Court File No. CV-25-00738613-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD., 1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C. UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.

EMPLOYEE REPRESENTATIVE COUNSEL'S BOOK OF AUTHORITIES

July 24, 2026

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See paras. 18-19, 23-24

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Bellai v. Forest Industry Pension Plan (Trustee of IWA) | 2003 BCSC 1077, 2003 CarswellBC 1711, 37 C.C.P.B. 1, 124 A.C.W.S. (3d) 1001, [2003] B.C.J. No. 1613, [2003] B.C.W.L.D. 689, 2003 C.E.B. & P.G.R. 8050 (headnote only), 2 E.T.R. (3d) 9 | (B.C. S.C., Jul 8, 2003)

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Electrical Industry of Ottawa Pension Plan v. Cybulski

2001 CarswellOnt 4214, 2001 C.E.B. & P.G.R. 8396 (headnote only), [2001] O.J. No. 4593, [2001] O.T.C. 835, 109 A.C.W.S. (3d) 984, 30 C.C.P.B. 95

The Board of Trustees of the Electrical Industry of Ottawa Pension Plan (James Barry, Dan Brennan, Mike Caletti, Cornelius Kroon, Gerald McDonald, Douglas Parsons, Kenneth Scott and Michael Tremblay), Applicants and Nelson Cybulski in His Personal Capacity and in His Representative Capacity as Treasurer of the International Brotherhood of Electrical Workers Union Local 586, Electrical Contractors Association of Ottawa and the Superintendent of Financial Services, Respondents

Roy J.

Heard: November 7, 2001
Judgment: November 19, 2001
Docket: 01-CV-18268

Counsel: *Fiona Campbell*, for Applicants
Ian B. McBride, *Tara E. Newman*, for Respondents

Subject: Estates and Trusts; Corporate and Commercial
Related Abridgment Classifications
Pensions
I Private pension plans
I.2 Payment of pension
I.2.h Determination of benefits payable
I.2.h.ii Credited service
Headnote
Pensions --- Payment of pension — Determination of benefits payable — Credited service
Trustees of multi-employer pension plan for electricians established practice of giving plan members whose employment by participating employer was terminated pension credits for period of 90 days following termination — After 90 days if plan member was still not working for participating employer, trustees considered whether member was ready, willing and able to work as electrician and if so, exercised discretion as to whether to continue to give member credited service — Several plan members objected to trustees' practice which restricted granting of credited service — Trustees applied for directions — Trustees' practice was in accordance with trust agreement and pension plan — Trustees' interpretation of trust agreement and pension plan for period 1974 to 1994 was reasonable and correct — Pension plan would not be viable if members could maintain membership in plan yet remain unemployed or work for non-participating employer indefinitely — To interpret 1988 amendments to plan upon introduction of Pension Benefits Act, 1987, as giving members possibility of two-year break in service without reduction of benefits would lead to problems under governing legislation — Pension Benefits Act, 1987, S.O. 1987, c. 35.
Table of Authorities
Cases considered by *Roy J.*:

Bathgate v. National Hockey League Pension Society (1994), 1 C.C.P.B. 209, 69 O.A.C. 269, 2 C.C.E.L. (2d) 94, 110 D.L.R. (4th) 609, 2 E.T.R. (2d) 1, 16 O.R. (3d) 761 (Ont. C.A.) — considered

Jeffery, Re, [1948] O.R. 735, [1948] 4 D.L.R. 704 (Ont. H.C.) — considered

Rivett v. Hospitals of Ontario Pension Plan, 9 C.C.P.B. 284, C.E.B. & P.G.R. 8251, 1995 CarswellOnt 1139 (Ont. Gen. Div.) — considered

