NOVA SCOTIA COURT OF APPEAL

Citation: ***Downey v. Halifax Port International Longshoremen's Association***, 2012 NSCA 49

Date: 20120508
Docket: CA 344079
Registry: Halifax

Between:

Terrence Downey

Appellant

v.

David Cranston and Robert Fisher, representing the members of the Board of Trustees of the Halifax Port International Longshoremen's Association/Halifax Employers Association Pension Plan and International Longshoremen's Association/Halifax Employers Association Welfare Trust Plan

Respondents

Judge(s):	Oland, Beveridge, Farrar, JJ.A.
Appeal Heard:	November 15 and 16, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Oland, J.A.; Beveridge and Farrar, JJ.A. concurring.
Counsel:	Bruce W. Evans, for the appellant John C. MacPherson, Q.C., and Kiersten Amos, for the respondents

Reasons for judgment:

[1] The issues on this appeal are the appellant's eligibility for and entitlement to certain disability pension and welfare benefits pursuant to the International Longshoremen's Association Maritime Ports Pension Plan and Welfare Plan in effect in 1991 (collectively, the "Plan"). The respondents are the Trustees of the Plan.

[2] In 1965, when he was not yet 15 years old, the appellant began working as a longshoreman at the Port of Halifax. He became a member of the Halifax Longshoremen's Association, Local 269 of the International Longshoremen's Association (the "Union") in July 1991. He had to stop working before the end of that year.

[3] The appellant's claim for benefits against the Trustees came before Justice G. G. McDougall of the Nova Scotia Supreme Court. The parties filed an agreed statement of facts. The hearing of evidence and submissions by counsel took three days in January 2008.

[4] On November 16, 2009 the judge released his decision. He found that the appellant had not met the eligibility requirements for membership in the Plan and was never a member. Therefore, the appellant never became eligible for or entitled to Plan benefits. In his decision on the merits (2009 NSSC 336), he dismissed the action.

[5] The parties were unable to agree on costs and made written submissions to the judge. He ordered the appellant to pay the Trustees a lump sum of $45,000 inclusive of costs, disbursements and all applicable taxes. His costs decision (2010 NSSC 270) is dated July 14, 2010.

[6] The judge's order dismissing the appellant's claim and awarding costs to the Trustees issued on January 12, 2011. The appellant appeals.

[7] For the reasons which follow, I would dismiss the appeal of the judge's decision on the merits of the appellant's claim for disability pension benefits and for welfare benefits pursuant to the Plan. I would also dismiss the appeal against his award of costs to the Trustees.

Background

[8] As mentioned earlier, an agreed statement of facts was entered at trial. A summary of the salient points will suffice at this point of my reasons. Additional facts will be added later as necessary.

[9] The appellant worked at the Halifax Ports for some twenty-six years. He was a non-union longshoreman from 1965 until he became a member of the Union on July 2, 1991. As such, so long as he met the eligibility requirements, he was entitled to receive the disability pension and welfare benefits available to Union members. These eligibility requirements, as set out in the governing documents, required an employee to satisfy certain criteria, such as working a certain number of hours within a certain period of time. Whether the appellant did so, and whether hours when he was not working but receiving Workers' Compensation were to be counted, were among the issues raised at trial.

[10] The appellant worked a total of 245 ½ hours from the day he became a Union member until December 16, 1991. After that day, he never returned to work as a longshoreman at the Halifax Ports.

[11] In 1992 and 1993, the appellant received Workers' Compensation benefits for a temporary total disability. During the 1990s, he also received Workers' Compensation vocational rehabilitation benefits for several periods.

[12] The Trustees appointed agents to carry out administration of the Plan on their behalf. From 1992 to 1994 inclusive, their agents sent the appellant a member pension statement for the preceding year in which they credited him with "hours" and a share of the employer contributions to the Pension Plan. In 1991, the appellant was credited with 245 ½ hours, the hours he worked after becoming a Union member that year. In 1992, he was credited with 430 hours and, in 1993, 575 hours, calculated on the weeks he received Workers' Compensation benefits. However, he had never worked any hours in 1992 and 1993.

[13] The appellant also received member pension statements for 1994 and each subsequent year. He was not credited with any "hours" for the purposes of pension benefits for the time in those years when he received Workers' Compensation

benefits. Workers' Compensation benefits he claimed during those years were not awarded until after lengthy appeal processes ended in 1999 and afterwards.

[14] During 1991 to 1993, the appellant sought reimbursement of certain benefits from the Welfare Plan. His claims for recovery of prescription drug expenditures and certain medical services were accepted.

[15] In 1997, the Trustees refused the appellant's application for a disability pension, stating that he did not meet the requirements. The appellant was told to get his other "hours" from Workers' Compensation and the Union, if he wanted to establish entitlement.

[16] In or around 2000, the Trustees determined that the Welfare Plan had been misinterpreted. They decided that the appellant was never a member of that Plan nor eligible for welfare benefits.

[17] The Trustees acknowledge that, in the past, hours were credited to the appellant on the basis of the time he received Workers' Compensation benefits. They have not sought to recover the entitlements that were credited on the basis of those hours.

[18] The appellant brought an action claiming benefits and subsequently amended his pleadings. At trial, his action consisted of a claim for entitlement for welfare and disability pension benefits, damages for breach of contract and damages for breach of the Trustees' fiduciary duty.

