM paid to Mr. Waterman under his employment contract on the assumption that he was retired may be treated as a "private insurance" and, thus, need not be deducted under the private insurance exception. I disagree with that conclusion. In my view, the private insurance exception has no applicability to this case.

137 This case involves the interpretation of a single employment contract that gives rise to Mr. Waterman's right to wrongful dismissal damages and his right to pension benefits. This Court has determined that employer-provided benefits "should not be considered contracts which are distinct from the employment contract, but rather as integral components of it" (*Sylvester*, at para. 13). The majority is correct that the words "'single contract' rule" do not literally appear in *Sylvester*, but the reasoning in *Sylvester* can lead to no other conclusion (para. 52).

138 As I will explain, in the context of a single contract, the collateral benefit or private insurance exception has no application. The reason is straightforward: where the plaintiff's cause of action and his right to a particular benefit arise from the same contract and the plaintiff is indeed entitled to the benefits -- i.e. he has "insured" himself in a manner that requires the defendant to pay the benefits -- then the plaintiff will receive the benefits based on the ordinary governing principle that he should be placed in the position he would have been in had the contract been performed. There will be no need to reach the collateral benefit exception.

139 Said another way, given that Mr. Waterman's pension flows from the same contract under which the court must assess his loss, the need to reach the private insurance exception is itself a concession that Mr. Waterman's pension was not "private insurance" that covered the breach in the first place. If he had "insured" the breach, he would get the benefits under the governing principle that he should be provided with what he would have expected to receive under the terms of the contract.

140 For this reason, the majority's approach to this case contains an inherent inconsistency: the majority concludes that Mr. Waterman had "private insurance" that allows him to keep his pension benefits in addition to his salary. To the extent Mr. Waterman had such "private insurance", it must have come from his employment contract. However, if Mr. Waterman's employment contract indeed allowed him to have pension benefits in addition to his salary, there would be no need to reach any exception: he would get the benefits by simply giving him what he would have expected under the terms of the contract.

141 In addition to this troubling inconsistency, applying the private insurance exception to this

case would not be consistent with the justification for the exception. The rationale for the private insurance exception is that it would be "be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor" (*Parry v. Cleaver*, [1970] A.C. 1 (H.L.), per Lord Reid, at p. 14). Accepting the assumption that Mr. Waterman's work for IBM over the years is analogous to paying premiums to obtain his pension plan, it remains that the contractual terms of the pension or "insurance" he paid for allowed him to receive salary or pension benefits, but not both at the same time. In other words, this is not a case where deduction would lead to some benefit that the plaintiff paid for enuring to the benefit of the defendant. Quite to the contrary, as explained above, deducting is necessary to provide the plaintiff with the pension or "insurance" he paid for. Not deducting has the effect of the plaintiff receiving more than he expected to receive under the terms of his contract and requiring the defendant to pay more than it agreed to pay.

142 This distinguishes the case before the court from all other cases in which the private insurance exception has been applied. Each of *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756, *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654, and *Cunningham* involved a plaintiff who was personally injured by the defendant and, upon being sued, the defendant sought to pay *less* than what it owed under ordinary principles of compensatory damages based on a distinct contractual or statutory benefit that the plaintiff received from a third party.

143 Similarly, *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812, involved a wrongful dismissal suit, in which the employer sought to have its damages reduced based on the employee's distinct statutory entitlement to unemployment benefits. Contrary to the majority's assertion that the benefits were derived from the employment contract, the source of the benefits was a *third party* -- the government. As with *Guy*, *Gill*, and *Cunningham*, *Jack Cewe* was not a case in which the plaintiff's cause of action and the benefit he received came from a single contract whose terms did not allow the plaintiff to receive both salary and benefits at the same time.

144 Considered in terms of the justification for the private insurance exception, in each of *Guy*, *Gill*, *Cunningham* and *Jack Cewe*, the Court was faced with two choices: (1) not deduct the benefits and thus require the defendant to pay the amount equal to the plaintiff's loss determined by ordinary principles of tort or (in the case of *Jack Cewe*) contract damages, even though the plaintiff would receive more than his actual loss as a result of the benefits he received; or (2) allow the defendant to pay nothing or some amount less than the plaintiff's loss, such that the plaintiff does not get the benefit resulting from the premiums he paid to the third party. The Court decided, consistent with the rationale for the private insurance exception, that the plaintiff -- not the defendant -- should receive the benefits associated with the premiums he paid.

145 The choice in this case is very different. The options are to (1) not deduct, requiring the defendant to pay more than it agreed to pay the plaintiff under the terms of the employment contract and awarding the plaintiff more than he bargained for; or (2) deduct, requiring the defendant to pay an amount equal to the plaintiff's loss (i.e. the amount required to put the plaintiff in the position he

would have been in had the contract been performed) and awarding the plaintiff an amount equal to his loss. In neither case do benefits that the plaintiff actually paid for enure to the defendant. The issue is whether the defendant should be required to pay twice, such that the plaintiff receives more than he bargained for under his contract, or pay once, such that the plaintiff receives exactly what he bargained for under his contract. In my view, the latter is appropriate.