Sansalone v. Wawanesa Mutual Insurance Co., (sub nom. *Non-Marine Underwriters, Lloyd's of London v. Scalera)* 2000 SCC 24, 75 B.C.L.R. (3d) 1, 18 C.C.L.I. (3d) 1, (sub nom. *Non-Marine Underwriters, Lloyd's of London v. Scalera)* 185 D.L.R. (4th) 1, 50 C.C.L.T. (2d) 1, [2000] 5 W.W.R. 465, (sub nom. *Non-Marine Underwriters, Lloyd's of London v. Scalera)* [2000] I.L.R. I-3810, (sub nom. *Scalera v. Lloyd's of London)* 253 N.R. 1, (sub nom. *Scalera v. Lloyd's of London)* 135 B.C.A.C. 161, (sub nom. *Scalera v. Lloyd's of London)* 221 W.A.C. 161, (sub nom. *Non-Marine Underwriters, Lloyd's of London v. Scalera)* [2000] 1 S.C.R. 551 (S.C.C.) — considered

Schmidt v. Air Products of Canada Ltd., 3 C.C.P.B. 1, 20 Alta. L.R. (3d) 225, (sub nom. *Stearns Catalytic Pension Plans, Re)* 168 N.R. 81, [1994] 8 W.W.R. 305, 3 E.T.R. (2d) 1, 4 C.C.E.L. (2d) 1, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631, (sub nom. *Stearns Catalytic Pension Plans, Re)* 155 A.R. 81, (sub nom. *Stearns Catalytic Pension Plans, Re)* 73 W.A.C. 81, C.E.B. & P.G.R. 8173, 1994 CarswellAlta 138, 1994 CarswellAlta 746, [1995] O.P.L.R. 283 (S.C.C.)

Statutes considered:

Income Tax Act, S.C. 1970-71-72, c. 63

Generally — referred to

Pension Benefits Act, 1987, S.O. 1987, c. 35

Generally — referred to

APPLICATION by trustees of pension plan for directions on interpretation of pension plan and trust agreement.

***Roy J.*:**

Introduction

1 This is an application by the Board of Trustees of the Electrical Industry of the Ottawa Pension Plan (the "Trustees") for the opinion, advice and direction of the Court regarding the interpretation of certain provisions of the Trust Agreements and Pension Plan texts for the Electrical Industry of the Ottawa Pension Plan. More particularly, the Trustee relying on the Trust Agreements and the texts of the Pension Plan have determined what is credited service for the members of the Plan.

2 At the outset a number of members were granted leave to intervene and be added as respondent's in this application. Further, counsel for a Mr. Jake, a retired electrician, was permitted to make brief submissions. I am grateful for the assistance of counsel in this matter. The complete and concise Factums prepared by counsel greatly facilitated the task of the Court.

Background

3 The E10 Pension Plan covers electricians and apprentice electricians who are members of the International Brotherhood of Electrical Workers, local 586. The provisions of the Pension Plan, including those at issue in this application were designed to take into account the nature of the industry in which these members work. Electricians in the construction industry in Ottawa typically work for numerous employers for short periods rather than a single employer for a lengthy period. Generally, members of local 586 do the electrical work on construction projects then move on to another construction project. Local 586 facilitates this by operating a hiring hall. When an employer who is bound to a collective agreement with local 586 needs electricians, he or she calls the hiring hall and receives the names of the members of local 586 who are at the top of the out of work list.

4 Electrical work in the construction industry is seasonal and cyclical. It is seasonal because construction projects are most commonly done during the good weather and there tends to be less work available in the winter. The work is cyclical because it is very sensitive to the fluctuations in the economy. Obviously, when the economy is good there is a lot of construction and most members of local 586 are at work. When there is a downturn in the economy, this usually means less construction and less work for members of local 586.

5 When there is high unemployment among the members of local 586, some of the members will take jobs outside of the local jurisdiction. Other members will work with employers who are not generally called union employers. Some members will work out of Province and out of Country.