The Plan

[19] The appellant claims disability pension and welfare benefits pursuant to the Plan. The portions relevant to membership and thus participation in the Plan read:

> 1.10 "Employee" means any person Employed in the Industry as defined below.
>
> ...
>
> 1.13 "Employment in the Industry," or "Employed in the Industry" means:

> (a) employment or being or having been employed by one or more Employer Companies at the Maritime Ports which at the time of such employment were parties to a Collective Labour Agreement with one of the I.L.A. Maritime Ports Locals while being an I.L.A. Member in good standing and works for at least 100 hours during the year. After January 1, 1991 the hours must be in work covered by the said Collective Labour Agreement;
>
> ...
>
> 2.1 Members
>
> Each person who is an Employee shall become a Member of the Plan provided that he works for at least 300 hours during the year and provided that he has not attained age 71, unless the Employee, because of his religious beliefs, objects to becoming a Member. [Emphasis added]

[20] Thus, to become a Member and participate in the Plan, a person must:

(a) be an Employee (s. 1.10);
(b) be Employed in the Industry (s. 1.13) - at least 100 hours of work during the year while a member in good standing of the I.L.A. and in work under a Collective Labour Agreement;
(c) work at least 300 hours during the year while a member of the I.L.A. (s. 2.1); and
(d) be under 71 years of age (s. 2.1).

[21] Once a Member of the Plan, further criteria must be fulfilled in order for that Member to be entitled to disability pension benefits:

> 5.3 Disability Pension
>
> (a) A Member who has completed .....5 years of consecutive service for the purpose of (ii) below, with an average of at least 600 hours for each such year and a minimum of 300 hours in each such year and who becomes totally and permanently disabled, may retire and the date of such retirement is his Disability Retirement Date. Total Disability shall mean any qualified Member's inability to perform the duties of any job for which the Employee is qualified by training or experience, due to physical or mental impairment.

...

(b) Total and permanent disability must be certified by a medical practitioner appointed by the Board who shall make final determination with respect to such disability, sickness or injury. ... [Emphasis added]

[22] The criteria for eligibility for welfare benefits are different than those for disability pension benefits. Prior to 2001, the Welfare Plan was not set out in a comprehensive plan text. A 1991 booklet provided by the Trustees summarized the pension plan and also outlined the eligibility criteria for Welfare Plan benefits. As with the disability plan benefits, these related to the hours worked:

A. ACTIVE MEMBERS:

1. Each active employee member who accumulates 800 or more work hour credits shall qualify for Group I Benefits. Active employee members who accumulate a minimum of 450 but less than 800 work hour credits shall quality for Group II Benefits.

...

4. Active employee members who due to illness for the 12 month period January 1 - December 31 fails to accumulate the required hours to qualify for Benefits shall be deemed covered in the Group he last qualified in, providing he was employed in the industry when the illness occurred and he has at least 15 continuous years in the industry, and during which he has worked not less than 15,000 hours.

B. NON-ACTIVE PENSIONERS:

...

2. Disability and non-active status Early Retirement Pensioners, their named spouses and eligible dependents. Coverage is limited to a maximum total payment of $600.00 per family, per plan year. This coverage will cease upon the member reaching age 65, or discontinuance of his pension.

The Judge's Decision on the Merits

[23] The parties agreed that the appellant has been totally and permanently disabled within the meaning of the Plan since December 16, 1991. The judge decided that the appellant never became eligible to receive disability pension or welfare benefits. The judge explained:

> [24] The Plaintiff did not meet the Plans' eligibility requirements which first arose on his becoming a member of the Union on July 2, 1991. Participation in the Plan was only open to those Union members who, according to Section 2 of the 1991 Pension, was an "Employee..... provided that he works for at least 300 hours during the year....". Unfortunately the Plaintiff did not meet this proviso. After becoming a Union member in July of 1991 the Plaintiff only worked 245 ½ hours before ceasing work due to injury which resulted in total and permanent disability. He did manage to meet the minimum requirement to be considered an employee in that he worked for at least 100 hours during the year but he did not meet the minimum threshold of 300 hours to become eligible for membership in the Plan. Even when factoring in the hours credited to the Plaintiff in error in 1992 and 1993 when he was receiving WCB benefits the Plaintiff still did not meet the requirements for Disability Pension benefits. ...

[24] The judge then set out s. 5.3(a) of the Plan on the requirements for disability pension benefits and continued:

> [25] First of all, the Plaintiff was not a Plan member since he did not work 300 hours after becoming a Union member. Furthermore, he never worked an average of 600 hours for five consecutive years with a minimum of 300 hours in each such year. His only year worked as a Union member was the second half of 1991. He has not worked as a longshoreman since. Clearly the Plaintiff cannot claim benefits save for some modest pension amount when he reaches the retirement age spelled out in the Pension Plan based on the credits properly allocated to him for 1991 along with those credits given to him in error for the years 1992 and 1993 which the Defendants are prepared to allow him to keep.

[25] The judge also reviewed the criteria to qualify as an active member for welfare benefits, namely 800 or more hours for Group I, and 450-800 hours for Group II Benefits. He stated:

> [39] The Plaintiff did not work 450 hours in 1991 after becoming a member of the Union. He, therefore, did not achieve eligibility for Welfare benefits as an Active Member. The only other way he might be eligible for Welfare benefits was if he could be classified as a "Non Active Pensioner". Since he was not eligible for a disability pension he could not meet this classification.