146 The fact that this case involves a single contract also distinguishes the cases the majority cites, such as *United States v. Price*, 288 F.2d 448 (4th Cir. 1961), and *Phillips v. Western Company of North America*, 953 F.2d 923 (5th Cir. 1992), in which employees sued their employers in tort for personal injuries caused by the employer. In each of those cases, the employer sought to pay less than the plaintiff's loss from the injury, according to ordinary tort principles, based on benefits that flowed to the plaintiff from his employment contract. In neither case did the facts before the court establish that it would be inconsistent with the terms of the employment contract for the plaintiff to receive both tort damages and his employment benefits. That is in contrast to this case, where, as described above, Mr. Waterman's contract provided that he could receive salary or pension benefits, but not both.

147 Further, the choice before the courts in *Price* and *Phillips* was whether to (1) require the defendant to honour both of its legal duties (the legal duty to take reasonable care under tort and the legal duty to pay the plaintiff the amount promised under his employment contract) such that the plaintiff would receive compensation for his loss and the benefits he was entitled to under his employment contract; or (2) allow the defendant to offset the damages for breaching its duty of care using the benefits that it had separately promised the plaintiff in his employment contract, such that those benefits would enure to the defendant. Again, there is no parallel here. This case involves a single legal duty to honour the terms of an employment contract. The terms of that contract provided that Mr. Waterman would receive only his salary during his reasonable notice period.

148 In sum, I would reject the idea that the private insurance exception is applicable to cases that involve a single contract that is the source of both the plaintiff's cause of action and other benefits. In such circumstances, there is no justification for resorting to the private insurance exception because the plaintiff's entitlement to the benefits is established based on the terms of his contract.

The Majority's Treatment of Sylvester

149 The majority has devoted an extensive portion of its reasons in attempting to distinguish this case from *Sylvester* and at the same time attempting to rely on *Sylvester* (paras. 80-98). As I read the majority's reasons with respect to *Sylvester*, they say that, under the ordinary principles of contract damages, *Sylvester* would support the proposition that Mr. Waterman is entitled to both his salary and his pension benefits at the same time (paras. 88-91). Indeed, if *Sylvester* was authority for such a result, it is difficult to understand the majority's resort to the private insurance exception. With respect, the majority's analysis of *Sylvester* is strained. In my respectful opinion, a straightforward reading of *Sylvester* demonstrates that it is a fully applicable authority supporting

the proposition that under a single contract of employment, barring contract terminology to the contrary, an individual cannot receive salary as if he is working and pension benefits as if he is retired. These are opposite, incompatible assumptions. Thus, salary and pension income are not payable at the same time.

Efficient Breach

150 My colleague appropriately cautions against speculation about "policy" and the future impact of deduction rules. I would not resolve this case based on policy or speculation. In my view, the case should be resolved based on the terms of the parties' contract.

151 Only in response to the majority's concerns about policy, I point out that while the majority's conclusion would operate to Mr. Waterman's benefit in this case, it would do so at the cost of other employees in the future. It is often advantageous for both employers *and* employees to agree to an amount for reasonable notice, rather than having the employee work through the notice period. For instance, in the case of an employer who must terminate an employee, it may be advantageous for the employer to offer the employee at least the amount he would have earned throughout the notice period in order to end the employment relationship immediately. In those circumstances, it will generally also be economically favourable for the employee to accept the offer because he will receive the full salary he would have earned if he worked through the notice period without having to work through the period. He would then be free to earn additional income from alternate employment.

152 In fact, the record reveals that this was precisely the case here: IBM offered Mr. Waterman a separation agreement that would have provided him with even more than he would have earned if he had worked through the reasonable notice period. If IBM had provided Mr. Waterman with the additional 18 months of notice to which he was entitled and Mr. Waterman had worked through the entire notice period, he would have earned approximately \$112,000 in salary and accrued benefits. Under the separation offer Mr. Waterman turned down, he would have received an \$80,000 separation payment, plus an additional \$38,000 in pension payments during the 18-month period. He thus would have received approximately \$118,000. In addition, he would have been free to obtain income from alternative employment.

153 This is an example of efficient breach. This Court has previously described efficient breach and cautioned courts from discouraging such a breach:

Efficient breach is what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, or expressed differently, nobody loses. Efficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff.

(Bank of America Canada v. Mutual Trust Co., 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31)

154 The majority's approach discourages efficient breach in the context of an employer with a defined benefit pension plan who wishes to terminate an employee. This is because, all things equal, the majority approach incentivizes the employer to require the employee to work through the notice period (and avoid paying out the pension benefits) instead of offering the employee a separation package that would be economically superior for the employee. While there are always a number of competing factors that govern whether an employer makes a separation offer and what that offer contains, the majority's approach encourages, at least to some extent, giving working notice rather than severance.

Conclusion

155 The pension benefits IBM paid to Mr. Waterman during the reasonable notice period should be deducted in assessing Mr. Waterman's damages for wrongful dismissal. I would allow the appeal with costs throughout.

Appeal dismissed with costs throughout, MCLACHLIN C.J. and ROTHSTEIN J. dissenting.

Solicitors:

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the respondent: MacKenzie Fujisawa, Vancouver.