6 This Plan was set up to recognize the realities of the construction industry. It is often referred to as a Brotherhood Plan in that it provides credit based on membership in the Plan as opposed to the number of hours worked. Under the Brotherhood System, even if a member was unemployed between jobs, during the off season or during economic downturn the member would still get credit in the Plan during the period of unemployment. In other words, under the Brotherhood System it was intended that the members that were working and contributing to the Plan would be assisting those who were unemployed and not contributing to the Plan for a period of time.

7 The E10 Pension Plan (or the "Plan") was created effective January 1 st, 1974, and is registered with the Financial Service Commission of Ontario and the Canada Customs and Revenue Agency. The Plan is described as a multi-employer Pension Plan. In other words, Pension Plan contributions come from not just one employer but from a number of employers. The contributions to the Plan are-negotiated as part of a wage package for electricians and apprentice electricians in the collective agreements, between the Electrical Trade Bargaining Agency and the Electrical Contractor Association of Ottawa. When a member of the Plan works for a participating employer, the employer remits the pension contribution to the Plan on behalf of the employee directly to the Plan Administrator. When an employee is not employed by a participating employer, there is no contribution made to the Plan.

8 Another characteristic of this Plan is that it is referred to as a "defined benefit" Pension Plan. In other words, the pension benefits are paid out to the Plan member based on a formula set out in the Plan documents. The Plan is also a fixed contribution plan, this means that if the Plan is under funded or has deficits, any special payment to eliminate deficit must be made from the negotiated contributions. If the negotiated contributions are insufficient, it is necessary to either increase the contributions or decrease the benefits.

9 The Plan documents, which established the Plan and set out the parameters and responsibilities of the Trustees, are to be found in the application record.

10 The Trust Agreement found at Tab 2A of the application record, provides that the pension, health and welfare fund is to be administered by the Board of Trustees with equal numbers of representatives from the employers (ECA and Local 586). The Trust Agreement gives the Trustees wide powers to administer the Pension Plan, as well as a broad discretion to determine questions of coverage and eligibility and to interpret provisions of the agreement. For the purposes of this application the Trust Agreement remains basically the same from 1974 to 1993.

11 The Pension Plan Agreement found at Tab 2D had minor amendments in 1983 and more important amendments in 1988 to comply with the *Ontario Pension Act* of 1988. In 1994, the Plan was converted to an hour bank system.

12 The Trustees relying basically on Article 4 of the Trust Agreement, established the practice prior to 1994, to give Plan members whose employment by a participating employer was terminated pension credits for a period of ninety days following a termination. After ninety days, if the members were still not working for a participating employer, the Trustees considered whether the member was "ready, willing and able" to work in the electrical industry and if so, exercise their discretion whether to continue to give the members credited service based on the individual circumstances of each case. A number of Plan members, including the Respondent, argue that the interpretation by the Trustees as to credited service does not conform with the wording of the Plan documents. Basically, they argue that the restriction imposed by the Trustees is not justified, and that the credited service between the years 1974 to 1994 is not restricted.

13 One Plan member raised this issue with the Financial Services Commission of Ontario ("FSCO") and claimed that he had been improperly denied pension credits for the period in question. Initially, FSCO ruled in favor of the member, then later

reversed its decision, but decided that the insurance outlined in the Plan applied only to health and welfare benefits and not to pension benefits.

14 Obviously, if additional credited service is given to a large number of members, this could have a serious financial impact on the Plan. This issue was discussed in the Factum of both parties.

Issue

15 Basically, this Court is asked to determine if the Trustees have properly interpreted the Plan documents, and adequately exercised their discretion. Alternatively, should the Plan documents be interpreted as to give members of the Plan credited service under the Plan for all periods before January 1st, 1994 when they had a break in service and were not working for a participating employers under the Plan?

General Principles

16 In interpreting the provisions of a pension plan certain general principles of interpretations apply. In arriving at my decision on the interpretation of the various clauses of the Trust Agreement, and the pension plan agreement, I have considered the following principles.