The Judge's Costs Decision

[26] In his costs decision, the judge found that the Tariff was inadequate to make a reasonable contribution to the Trustees' costs. He awarded the Trustees $45,000 lump sum costs.

The Issues

[27] The judge's finding that the appellant met the requirement to be an "Employee" is not in dispute. The appellant was a Union member in good standing who worked more than double the minimum of 100 hours. The issues on the merits appeal focus on whether, pursuant to s. 5.3 of the Plan, the appellant qualified as a member of the Plan and thus was entitled to disability pension and welfare benefits.

[28] The appellant argues that he satisfied the prerequisites to membership set out in the Plan and so is contractually entitled to such benefits. He says that the Trustees are estopped from denying his Plan membership. He also submits that various provisions of the *Pension Benefits Standards Act, 1985*, R.S.C., 1985, c. 32 (2nd Supp.) support his claim to benefits, as do certain provisions in the *Canada Labour Code*, R.S.C., 1985, c. L-2. At trial, the appellant raised arguments based on the *Pension Benefits Standards Act*, but did not advance any based on the *Canada Labour Code*.

[29] On his appeal of the judge's decision on the merits, the appellant set out numerous grounds including alternative grounds. The issues to be determined can be simplified and restated as follows:

(a) Whether the appellant should be permitted to raise arguments based on the *Canada Labour Code*;
(b) Whether the trial judge correctly determined that the appellant was not entitled to a disability pension; and
(c) Whether he correctly determined that the appellant was not entitled to welfare benefits.

[30] With respect to the costs appeal, the issues are:

(a) Whether leave to appeal the costs provisions of the order of January 12, 2011 is required and, if so, the appellant should be granted leave to do so;
(b) Whether the judge erred in the amount of his costs award; and
(c) Whether the judge erred in awarding costs against the appellant.

[31] I will first deal with all the issues pertaining to the judge's decision on the merits of the appellant's claim of entitlement to disability pension and welfare benefits. Afterwards, I will consider the issues which relate to his costs award.

The Appeal of the Decision on the Merits

The Standard of Review

[32] The issues on appeal pertaining to the judge's determinations that the appellant was not entitled to disability pension benefits nor to welfare benefits, raise questions of mixed fact and law. The standard of review for errors in civil matters was summarized by Hamilton, J.A. in *Go Travel Direct.Com Inc*. v. *Maritime Travel Inc*., 2009 NSCA 42 thus:

> [14] The key decision on appellate standards of review in civil matters is the Supreme Court of Canada decision in **Housen v. Nikolaisen**, 2002 SCC 33, [2002] 2 S.C.R. 235. In that case, the majority reiterated that the appropriate standard of review for factual findings and inferences of fact is palpable and overriding error (¶19-23). The standard of review for errors of law is correctness (¶10). Questions of mixed fact and law are subject to two standards; where there is an extricable legal error, that is assessed on a standard of correctness; where a legal principle is not readily extricable, the standard of review is more deferential and should not be disturbed absent palpable and overriding error (see for example ¶ 36).

The Interpretation of the Plan

[33] I will begin with the appellant's submission that he is contractually entitled to benefits pursuant to the Plan and the judge erred in ruling to the contrary. In doing so, the appellant points out that while the trial was heard in January 2008, the judge did not render his decision until almost 22 months later. According to the appellant, the date of the decision and its content raise the concern that by the time he rendered his decision, the trial judge was "not alive" to the issues that had

to be resolved. The appellant alleges factual errors, errors in interpretation, errors in the application of the law, and failure to consider key arguments such as the *Pension Benefits Standards Act*. I will deal with these in turn and then the submissions regarding the *Canada Labour Code*.

[34] I can quickly dispose of the alleged factual errors. I agree that the judge's recounting of the facts in his analysis contains errors. For example, ¶ 15 to ¶ 17 of his decision states that the appellant suffered a second workplace injury on December 16, 1991. The agreed statement of facts did not refer to such an injury on that date. Rather, it stated that due to severe pain and strong pain medication, the appellant could not continue working after December 16, 1991.

[35] As well, the judge stated that the appellant was credited "in error" for 432 hours in 1992 and 575 ½ hours in 1993. The agreed statement of facts did not say this had been done in error. It stated only that the Trustees had claimed they had been credited in error.

[36] The judge's decision included a conclusion, without any analysis whatsoever, that the Trustee had not breached any fiduciary duty that might have been owed to the appellant. However, the appellant had emphasized in his oral and written submissions to the judge that he was <u>not</u> being asked to rule if the Trustees had breached their fiduciary duty.

[37] The parties having negotiated and put forward an agreed statement of facts and written briefs, and he having taken the decision under reserve, it is disappointing that the judge was not more precise. However, in my opinion, none of these and any other factual errors and inconsistencies, either alone or cumulatively, is sufficient to warrant appellate intervention.