* * * * *

Corrigendum, released January 10, 2014

Please note the following changes in the English version of *IBM Canada Limited v. Waterman*, 2013 SCC 70, released December 13, 2013:

Paragraph 144, first sentence should read: "Considered in terms of the justification for the private insurance exception, in each of *Guy*, *Gill*, *Cunningham* and *Jack Cewe*, the Court was faced with two choices: (1) not deduct the benefits and thus require the defendant to pay the amount equal to the plaintiff's loss determined by ordinary principles of tort or (in the case of *Jack Cewe*) contract damages, even though the plaintiff would receive more than his actual loss as a result of the benefits he received; or (2) allow the defendant to pay nothing or some amount less than the plaintiff's loss, such that the plaintiff does not get the benefit resulting from the premiums he paid to the third party."

Paragraph 145, second sentence should read: "The options are to (1) not deduct, requiring the defendant to pay more than it agreed to pay the plaintiff under the terms of the employment contract and awarding the plaintiff more than he bargained for; or (2) deduct, requiring the defendant to pay an amount equal to the plaintiff's loss (i.e. the amount required to put the plaintiff in the position he would have been in had the contract been performed) and awarding the plaintiff an amount equal to his loss."

TAB 2

Case Name:
Canwest Publishing Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or
arrangement of Canwest Publishing Inc./Publications Canwest
Inc., Canwest Books Inc. and Canwest (Canada) Inc.**

[2010] O.J. No. 943

2010 ONSC 1328

65 C.B.R. (5th) 152

2010 CarswellOnt 1344

185 A.C.W.S. (3d) 865

Court File No. CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

March 5, 2010.

(28 paras.)

Bankruptcy and insolvency law -- Administration of estate -- Administrative officials and appointees -- Appointment -- When required or justified -- Remuneration -- Motion by proposed representatives for appointment as representatives of former salaried employees and retirees of applicant, appointment of law firm and order applicant pay fees allowed -- Applicant granted protection under CCAA without requirement to pay employee and retirement benefit plans -- Former salaried employees and retirees had little means of pursuing claim without representation and could not afford counsel -- While applicant's Support Agreement did not permit payment of legal fees, agreement could not oust jurisdiction of court -- Staged payments starting at \$25,000 ordered, to be paid prospectively and not for investigations of or claims against directors.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Motion by proposed representatives for appointment as representatives of former salaried employees and retirees of applicant, appointment of law firm and order applicant pay fees allowed -- Applicant granted protection under CCAA without requirement to pay employee and retirement benefit plans -- Former salaried employees and retirees had little means of pursuing claim without representation and could not afford counsel -- While applicant's Support Agreement did not permit payment of legal fees, agreement could not oust jurisdiction of court -- Staged payments starting at \$25,000 ordered, to be paid prospectively and not for investigations of or claims against directors.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. 36,

Income Tax Act, R.S.O. 1990, c. I.2,

Counsel:

Lyndon Barnes and Alex Cobb for the Canwest LP Entities.

Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Hilary Clarke for the Bank of Nova Scotia,
Administrative Agent for the Senior Secured Lenders'
Syndicate.

Janice Payne and Thomas McRae for the Canwest Salaried Employees and Retirees (CSER) Group.

M.A. Church for the Communications, Energy and Paperworkers' Union.

Anthony F. Dale for CAW-Canada.

Deborah McPhail for the Financial Services Commission of Ontario.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bale (the "Representatives") seek to

be appointed as representatives on behalf of former salaried employees and retirees of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) and Canwest Limited Partnership and the Canwest Global Canadian Newspaper Entities (collectively the "LP Entities") or any person claiming an interest under or on behalf of such salaried employees or retirees including beneficiaries and surviving spouses ("the Salaried Employees and Retirees"). They also seek an order that Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed in these proceedings to represent the Salaried Employees and Retirees for all matters relating to claims against the LP Entities and any issues affecting them in the proceedings. Amongst other things, it is proposed that all reasonable legal, actuarial and financial expert and advisory fees be paid by the LP Entities.

2 On February 22, 2010, I granted an order on consent of the LP Entities authorizing the Communications, Energy and Paperworker's Union of Canada ("CEP") to continue to represent its current members and to represent former members of bargaining units represented by the union including pensioners, retirees, deferred vested participants and surviving spouses and dependants employed or formerly employed by the LP Entities. That order only extended to unionized members or former members. The within motion focused on non-unionized former employees and retirees although Ms. Payne for the moving parties indicated that the moving parties would be content to include other non-unionized employees as well. There is no overlap between the order granted to CEP and the order requested by the Salaried Employees and Retirees.

Facts

3 On January 8, 2010 the LP Entities obtained an order pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") staying all proceedings and claims against the LP Entities. The order permits but does not require the LP Entities to make payments to employee and retirement benefit plans.

4 There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.

5 Additionally, seven retirees and two current employees are (or would be) eligible for a pension benefit from Southam Executive Retirement Arrangements ("SERA"). SERA is a non-registered pension plan used to provide supplemental pension benefits to former executives of the LP Entities and their predecessors. These benefits are in excess of those earned under the Canwest Southam Publications Inc. Retirement Plan which benefits are capped as a result of certain provisions of the

Income Tax Act. As of the date of the Initial Order, the SERA payments ceased also. This impacts beneficiaries and spouses who are eligible for a joint survivorship option. The aggregate benefit obligation related to SERA is approximately \$14.4 million. The Representatives also seek to act for these seven retirees and for the aforementioned law firms to be appointed as representative counsel.