17 The pension plan is registered with FSCO and the Canada Customs and Revenue Agency. The Plan of course has to comply with the provisions of both statutes. The Court should avoid interpretations, which do not comply or avoid the provisions of these statutes.

18 In exercising their interpretative function, Trustees generally use interpretative principles that are the same or, analogous to contract interpretation and, to a lesser extent, statutory interpretation. However, there are a number of interpretative principles that are particular to trusts, (See *Rivett v. Hospitals of Ontario Pension Plan*, [1995] O.J. No. 3270 (Ont. Gen. Div.) at para 28.)

19 Trustees are obliged to interpret Trust Agreements in a way that is evenhanded as between beneficiaries. Interpretative results that favor a beneficiary group or group of beneficiaries over others, are to be avoided unless, the trust document language mandates its results, (See *Jeffery, Re*, [1948] 4 D.L.R. 704 (Ont. H.C.) at 711.)

20 Where the suggested interpretation of a pension document creates extra benefits for some members, it must be kept in mind that this extra benefit also creates a corresponding burden on others, including other beneficiaries and possibly, both employer and employee contributors, (See *Rivett*, *supra*, at para. 28.)

21 A clause in a pension plan text protecting the exercise of a Trustees discretion, will not be effective to prevent judicial review whenever the Trustees:

1) have failed to exercise the discretion at all;

2) have acted dishonestly;

3) have failed to exercise the level of prudence to be expected from a reasonable businessman;

4) have failed to hold the balance evenly between beneficiaries, or have acted in a manner prejudicial to the interest of a beneficiary.

22 The Courts also look to the economic and social purpose of the contract in order to interpret such documents. In the instance of ambiguous contract language, the interpretation should give effect to reasonable expectations of the parties. Courts are reluctant to interpret a contract in such a way as to produce an unrealistic result. The Supreme Court has held that the most reasonable and fairest interpretation of a contract is one, which promotes the intention of parties to the contract. (See *Sansalone v. Wawanesa Mutual Insurance Co.*, [2000] 1 S.C.R. 551 (S.C.C.) at para. 68 onward.)

23 The Court after reviewing the documents and the facts must give careful consideration to the complete picture. In interpreting pension plan contracts, the Courts are guided not only by the language of the pension plan document, but also by the parties' conduct, statements, and representation made to each other. (See *Bathgate v. National Hockey League Pension Society* (1994), 16 O.R. (3d) 761 (Ont. C.A.) at 768.)

24 If there is a conflict between Trust Agreements and pension plans text, equitable principles override common law principles, (See *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.), (See reference at page 641.)

Decision

25 In reviewing the discretion exercised by the Trustees, I shall deal with three aspects of the Trustees' discretion:

1) was FSCO correct in interpreting that the term insurance, did not include pension benefit and therefore the Trustees' discretion did not apply to such benefit?

2) was the Trustees' interpretation of the documents reasonably exercised on issue of breaks in service for the period 1974 to 1988?

3) was such discretion reasonably exercised for the period 1988 to 1984?

FSCO Decision Re: Pension Benefits

26 The basis of FSCO's decision is that Article 4 of the Trust Agreement mentions "insurance benefits", but that "insurance benefits" are not defined. Therefore they conclude that the ordinary meaning of insurance benefit is health and welfare benefits and not pension benefits. Article 4 of the Trust Agreement reads as follows:

> **Insurance Coverage During Unemployment**
>
> If the employment of the employee is terminated by the act of a contractor and while such employee is a member of the local, all insurance benefits hereunder shall be continued in force by the Trustees for a period of ninety days after cessation of such employment or longer at the discretion of the Trustees. Employees must be ready, willing and able to work in the electrical industry to remain eligible for the insurance benefits under the Plan.

27 Further, Article 5 titled administration of the Plan reads as follows in sub paragraph 4:

> **Authority of the Trustees**
>
> Subject to the stated purpose of the Plan and the provisions of this agreement, the Trustees shall have full authority to determine all questions of coverage and eligibility. They shall have the power to construe the provisions of this agreement and the terms used herein. Any such determination or such construction adopted in good faith shall be binding upon all the parties and beneficiaries hereto.