[38] I will now address the alleged errors in interpretation. The appellant argues that the judge erred in finding at ¶ 25 of his decision that he was not a Plan member because "he did not work 300 hours after becoming a Union member". He points out that, pursuant to s. 1.10 and 1.13 of the Plan, an Employee is a Union member who has worked "at least 100 hours during the year" and, pursuant to s. 2.1, an Employee shall become a Member provided that he works "at least 300 hours during the year". The appellant emphasizes that the word "year" is not defined in the Plan. He argues that s. 2.1 does not require all those hours to be worked <u>after</u>

the person became a Union member. According to the appellant, “year” means a calendar year and “hours during the year” includes non-Union hours as well as Union hours during the calendar year.

[39] The agreed statement of facts showed that from January 1, 1991 to and including July 1, 1991 the appellant worked 202 ½ hours as a non-Union longshoreman and, from July 2, 1991 when he became a member until December 16, 1991 when he stopped working, 245 ½ hours as a Union member. Therefore, in 1991 he worked a total of 448 non-Union and Union hours. The appellant faults the judge for failing to mention that he worked a total of 448 hours in 1991 and to make any finding as to how many hours he worked “during the year” (1991) as required by the Plan. If the appellant’s interpretation of “year” and “hours during the year” are correct, he worked more than the 300 hour minimum set out in s. 2.1 for membership in the Plan and eligibility for benefits.

[40] The appellant urges that his interpretation is more reasonable than that accepted by the judge for several reasons including:

(a) the plain and ordinary meaning of the words themselves. Section 2.1 does not stipulate that only Union hours are to be counted;

(b) it fits with how the Plan is actually administered, which relates to a calendar year in several ways. For example, the member pension statements show hours during a calendar year. Furthermore, the information in those documents is retroactive in that the Trustees are required to send the member pension statements within six months after the end of each calendar year; and,

(c) every employee would have the same opportunity to earn the 300 hours for membership. None would be treated unfairly because he joined late in the year.

[41] In answer to a question during the hearing of the appeal, the appellant maintained that, if a person had worked at least 300 hours during a year as a non-Union member, and joined the Union only on December 31st of that year, he would qualify as a Member.

[42] With respect, I cannot accept the appellant’s argument. It completely ignores that part of the definition of Employed in the Industry which requires 100 hours of work “while being an I.L.A. Member in good standing”. The requirement

that an Employee be a Union member carries over into the definition of a Member. Such a person is an Employee who has worked at least 300 hours during the year while a Union member.

[43] These definitions clearly demonstrate that only hours worked while a Union member count towards membership for the purposes of the Plan. In these circumstances it is not surprising that "hours during the year" does not contain additional wording elaborating that the hours had to be worked after becoming a Union member. Such wording would be redundant. That requirement had already been built into the definitions of Employed in the Industry and Member. Hours worked on the waterfront before a person becomes a Union member are simply not relevant in the accumulation of credits for Plan benefits.

[44] The judge was correct in his determination that, pursuant to the contractual terms of the Pension Plan alone, the appellant was not entitled to membership in the Pension Plan.

[45] The appellant also says that the judge erred in his conclusion that he was not eligible under the Plan by:

(a) failing to address and respond to his argument that he was entitled to Workers' Compensation credited hours for the purposes of disability pension and welfare benefits under the Plan; and
(b) incorrectly applying the principles of estoppel by representation and promissory estoppel to the facts.

[46] Before the trial judge, the appellant urged that the Workers' Compensation hours should be credited for pension and welfare purposes - yet, nowhere in his decision does the judge consider this argument. However, in my view, the claim that Workers' Compensation hours should be credited has no merit. The agreed statement of facts showed that the Trustees had passed a resolution to give credit for pension purposes for such hours and such information had been included in a 1991 booklet summarizing the Plan. However, nothing in the contractual document, namely the Plan itself, provides that a person away from work and receiving Workers' Compensation benefits is entitled to be credited "hours" for time either to achieve initial eligibility to become a Member or, once a Member, towards entitlement to disability pension benefits. Moreover, the 1991 booklet states that it was intended to provide an "outline" of the Plan and that it is the text

of the Plan that is the governing document. As a result, those Workers' Compensation hours cannot be used to become a Member.

[47] Nor am I persuaded that the judge erred in deciding that the Trustees were not estopped from maintaining that the appellant is not entitled to benefits under the Plan. In his decision at ¶ 30, the judge referred to the criteria to establish estoppel by representation as set out in *Kennie v. Ross-Ford*, 2002 NSCA 140 at ¶ 36-42. Those criteria require that a party act to his detriment in reliance on an unambiguous representation.

[48] The judge's decision reads in part:

> [31] The Plaintiff during discovery examination on September 13, 2006, had the following question put to him by Defendants' counsel:
>
> > Q. Okay. But by relying on it, did you change anything about your personal situation in any way because either a pension member statement came in the mail or booklet may have come in the mail?
>
> [32] The Plaintiff simply answered "No." in response to this question. It is clear from this response that the Plaintiff did not act (or fail to act) to his detriment in reliance on any representation made by the Defendants. In any event, estoppel works negatively. It is not capable of creating a cause of action.
>
> [33] Estoppel has no particular application in this case and cannot be used as the basis for a cause of action by the Plaintiff.

[49] The appellant urges that by sending member pension statements to him, the Trustees represented to the appellant that he was a Member of the Plan and that he had joined it on July 2, 1991. He argues that the judge made a clear error in fact by failing to take into account the appellant's discovery evidence that he relied on the Trustees' representation of pension membership by continuing to pay Union dues. He makes the same argument with regard to his claim of promissary estoppel.