6 Since January 8, 2010, the LP Entities have been pursuing the sale and investor solicitation process ("SISP") contemplated by the Initial Order. Throughout the course of the CCAA proceedings, the LP Entities have continued to pay:

- (a) salaries, commissions, bonuses and outstanding employee expenses;
- (b) current services and special payments in respect of the active registered pension plan; and
- (c) post-employment and post-retirement benefits to former employees who were represented by a union when they were employed by the LP Entities.

7 The LP Entities intend to continue to pay these employee related obligations throughout the course of the CCAA proceedings. Pursuant to the Support Agreement with the LP Secured Lenders, AcquireCo. will assume all of the employee related obligations including existing pension plans (other than supplemental pension plans such as SERA), existing post-retirement and post-employment benefit plans and unpaid severance obligations stayed during the CCAA proceeding. This assumption by AcquireCo. is subject to the LP Secured Lenders' right, acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.

8 All four proposed Representatives have claims against the LP Entities that are representative of the claims that would be advanced by former employees, namely pension benefits and compensation for involuntary terminations. In addition to the claims against the LP Entities, the proposed Representatives may have claims against the directors of the LP Entities that are currently impacted by the CCAA proceedings.

9 No issue is taken with the proposed Representatives nor with the experience and competence of the proposed law firms, namely Nelligan O'Brien Payne LLP and Shibley Righton LLP, both of whom have jointly acted as court appointed representatives for continuing employees in the Nortel Networks Limited case.

10 Funding by the LP Entities in respect of the representation requested would violate the Support Agreement dated January 8, 2010 between the LP Entities and the LP Administrative Agent. Specifically, section 5.1(j) of the Support Agreement states:

"The LP Entities shall not pay any of the legal, financial or other advisors to any other Person, except as expressly contemplated by the Initial Order or with the consent in writing from the Administrative Agent acting in consultation with the Steering Committee."

11 The LP Administrative Agent does not consent to the funding request at this time.

12 On October 6, 2009, the CMI Entities applied for protection pursuant to the provisions of the CCAA. In that restructuring, the CMI Entities themselves moved to appoint and fund a law firm as representative counsel for former employees and retirees. That order was granted.

13 Counsel were urged by me to ascertain whether there was any possibility of resolving this issue. Some time was spent attempting to do so, however, I was subsequently advised that those efforts were unsuccessful.

Issues

14 The issues on this motion are as follows:

- (1) Should the Representatives be appointed?
- (2) Should Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed as representative counsel?
- (3) If so, should the request for funding be granted?

Positions of Parties

15 In brief, the moving parties submit that representative counsel should be appointed where vulnerable creditors have little means to pursue a claim in a complex CCAA proceeding; there is a social benefit to be derived from assisting vulnerable creditors; and a benefit would be provided to the overall CCAA process by introducing efficiency for all parties involved. The moving parties submit that all of these principles have been met in this case.

16 The LP Entities oppose the relief requested on the grounds that it is premature. The amounts outstanding to the representative group are pre-filing unsecured obligations. Unless a superior offer is received in the SISF that is currently underway, the LP Entities will implement a support transaction with the LP Secured Lenders that does not contemplate any recoveries for unsecured creditors. As such, there is no current need to carry out a claims process. Although a superior offer may materialize in the SISF, the outcome of the SISF is currently unknown.

17 Furthermore, the LP Entities oppose the funding request. The fees will deplete the resources of the Estate without any possible corresponding benefit and the Support Agreement with the LP Secured Lenders does not authorize any such payment.

18 The LP Senior Lenders support the position of the LP Entities.

19 In its third report, the Monitor noted that pursuant to the Support Agreement, the LP Entities are not permitted to pay any of the legal, financial or other advisors absent consent in writing from the LP Administrative Agent which has not been forthcoming. Accordingly, funding of the fees requested would be in contravention of the Support Agreement with the LP Secured Lenders. For

those reasons, the Monitor supported the LP Entities refusal to fund.

Discussion

20 No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). Indeed, a human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group.

21 Factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.

22 The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report, and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.

23 The primary objection to the relief requested is prematurity. This is reflected in correspondence sent by counsel for the LP Entities to counsel for the Senior Lenders' Administrative Agent. Those opposing the relief requested submit that the moving parties can keep an eye on the Monitor's website and depend on notice to be given by the Monitor in the event that unsecured creditors have any entitlement. Counsel for the LP Entities submitted that counsel for the proposed representatives should reapply to court at the appropriate time and that I should dismiss the motion without prejudice to the moving parties to bring it back on.

24 In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits.

That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. It would be of considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

25 The second basis for objection is that the LP Entities are not permitted to pay any of the legal, financial or other advisors to any other person except as expressly contemplated by the Initial Order or with consent in writing from the LP Administrative Agent acting in consultation with the Steering Committee. Funding by the LP Entities would be in contravention of the Support Agreement entered into by the LP Entities and the LP Senior Secured Lenders. It was for this reason that the Monitor stated in its Report that it supported the LP Entities' refusal to fund.