28 It is obvious from Article 4 and Article 5 sub paragraph (4) that the Trustees are given wide discretion in their interpretation of the Trust Agreement. Given that the term insurance benefits in Article 4 are not defined in the agreement, was the interpretation by the Trustees that insurance benefits included pension benefits reasonable in the circumstances? I have no hesitation in saying that it was.

29 Article 3 Defines the Purpose of the Trust:

> The purpose of the Trust is to provide, through group policies issued by insurance carriers, pension benefits, life, accident and health insurance for employees of employers and members of families of employees, or any such insurance as the Trustees may determine.

30 Obviously, the term insurance carriers or insurance, in Article 3 includes pension benefits. Further, Article 6 sub paragraph of 3(a) reads as follows:

> The Trustees shall to the extent of funds available procure from one or more insurance companies or hospitalization services and shall hold as policy or contract holders thereof, one or more policies or contracts of group life insurance, sick and accident benefits of hospitalization services, surgical insurance, dental insurance and pension benefits, or other form of agreement covering all employees and their dependents entitled to benefits under this agreement.

31 It may be as FSCO has concluded that the normal use of the term insurance benefits does not include pension benefits, but that conclusion is hardly consistent with the reading of Article 3, 4, and 6 of the Trust Agreement. In my opinion, the Trustee interpretation of insurance benefit to include pension benefits is more reasonable and consistent with the Trust Agreement.

Period from 1974 to 1988

32 A reading of the pension plan text and the Trust Agreement does not for the period 1974 to 1988 show obvious conflicts. The pension plan text provides in section 9 that when there is a termination of service benefits prior to retirement, the member would be provided with a deferred annuity calculated based on a formula in the Plan. If the member became re-employed by a participating employer, as a general rule, he or she was treated as a new member except that, his or her prior service was counted for purposes of determining whether his or her benefits under the Plan had vested. The Trustees also had discretion to decide if the member service under the Plan was continuous despite the period of unemployment.

33 Article 4 of the Trust Agreement is not inconsistent with that approach. The Trustees concluded that the combined effect of both documents was that, the members should receive pension credit for the first ninety days following their termination of employment by a participating employer, but after that the Trustees had the discretion whether to continue to give the members pension credits. In conclusion, I found that the Trustees' interpretation of the Trust Agreement and the Pension Plan text for the period 1974 to 1988 is reasonable.

Period 1988 to 1992

34 As mentioned earlier the 1988 pension plan text brought in changes, which according to the preamble were intended to primarily ensure that the Plan was in compliance with the *Pension Benefits Act*, 1987, which came into effect January 1 st, 1988. The 1988 Plan had further amendments such as, everyone who works for a participating employer has to become a member of the Plan, that they cannot withdraw their membership from the Plan while working for a participating employer, or while maintaining their membership in local 586. The 1988 Plan also defines *continuous* in relation to employment, membership, or service, means without regard to period of temporary suspension of employment, membership or service without regard to periods of temporary layoff from employment not exceeding 2 consecutive years of duration.

35 Clearly on its face the definition of continuous in the 1988 Plan, appears to conflict with Article 4 of the Trust Agreement.

36 The Respondents take the position that the Trustees have incorrectly interpreted the documents, that is the Trust Agreement and the Pension Plan text for the years 1974 to 1994. They argued that a consistent and evenhanded interpretation of these documents is that, for the period 1974 to 1988 a member continued to be a member of the Plan while they were working for a participating employer, or while they maintained membership in local 586. In other words, even if a member was no longer working with a participating employer, there should be no break in benefits as long as the member maintained his membership in local 586. Further, they argue that just because a member is working with a non-participating employer does not mean this member is not ready, willing and able to respond to a call from the Union Hall and work with a participating employer.