[50] In his discovery evidence tendered at trial, the appellant was asked how he relied on the member pension statements. He explained that his common-law wife, Cathy Hogan, would read them and point things out to him. His evidence included:

Q. Okay. But by relying on it, did you change anything about your personal situation in any way because either a pension member statement came in the mail or booklet may have come in the mail?

A. No.

...

Q. Now, if you - - Paragraph 6(a) says:

> "The Plaintiff [being you] relied on the representations of the Trustees by continuing his membership in the 1991 pension plan."

What do you mean by that?

A. Well, I continued to pay my union dues and that because if I never paid them, they would expel me from the union so I was advised to keep paying them and stay in good standings with the union. So that's what I did. Like, you know, I was keeping good standing with the union. And, you know, they had me over a barrel, I guess, you know, what I mean? I had to pay them or else they'd throw me out of the union and God knows what else they would have done to me, right?

[51] Cathy Hogan gave evidence that she helped her husband deal with and interpret documents received from the Union. She testified that she was aware of the disclaimer on the bottom of the member pension statements and understood that the appellant's information would be based on the correct information as to hours or other things.

[52] Even if one were to accept that a successful argument based on estoppel could support his claim for benefits, it is my view that the appellant has not satisfied all the elements of estoppel. The member pension statements did not contain an unambiguous representation. Rather, they contained a clear representation and declaration that they were for information only.

[53] Moreover, the judge did not make any palpable and overriding error in stating that the appellant denied reliance on any representation made by the Trustees and in rejecting the estoppel argument. The evidence from the appellant's discovery includes a complete and unequivocal denial of any such reliance. His indication that he continued to pay union dues to maintain his status within the

Union does not refute this. The record is clear that the appellant did not prove detriment, an essential element of estoppel.

[54] In summary, on the grounds of appeal relating to the wording of the contractual terms contained within the Plan itself, the appellant qualified as an "Employee" and was "Employed in the Industry". However, he worked only 245 ½ hours in 1991 as a Union member in good standing. Hours while away from work and receiving Workers' Compensation are not included in the calculation of "hours during the year". The evidence does not support the appellant's claim of estoppel. In the result, he does not satisfy the qualifying criteria to be an eligible Member within the meaning of the Plan. Moreover, even if the Workers' Compensation hours credited in 1992 and 1993 were considered, they still do not give the appellant the necessary hours over five years to qualify for a disability pension.

[55] I turn then to the appellant's arguments which rely upon the *Pension Benefits Standards Act* and the *Canada Labour Code*.

The Pension Benefits Standard Act, 1985

[56] In his pleadings and his closing submission to the judge, the appellant argued statutory entitlement to the disability pension pursuant to certain provisions of the *Pension Benefits Standards Act*. The Trustees acknowledged that its pension plan is subject to regulation under that federal statute, but maintained that its provisions did not support the appellant's claim.

[57] In his decision, the judge did not mention that statute or the arguments as to its application. The only reference that could support any suggestion that he may have considered this legislation is found in one of his paragraphs under the heading "Conclusion":

> [42] The Defendants have not breached any statutory or fiduciary duty that might have been owed to the Plaintiff if he had been an eligible member of either or both of the Plans.

However, the judge did not identify the source of the statutory duty to which he referred. He neither names the statute nor provided any analysis to support this determination.

[58] The *Pension Benefits Standards Act* sets out minimum requirements that are to be incorporated in private pension plans. It deals with matters such as their administration, required funding, registration, reporting obligations, portability, and termination and winding-up. Through such regulation, it protects the members of private pension plans.

[59] On this appeal, the appellant submits that the judge erred in his conclusion that he was never an eligible Member of the Plan, on the basis that he failed to interpret the Plan in a manner consistent with the *Pension Benefits Standards Act*. As he had before the trial judge, the appellant relies on provisions relating to eligibility for membership and the vesting of benefits.

[60] The appellant urged a broad interpretation of the *Pension Benefits Standards Act*. He referred to Ari N. Kaplan, *Pension Law* (Toronto: Irwin Law Inc, 2006) at pp. 9-10:

> The *PBA* has consistently been identified by the courts as public policy legislation designed to "benefit," "protect" and "expand" the interests of employees and redress social policy concerns relating to "poverty among the elderly" and should therefore be interpreted broadly and in accordance with its purpose. The focus has invariably been on preserving employee rights.

[61] I will first consider the appellant's argument relying on that legislation for eligibility for membership in the Plan as of July 2, 1991, the date he joined the Union. At the hearing of the appeal, the appellant stated that while his written submissions referred to ss. 14 and 15, he relies on s. 14 which deals with full-time employment, not s. 15 which deals with part-time employment. For that reason, only s. 14 is reproduced below:

> **14.** (1) Each employee who is engaged to work on a full-time basis for an employer and is a member of a class of employees for which a pension plan is provided by that employer shall be eligible to become a member of that pension plan on and after
>
> ...