26 I accept the evidence before me on the inability of the Salaried Employees and Retirees to afford legal counsel at this time. There are in these circumstances three possible sources of funding: the LP Entities; the Monitor pursuant to paragraph 31(i) of the Initial Order although quere whether this is in keeping with the intention underlying that provision; or the LP Senior Secured Lenders. It seems to me that having exercised the degree of control that they have, it is certainly arguable that relying on inherent jurisdiction, the court has the power to compel the Senior Secured Lenders to fund or alternatively compel the LP Administrative Agent to consent to funding. By executing agreements such as the Support Agreement, parties cannot oust the jurisdiction of the court.

27 In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for Representative Counsel although I acknowledge that the circumstances here are somewhat different. Staged payments commencing with the sum of \$25,000 may be more appropriate. Funding would be prospective in nature and would not extend to investigation of or claims against directors.

28 Counsel are to communicate with one another to ascertain how best to structure the funding and report to me if necessary at a 9:30 appointment on March 22, 2010. If everything is resolved, only the Monitor need report at that time and may do so by e-mail. If not resolved, I propose to

make the structuring order on March 22, 2010 on a nunc pro tunc basis. Ottawa counsel may participate by telephone but should alert the Commercial List Office of their proposed mode of participation.

S.E. PEPALL J.

TAB 3

Case Name:
Target Canada Co. (Re)

**RE: IN THE MATTER OF the Companies' Creditors
Arrangement Act, R.S.C., 1985,
c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise
or Arrangement of Target Canada
Co., Target Canada Health Co., Target
Canada Mobile GP Co., Target Canada
Pharmacy (BC) Corp., Target Canada Pharmacy
(Ontario) Corp., Target Canada
Pharmacy Corp., Target Canada Pharmacy
(SK) Corp., and Target Canada
Property LLC**

[2015] O.J. No. 1205

2015 ONSC 1028

2015 CarswellOnt 3274

23 C.B.R. (6th) 303

252 A.C.W.S. (3d) 11

Court File No.: CV-15-10832-00CL

Ontario Superior Court of Justice

G.B. Morawetz R.S.J.

Heard: February 11, 2015.

Judgment: February 18, 2015.

(41 paras.)

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters --
Compromises and arrangements -- Directions -- Motion by the Pharmacy Franchisee Association*

of Canada for a direction that the disclaimer of the Franchise Agreements be set aside dismissed -- In January 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements, seeking to shut down the pharmacies in Target Canada store locations within 30 days -- Setting aside the disclaimer might provide limited assistance to the pharmacists, but it would come at the expense of other creditors, and that was not a desirable outcome.

Commercial law -- Franchising -- Franchise agreement -- Motion by the Pharmacy Franchisee Association of Canada for a direction that the disclaimer of the Franchise Agreements be set aside dismissed -- In January 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements, seeking to shut down the pharmacies in Target Canada store locations within 30 days -- Setting aside the disclaimer might provide limited assistance to the pharmacists, but it would come at the expense of other creditors, and that was not a desirable outcome.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 32(2), s. 32(4)

Counsel:

Jeremy Dacks, John MacDonald and Shawn Irving, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants").

Jay Swartz, for the Target Corporation.

William Sasso, Sharon Strosberg and Jacqueline Horvat, Proposed Representative Counsel for the Pharmacy Franchisee Association of Canada.

Susan Philpott, Employee Representative Counsel for employees of the Applicants.

Alan Mark, Melaney Wagner, Graham Smith and Francy Kussner, for the Monitor, Alvarez & Marsal Inc.

J. Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC.

Andrew Hodhod, for Bell Canada.

Harvey Chaiton, for the Directors and Officers.

ENDORSEMENT

1 G.B. MORAWETZ R.S.J.:-- The Pharmacy Franchisee Association of Canada ("PFAC") brought this motion for the following relief:

- a. appointing PFAC as the representative of the Pharmacists and Franchisees (collectively, the "Pharmacists") under the Pharmacy Franchise Agreements ("Franchise Agreements");
- b. appointing Sutts, Strosberg LLP as the Pharmacists' Representative Counsel (the "Representative Counsel");
- c. appointing BDO Canada ("BDO") as the Pharmacists' financial advisor;
- d. directing that the Pharmacists' reasonable legal and other professional expenses be paid from the estate of the Target Canada Entities with appropriate administrative charges to secure payment;
- e. directing that the "Disclaimer of Franchise Agreements" dated January 26, 2015 by the Franchisor, Target Pharmacy Franchising LP ("Target Pharmacy") be set aside;
- f. declaring that the Franchise Agreements and/or related agreements may not be disclaimed without court order; and
- g. directing that Target Pharmacy cannot deny the Pharmacists access to premises, discontinue supplies or otherwise interfere with a Pharmacist's operations without that Pharmacist's consent or a court order.

2 On January 26, 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements and related agreements to each of the Pharmacists operating the pharmacies at 93 locations across Canada (outside Quebec), seeking to shut down these pharmacies in the Target Canada store locations within 30 days.