37 They also take the position that after 1988, because of the definition in the text of the word continuous, that there cannot be a break in benefits unless there is unemployment with the participating employer for a period over 2 years. They argue that Article 4 of the Trust Agreement does not apply to pension benefits.

38 I have already dealt with the issue of the application of Article 4 to pension benefits. To accept the balance of the Respondents' position would result in some very serious consequences to any pension plan. I appreciate that the Plan is called a Brotherhood Plan, but I doubt that any Plan could survive if a member just maintained his Union membership in the Plan, but worked with a non-participating member indefinitely. Theoretically, he could be paying into another pension plan and maintain his full benefits in this Plan. How fair would that be to the contributing members of the Plan? Why would they not do the same and build two or three different pension plans. As the affidavit evidence indicates in the early 1990's there was serious concerns by the Trustees that the Brotherhood System could be maintained. Apparently this concern was based on a complaint by some members that the Brotherhood System was unfair and that some local 586 members were subsidizing unemployed members. Even with the interpretation of Article 4 of the Trust Agreement given by the Trustees, they were obligated in 1994 to change the Brotherhood System to an hour bank system which provided credits in the Plan based on the number of hours worked. One could only speculate how long the Brotherhood Plan would have subsisted if the unemployed members could have been subsidized indefinitely. Finally, to accept the Respondents' position for the years 1974 to 1988 could result in serious tax implication. Therefore, for the period 1974 to 1988 I have no difficulty in rejecting the position taken by the Respondents.

39 More difficult is the interpretation to be given after the amendments of 1988.

40 It is obvious from looking at the amendments of 1988 that the main reason for the Trustees modifying the Plan was to have it comply with the *Pension Benefit Act* of 1987. One would think if the Trustees wanted to modify the Plan in such a way as Article 4 of the Trust Agreement no longer applied, they would have said so in the amendments or the preamble. I can only conclude that the Trustees did not intend to amend Article 4 with the 1988 amendments. In reading these amendments, I note that the two-year period is mentioned in a number of places such as, Section 11 of the amendments where there is discussion about eligibility and service less or more than two years. Could the Trustees have intended by the amendments of 1988 to limit their discretion under Article 4 of the Trust Agreement for the first two years?

41 To interpret the 1988 amendments in such a way as to nullify completely the effect of Article 4 of the Trust Agreement is inconsistent with some of the principles that I have outlined earlier. Clearly rules of interpretation state that, when there is a conflict between a Trust Agreement and common law or legislation, the equitable principles override and take priority. Further, to interpret the 1988 amendments as giving the beneficiaries a possibility of a two year break in service without reduction of benefits, could lead to problems indicated earlier with the *Pension Act* and the *Income Tax Act*.

42 Finally, the 1992 amendments allowing members to terminate their membership in the Plan after two years without employment, would appear to be more consistent with the interpretation that I have suggested earlier. For these reasons, I would conclude that the interpretation and practice of the Trustees from 1974 to 1994 was the correct one.

Costs

43 Very often in circumstances when parties ask the Court for assistance in interpreting documents, cost are not awarded to either party. In this case, I have been invited by both the Respondents and the Applicants to award reasonable cost to the Respondents. Counsel for the Applicants has underlined that the Applicants, the Board of Trustees, had to approach the Court in a completely neutral position. In fact, I am advised that the Respondents were encouraged by the Applicants to come to the Court with an alternative position regarding the interpretation of the pension documents. The results of having the Respondents as participants was that the Court was able to weigh alternative interpretation suggested by the Respondents. It is obvious from the material that the Respondents have spent considerable time in drafting their documents, researching the law, and argue their case before the Court. In the circumstances the Respondents will be awarded cost, that I would fix at $10,000.00.

Order accordingly.

End of Document

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

Court File No.: CV-25-00738613-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1242939 B.C. UNLIMITED LIABILITY COMPANY et al.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
(Proceeding commenced in Toronto)

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