> (b) in the case of a multi-employer pension plan, the day on which both the following requirements have been fulfilled, namely,
>
> > (i) twenty-four months have elapsed since the employee was first employed with a participating employer, and
> >
> > (ii) the employee has earned, in respect of employment with the participating employers, at least thirty-five per cent of the Year's Maximum Pensionable Earnings in each of two consecutive calendar years after December 31, 1984, or has fulfilled an alternative requirement that, in the Superintendent's opinion, is reasonably equivalent. [Emphasis added]

[62] It is undisputed that the Plan is a multi-employer pension plan within the meaning of this legislation. The appellant says that he satisfied s. 14 because as of July 2, 1991, the day he joined the Union, he was a full time member of the class of employees for which the pension was provided, namely longshoremen who were Union members in good standing; he had been employed for more than 24 months with a participating employer as a longshoreman; and, he had more than the required two years of earning from such employment for several years after 1985 and in each of those years he exceeded the requisite earnings. According to the appellant, he had a statutory right to eligibility for membership in the Plan and all the benefits which flowed from such membership.

[63] With respect, I am not able to accept the appellant's arguments based on s. 14 of the *Pension Benefits Standards Act*.

[64] Quite simply, the appellant does not satisfy the key requirement stipulated in the opening words of s. 14(1). As explained earlier in my decision, the appellant never met the eligibility requirements for membership in the Plan. The result is that at no time during the period he was a Union member, namely from July 2, 1991 to December 16, 1991, was he "a member of a class of employees for which a pension plan is provided". The words "is provided" are in the present tense, and indicate a pension plan already created for that class of employees. That plan in the circumstances here is the Plan which requires that employees be Members before becoming entitled to its benefits. Therefore, the "class of employees for which a pension plan is provided" is not just unionized longshoremen without more, but rather unionized longshoremen who meet the eligibility qualifications for membership in the Plan. The appellant never did. Therefore the Trustees were

under no statutory obligation to him, and he cannot assert any rights pursuant to s. 14 of the *Pension Benefits Standard Act*.

[65] I now turn to the appellant's second argument under this legislation, namely that he is entitled to membership in the pension plan because of its vesting provisions. The appellant again quoted Kaplan, this time in regard to the protection provided to employees by vesting, at p. 218:

> Vesting is the "foundation stone" of employee protections upon which pension regulation is based . . . The objective of statutory vesting was to eliminate provisions in pension contracts whereby the payment of benefits was discretionary or revocable by the employer. It is statutory vesting that distinguishes pension benefits from non-registered benefit entitlements where legal rights are conferred solely in accordance with the terms of the contract. 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.

and at p. 224:

> The vesting rules require that service in the pension plan be "continuous." Continuous membership under the *PBA* deems that all periods of temporary layoff and suspension of employment, membership or service be ignored. The aim of ignoring temporary absences is to facilitate vesting and benefit accrual notwithstanding disruptions in labour relations and employment. Two common examples of temporary interruptions in service are leaves of absence and layoffs.

[66] The appellant relies on s. 17(1) on vesting of benefits which reads:

> **17**. (1) A pension plan shall provide that <u>any member of the plan who has been a member for a continuous period of two years is entitled, on cessation of membership in the plan</u>,
>
> > (a) to a deferred pension benefit, based on the member's period of employment and salary up to the time of cessation of membership, and calculated in a similar manner and payable on the same terms and conditions as the immediate pension benefit (other than that provided by additional voluntary contributions) that, if the member had attained pensionable age, the member would have been eligible to receive

> (i) under the terms of the plan, in respect of membership in the plan on and after January 1, 1987, in the case of a plan established before that date,
>
> (ii) under the terms of the plan, in the case of a plan established on or after January 1, 1987, and
>
> (iii) by virtue of any amendment to the plan made on or after January 1, 1987, in the case of a plan whenever established; and
>
> (b) to any other benefit or option, based on the member's period of employment and salary up to the time of cessation of membership, and calculated in a similar manner and payable on the same terms and conditions as the benefit or option to which, if the member had remained a member of the plan until pensionable age, the member would have been entitled
>
> (i) under the terms of the plan described in subsection (2), in respect of membership in the plan on and after January 1, 1987, in the case of a plan established before that date, and
>
> (ii) under the terms of the plan described in subsection (2), in the case of a plan established on or after January 1, 1987. [Emphasis added]

[67] The appellant argues that he had been a member of the Plan for a continuous period of two years and therefore is entitled to its benefits. He emphasizes that his absence from work commencing December 16, 1991 was temporary through July 1993. He says that he tried to rehabilitate himself, his temporary total disability lasted beyond July 1993 and, during 1992 and 1993, the Trustees sent him member pension statements which allocated pension contributions to him. According to the appellant, his rights had vested by July 2, 1993, two years after he joined the Union, and well before the Trustees denied in 2000 that membership status had been achieved.

[68] With respect, I cannot accept this argument. Its essence is that, whatever the reasons for hours appearing on the member pension statements even though he had not worked after 1991, that material could be relied upon for more than time credited for his benefits. In particular, it could also be used to establish membership in a plan to which one is not otherwise entitled. However, the appellant's submission is without any foundation in the evidence. There was

nothing that indicated that, as a result of that material, the Trustees ever determined that the appellant was a member of the Plan such that benefits would vest.

[69] I would dismiss the appellant's arguments based on the *Pension Benefits Standards Act.*

Canada Labour Code

[70] Since the appellant did not plead this statute at trial, it is first necessary to decide whether he should be permitted to raise arguments based upon it on appeal.