3 The Pharmacists ask the court to deny Target Pharmacy's Disclaimer of the Franchise Agreements because (i) the Disclaimers will not enhance the prospects of a viable arrangement being made; and (ii) the Pharmacists will suffer significant financial hardship as a consequence of

the disclaimer, with insolvency and/or bankruptcy awaiting many of them.

4 Under the proposed wind-down, Target Pharmacy is not responsible for pharmacy shut-down costs. Instead, the Pharmacists are responsible for (i) the payment of salaries, severance pay and other obligations to their own employees, suppliers and contractors; (ii) the relocation costs of their pharmacies; and (iii) the continuation of services to their patients in accordance with professional standards.

5 The Pharmacists recognize that they face numerous challenges as a result of Target store closures. In relocating, or winding-down pharmacy operations, the Pharmacists are required to comply with applicable legislation, regulations and standards governing the conduct of pharmacists in Canada, including such matters as: notice of pharmacy closure; notice of intention to open a new pharmacy; the safe-guarding of personal health records; providing notice to patients respecting their personal health information; and safeguarding and disposing of narcotics and controlled substances.

6 The Pharmacists seem to accept that when a Target store closes, the pharmacy within that store will also close. They state that they require "breathing space" that may be afforded to them by an order that the Franchise Agreements are not to be disclaimed at this time. They ask the court to direct Target Pharmacy and its Affiliates not to deny them access to their licenced space or otherwise interfere with the Pharmacist's operations without the consent of or on terms directed by the court. Practically speaking, the Pharmacists want to postpone the effect of the disclaimer in the hope of obtaining a continuation of support payments from Target Canada for an unspecified time.

7 There is no doubt that the closure or pending closure of Target Canada is causing and will cause significant dislocation for a number of parties. For the most part, Target Employees will lose their jobs. Representative Counsel have been appointed to assist employees in a process that includes an Employee Trust.

8 The closure of Target Canada also impacts suppliers to Target, especially sole suppliers. The insolvency of Target Canada and its filing under the *Companies' Creditors Arrangement Act* (CCAA) has no doubt resulted in Target defaulting on a number of contractual relationships. These suppliers will have claims against Target Canada that will be filed in due course.

9 The closure of Target Canada also affects the Pharmacists. The insolvency of Target and its filing under the CCAA has resulted in Target defaulting on its contractual relationships with the Pharmacists. Target wishes to disclaim the Franchise Agreements. The Monitor approved the proposed disclaimer and, as noted, disclaimer notices were sent on January 26, 2015.

10 The Pharmacists are challenging the disclaimer and seek an order under s. 32(2) of the CCAA that the Franchise Agreements not be disclaimed. Section 32(4) of the CCAA references a section 32(2) order and provides:

Factors to be considered -- In deciding whether to make the order, the court is

to consider, among other things,

- (a) whether the monitor approved the proposed disclaimer or resiliation;
- (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

11 The reality that the Target stores will be closing provides, in my view, the starting point to analyze the issue being brought forward by the Pharmacists.

12 Following the closing of a particular Target Store, it is unrealistic for the Pharmacist to carry on the operation of the pharmacy. As noted by counsel to the Applicants, as soon as operations cease at a particular location, the store will "go dark" and there will no longer be employee or security support that would permit the Franchisees to continue to operate. Further, counsel to the Applicants submits it would not be either commercially reasonable or practical for the Franchisees to continue to operate in a closed store, nor would it be reasonable or in the interests of stakeholders to require these locations to remain open in order to serve the interests of the Franchisees.

13 It is in this context that the issue of the disclaimer has to be considered.

14 Counsel to the Pharmacists seem to appreciate the reality of the situation, as reflected in the following references in their factum.

- 49. It is cold comfort for the Pharmacists to be advised that their losses in relation to the disclaimer of the Franchise Agreement are provable claims in the CCAA proceedings. The Pharmacists must pay their employees now. It is problematic that a provable claim may result in the possible recovery of some part of those payments, at a future uncertain date, if the funds are available in the Target Pharmacy Estate.
- 50. Evidence that simply provides that a debtor company will be more profitable with the disclaimer contracts is insufficient. Setting aside the disclaimers in this case will provide the Pharmacists with flexibility and time to make informed decisions and carry out their own relocation and/or wind-down in a manner that causes the least amount of damages to

themselves and those who depend on them. ...

53. Respectfully, such disclaimer should not be permitted until the court receives an independent report of the circumstances of each of the Pharmacists and directs the orderly wind-down and/or relocation of such operations on terms that are fair and reasonable. ...

55. In no respect is the 30-day termination of the Franchise Agreements fair, reasonable and equitable to the Pharmacists, their employees and the public they serve. For many Pharmacists, it minimizes their capacity to relocate, [and] will leave them without funds to pay their employees, or the capacity to meet their ongoing obligations to their patients.

15 It seems to me, having considered these submissions, that the Pharmacists recognize that it is inevitable that the pharmacies will be shut down.