[71] The appellant's Statement of Claim was amended four times. In none of these versions was any reference made to the *Canada Labour Code*. Nor was there any reference to it in his pre-trial brief or his supplemental written submission to the judge. At the end of the trial, his counsel mentioned this legislation in the course of his oral submissions. The entirety of what counsel said respecting that statute was:

> Just while we're talking about the general area, this doesn't really probably help the Court too much. But you know, there are protections, like, in the Canada Labour Code, for example, protecting employees from having a pension benefit accumulation interrupted, by interruptions due to disability.

After this comment, the appellant immediately proceeded to discuss what he described as "clearly the more pertinent point", being the provisions of the *Pension Benefits Standards Act.*

[72] Before this court, the appellant admitted that, until very late in his preparation for trial, he did not understand that the *Canada Labour Code* dealt with pensions. He urges that raising this ground now does not cause any prejudice and that the matter is a pure issue of law. The Trustees submit that allowing the appellant to raise a new issue or claim on appeal is contrary to the judicial policy of promoting finality in litigation. See, for example, *Kavanagh v. Newfoundland (Minister of Education)*, 2000 NFCA 2 at ¶ 14. They say the appellant had more than ample opportunity to raise any issues he considered relevant to the dispute.

[73] It is significant that the issue here is the protection of a statute. Statutes are to be pled. *Rule* 4.02(4)(c) stipulates:

> (4) The statement of claim must notify the defendant of all the claims to be raised by the plaintiff at trial, conform with Rule 38 - Pleading, and include each of the following:
>
> ...
>
> (c) reference to legislation relied on by the plaintiff, if the material facts that make the legislation applicable have been stated;

[74] Courts have refused to allow an appellant to raise a statutory argument for the first time on appeal when it was not contained in his pleadings. See, for example, *Gale v. Bureau (1911),* 44 S.C.R. 305*, Aikinco Inc. v. Phantom Industries Inc.*, 2001 CarswellOnt 1291, and *Scarborough Golf & Country Club v. Scarborough (City)* (1988), 54 DLR (4th) 1 (Ont. C.A.).

[75] The general rule against the raising of a new issue on appeal, and when exceptions to that general rule should be made, were considered in *Quan v. Cusson*, 2009 SCC 62. There, the defendant newspaper reporters and police officer had unsuccessfully pled the defence of qualified privilege to a claim of libel. On appeal, the Court of Appeal established a responsible journalism defence in Ontario, but denied the defendants its protection because they had not advanced it at trial. The defendants appealed.

[76] The question before the Supreme Court of Canada was whether the defendants should be able to avail themselves of the new common law defence of responsible journalism. At ¶ 36 to ¶ 39, McLachlin, C.J. set out the test to be applied in determining whether an exception should be made to the general rule that a new issue may not be raised on appeal. It is not necessary for me to conduct the two step analysis in *Quan*. Even assuming, without deciding, that the exception should apply and this ground of appeal heard, I am of the view that the provisions of the *Canada Labour Code* do not apply to these particular circumstances.

[77] I begin by observing that the *Canada Labour Code* focuses on labour relations and collective bargaining matters. It establishes the Canada Industrial Relations Board, and deals with matters such as bargaining rights, collective

agreements, strikes and lockouts, occupational health and safety, and standard hours, wages, vacations and holidays.

[78] The appellant seeks to rely on ss. 239 and 239.1 of the *Canada Labour Code* which provides certain protections in regard to pension, health and disability benefits to employees who are absent from work due to illness or injury. They read in part:

> **239.** (1) Subject to subsection (1.1), no employer shall dismiss, suspend, lay off, demote or discipline an employee because of absence due to illness or injury if
>
> (a) the employee has completed three consecutive months of continuous employment by the employer prior to the absence;
>
> (b) the period of absence does not exceed twelve weeks; and
>
> (c) the employee, if requested in writing by the employer within fifteen days after his return to work, provides the employer with a certificate of a qualified medical practitioner certifying that the employee was incapable of working due to illness or injury for a specified period of time, and that that period of time coincides with the absence of the employee from work.
>
> ...
>
> (2.1) The pension, health and disability benefits and the seniority of an employee who is absent from work due to illness or injury shall accumulate during the entire period of the absence if the conditions set out in subsection (1) are met in respect of that absence.
>
> ...
>
> **239.1** (1) Subject to subsection (4) and to the regulations made under this Division, no employer shall dismiss, suspend, lay off, demote or discipline an employee because of absence from work due to work-related illness or injury.
>
> ...
>
> (5) The pension, health and disability benefits and the seniority of an employee who is absent from work due to work-related illness or injury shall accumulate during the entire period of the absence. [Emphasis added]

[79] Having examined s. 239 and s. 239.1 of the *Canada Labour Code* and the submissions of the parties, I conclude that these provisions do not apply in the circumstance of this case. First, they prohibit an “employer” from dismissing, suspending, laying off, demoting or disciplining an employee because of absence due to illness or injury in certain situations. The Trustees are not captured by the definition of an "employer" in s. 2 of the *Canada Labour Code*. They are not an “employer” but rather are the trustees of multi-employer pension plan. Thus it is doubtful that, as against the Trustees, the appellant can claim any protection of this legislation.