16 With respect to the factors to be considered as set out in s. 32(4), the disclaimer notices were approved by the Monitor. The Pharmacists complain that no reasons were provided in the notice approved by the Monitor. However, there is no requirement in s. 32(1) for the Monitor to provide reasons for its approval. This is reflected in Form 4 -- Notice by Debtor Company to Disclaim or Resiliate an Agreement.

17 However, the absence of reasons does not lead necessarily to the conclusion that the Monitor did not consider certain factors prior to providing its approval.

18 The Monitor has made reference to the issues affecting the pharmacies in its Reports.

19 The pharmacies were specifically the subject of comment in the Monitor's First Report at sections 8.2 - 8.5, and in the Second Report at section 6. Section 6.1 (h) of the Second Report specifically comments on the disclaimer notices. A summary of the reasons is provided at section 6.2.

20 The information contained in the Monitor's reports establishes that there was communication as between Target Canada, the Monitor and the Franchisees such that it was clear that the stores were being closed. Specific reference to the communication is set out in the Monitor's Report at section 6.1(f), which in turn references the second Wong affidavit, filed by the Applicants.

21 I am satisfied that the Monitor considered a number of relevant factors prior to approving the disclaimer notices.

22 With respect to the second factor to be considered, namely whether the disclaimer would

enhance the prospects of a viable compromise or arrangement being made in respect of the company, the Applicants have indicated they may be filing a plan of arrangement. I note that a plan may be required to ensure an orderly distribution of assets to the creditors.

23 The Applicants seek to achieve an orderly wind-down and maximization of realizations to the benefit of all unsecured creditors. It seems to me that if the disclaimers are set aside it would delay this process because it would extend the time period for Target Canada to make payments to one group of creditors (the Pharmacists) to the detriment of the creditors generally. Further, in the absence of an effective disclaimer, the Target Entities will continue to incur significant ongoing administrative costs which would be detrimental to the estate and all stakeholders.

24 The interests of all creditors must be taken into account. In this case, store closures and liquidation are inevitable. The Applicants should focus on an asset realization and a maximization of return to creditors on a timely basis. Setting aside the disclaimer might provide limited assistance to the Pharmacists, but it would come at the expense of other creditors. This is not a desirable outcome. I expressed similar views in *Timminco Ltd., Re*, 2012 ONSC 4471 at paragraph 62 as follows:

[62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

25 I am satisfied that the disclaimer will be beneficial to the creditors generally because it will enable the Applicants to move forward with their liquidation plan without a further delay to accommodate the Pharmacists.

26 The third factor is whether the disclaimer would likely cause significant financial hardship to a party to the agreement. This factor is addressed by Counsel to the Monitor at paragraph 27 of its factum.

27. On its own terms the CCAA effectively imposes a high threshold, beyond economic or financial loss, for the consideration under section 32(4): there must be evidence of financial *hardship*, it must be *significant* financial hardship, and it must be *likely* to be caused by the disclaimer. Financial loss or damage, without more, is not sufficient, in the Monitor's submission. It appears that Section 32 itself recognizes the distinction, providing expressly in ss. 32(7) that where a party suffers "a loss" in relation to the disclaimer the consequence is that such party "is considered to have a provable claim." (emphasis in original)

27 In these circumstances, the pharmacies will inevitably close in the very near future whether or not the Franchise Agreements are disclaimed. I accept the submission of counsel to the Monitor to the effect that no Franchisee has adduced evidence that disallowing the Disclaimer and continuing to operate in otherwise dark, vacated premises would improve its financial circumstances.

28 The situation facing the Pharmacists is not pleasant. However, in my view, setting aside the disclaimer will not improve their situation. Extending the time before the disclaimers take effect has the consequence of requiring Target Canada to allocate additional assets to the Pharmacists in priority to other unsecured creditors. This is not a desirable outcome.

29 The Target Canada Entities, in consultation and with the support of the Monitor, have offered a degree of accommodation to the Pharmacists. The details are set out at paragraphs 64-66 of the affidavit of Mark Wong sworn February 16, 2015:

64. As outlined above, in consultation with and with the support of the Monitor, on February 9, 2015 the Target Canada Entities' legal advisors delivered an accommodation to PFAC's counsel intended to address the primary concern expressed by PFAC, namely that franchisees require additional time to transfer patient files and drug inventory and to relocate their respective pharmacy businesses. Under the terms of the accommodation, TCC will permit the pharmacists to continue to operate at their respective existing TCC locations until the earlier of March 30, 2015 and three days following written notice by TCC to the pharmacist of the anticipated store closure at such pharmacist's location. The accommodation provides that the Notices of Disclaimer will continue in effect and the franchise agreements will be disclaimed on February 25, 2015, but the pharmacists will be entitled to remain on the premises for an additional period of time.
64. Under the terms of the accommodation, pharmacists will be able to continue operating in TCC stores for longer than the 30-day period contemplated. Depending on the date the Agent decides to vacate certain TCC stores, many pharmacists may be able to continue operating for 60 days or more following delivery of the Notices of Disclaimer and approximately 75 days following the date of the Initial Order. As I described above, at any time after the third anniversary of the opening date of the pharmacy, TCC Pharmacy would have the right to terminate the franchise agreement for any reason on 60 days' notice.
66. The March 30, 2015 date indicated in the accommodation made by Target Canada Entities is intended to be a reasonable compromise whereby pharmacist franchisees will get additional time to transfer patient files and inventory and

relocate their businesses, while at the same time permitting the Target Canada Entities to undertake the orderly wind down of TCC pharmacy operations and the TCC retail stores as a whole. As I described above, in order to accommodate the continued operations of the pharmacies during the wind down process, TCC Pharmacy and TCC have not yet delivered notices of disclaimer to a number of third-party providers such as McKesson, Kroll and others, which TCC Pharmacy has maintained at considerable cost. The March 30, 2015 outside date for the operation of all TCC pharmacies will allow TCC Pharmacy to time the delivery of disclaimer notices to these third-party providers so as to avoid incurring additional unnecessary costs. The certainty provided by the firm outside date is also to the benefit of the pharmacies themselves, each of whom will be required to wind down their operations and make alternate arrangements in the very short term as a result of the imminent closures of TCC retail stores.

30 In the circumstances of this case, this accommodation represents, in my view, a constructive, practical and equitable approach to address a difficult issue.

31 Having considered the factors set out in section 32(4) of the CCAA, the motion of PFAC for a direction that the disclaimer of the Franchise Agreements be set aside is dismissed, together with ancillary relief related to the disclaimers. It is not necessary to address the standing issue raised by the Monitor.

32 I turn now to the request of PFAC that it be appointed representative of the Franchisees and that Sutts, Strosberg LLP be appointed as the Pharmacists' Representative Counsel, and BDO as the Pharmacists' financial advisor.

33 In view of my decision relating to the disclaimers, the scope of legal and financial services required by the Pharmacists may be limited. However, there are many transitional issues that remain to be addressed. First and foremost is dealing with the patient records and ensuring uninterrupted delivery of prescription drugs to all such patients. There is also interaction required between Target Pharmacy, the Franchisees, and the regulators, concerning the relocation or shut down of pharmacies and the return of certain products to suppliers. This is not a simple case where the Franchisee receiving the disclaimer notice can simply walk away from the scene. From a professional and regulatory standpoint, they still have to participate in the process.

34 In addressing these transition issues and recognizing that similar circumstances exist for the Franchisees, there would appear to be some benefit in having a limited form of representation for the Franchisees. This would assist in ensuring that a consistent approach is followed not only in the wind-down or relocation aspect of the process, but also in the claims process. In my view, the estate could benefit if this process was coordinated.

35 The Monitor and the Applicants would have a single point of contact which would likely result in a reduction in administrative time and costs during the liquidation and the claims process. I

am satisfied that PFAC has the support of the majority of franchisees. PFAC is appointed as the Representative of the Pharmacists. Sutts, Strosberg LLP is appointed Representative Counsel and BDO is appointed as the Pharmacists financial advisor.

36 The funding of this representational role is to be limited. The Applicants are to make available up to \$100,000, inclusive of disbursements and HST, to PFAC to be used for legal and financial advisory services to be provided by Sutts, Strosberg, as Representative Counsel and BDO as financial advisor in these proceedings. PFAC can provide copies of invoices to the Monitor, who can arrange for payment of same. Any surplus funds at the conclusion of the representation are to be returned to the Applicants. The contribution to PFAC can be used only to cover legal and financial advisory services provided to date in these proceedings as well as to assist on the going forward matters, subject to the following parameters.

37 Such assistance is to be limited to:

- a. corresponding with the regulators concerning the wind-down process and the relocation process;
- b. return of inventory; and
- c. participating in the claims process.

38 If the individual franchisees decide not to participate in PFAC, they should not expect any further accommodation in a financial sense.

39 In arriving at this accommodation, I have taken into account that this limited funding will provide benefits to the Applicants under CCAA protection insofar as the legal and financial advisory services provided by Representative Counsel and BDO should reduce the overall administrative cost to the estate and will avoid a multiplicity of legal retainers. The representation and funding will also benefit the franchisees so that they can effectively shut-down or relocate their business and prepare any resulting claim in the CCAA proceedings.

40 Given the limited nature of the Applicants' financial contribution, an administrative charge is not, in my view, required.

41 In the result, PFAC's motion for representation status is granted, with limitations set out above. The motion in respect of the disclaimers is dismissed.

G.B. MORAWETZ R.S.J.

N° / No.: 500-11-048114-157

SUPERIOR COURT
(COMMERCIAL DIVISION)

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

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC.,

Petitioners

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

- and -

FTI CONSULTING CANADA INC.

Monitor

- and -

MICHAEL KEEPER, TERENCE WATT, DAMIEN LABEL & NEIL JOHNSON

Petitioners-Mises-en-cause

BOOK OF AUTHORITIES

Factum of the Petitioners-Mises-en-cause as Representatives of Non-Union and Retired Employees of the Wabush CCAA Parties in Support of Their Notice of Objection to the Wabush CCAA Parties' Motion for the Issuance of an Order Dated May 29, 2015

M^{es} NICHOLAS SCHEIB, ANDREW HATNAY AND ARI KAPLAN
Co-Attorneys for the Petitioners-Mises-en-cause Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson

AS-0G41

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ORIGINAL