[80] In addition, the appellant was never dismissed, suspended, laid off, demoted, or disciplined because of an absence from work due to injury or illness. He stopped working on the waterfront because of his health and inability to undertake the work. In that situation, s. 239 does not apply. In *Hutton Transport Ltd. and Teamsters Union, Loc. 141, Re* (1992), 31 L.A.C. (4th) 234 (Can.), the arbitration panel held that where there had been no discharge, s. 239(1) had not been violated and s. 239(2.1) cannot apply to a person who has resigned. The same reasoning would lead to the conclusion that s. 239.1 does not apply here.

[81] In my view, the appellant’s arguments pertaining to the *Canada Labour Code* are misguided. He submits that these provisions impose a statutory obligation on an employer to provide benefits to employees who have not already become entitled to these benefits through their employment. However, these sections are directed to the protection and preservation of employment of employees off work temporarily and the benefits or entitlements earned as of the time their absence started.

[82] Thus s. 239(2.1) provides that "pension...benefits...shall accumulate..." while the employee is absent from work. An employee's pension benefits can accumulate only if he is entitled to receive benefits. As explained earlier, the appellant did not meet the eligibility criteria to be a member of the Plan and was not entitled to disability pension benefits under the Plan. Accordingly, there were no such benefits which could "accumulate" while he was absent from work.

[83] For the reasons above, I would reject the appellant’s arguments which rely on the *Canada Labour Code.*

[84] Having disposed of the grounds of appeal respecting entitlement to the disability pension, I will now consider the welfare plan.

The Welfare Plan

[85] The appellant submits that the judge erred in deciding that he was not entitled to welfare benefits. The eligibility criteria for participation as an active member, which were set out in ¶ 22 of my decision, include 800 or more work hour credits to quality for Group I Benefits and 450 to 800 work hour credits to qualify for Group II Benefits. The appellant, who worked 245 ½ hours, does not satisfy the requirements to be an active member in order to receive either category of benefits.

[86] Again, the appellant argues that "hours" need not be hours worked after becoming a member of the Union. I reject this submission for the same reasons I have given in respect of this argument for entitlement to disability pension benefits.

[87] The appellant's argument that he is entitled to welfare benefits as a non-active pensioner, including disability pensioners, also cannot succeed. Such benefits are available only to non-active members who are pensioners; that is, members who had earlier satisfied the criteria for a disability pension. As I have already explained, the appellant never met those criteria. As a result, he never became eligible for welfare benefits as a non-active pensioner.

[88] The appellant also argues his entitlement to welfare benefits based on s. 239 and 239.1 of the *Canada Labour Code*. I reject these submissions for the same reasons as I have explained for the disability pension plan.

Costs Decision

[89] Where the appellant's action was commenced and heard pursuant to the *Nova Scotia Civil Procedure Rules (1972)*, the judge referred to *Rule* 63 of those *Rules*. He determined that the appropriate tariff is Tariff A.

[90] Using an actuarial estimate of the appellant's damages of $181,605 as the "amount involved" and adding a $2,000 *per diem* for each of the four days of trial, the Trustees calculated their costs entitlement pursuant to Tariff A as $24,750. However, they urged that this amount did not accord with the reasonable costs incurred to defend the claim and, pursuant to *Rule* 63.02(1)(a), sought a lump sum either in lieu of or in addition to any taxed costs awarded. They argued for a substantial contribution pursuant to *Williamson v. Williams*, [1998] N.S.J. No 498, and suggested that $90,000 was appropriate for costs and disbursements.

[91] The disabled appellant asked the judge to exercise his discretion in the circumstances of this case and, instead of costs following the event, to award both parties costs on a solicitor-client basis payable from the Plan. He argued that there were principled reasons to support this, including the public interest in the proper administration of the pensions and the Trustees' inconsistent interpretations of the Plan. According to the appellant, the dominant character of his action was not adversarial but resulted from the Trustees' failure to seek directions from the court.

[92] The judge rejected the appellant's characterization of his action. He awarded costs against the appellant personally and increased costs beyond the Tariff amount. The judge explained:

> [16] The plaintiff attempts to characterize this litigation as non-adversarial. I am not persuaded to accept this proposition. The plaintiff was not simply a nominal party seeking an interpretation of pension and other benefit plan documents on behalf of a number of other group members.
>
> ...
>
> [19] In the case that is before me, I see no reason why the successful party should not be awarded costs payable by the unsuccessful plaintiff. The defendant Trustees owe a fiduciary duty to all eligible plan members to defend against the claims of an individual who , although he might think he is entitled to benefits, is in actual fact, ineligible. The plaintiff's action was adversarial and ultimately unsuccessful. To order the payment of costs to each of the parties, on a solicitor and client basis, out of the funds in the two Plans is not warranted in the circumstances of this case.
>
> **DECISION:**

[20] Based on the foregoing and considering the nature and complexity of this case, the Court feels it is appropriate to order the plaintiff to contribute to the costs of the defendants in a lump sum amount.

[21] In doing so, the Court is not unmindful of the plaintiff's relative financial circumstances as compared to that of the Trustees of the Pension and Welfare Plans. Nonetheless, the plaintiff was unsuccessful in his action and the defendants, as the successful party, are entitled to costs. There are no special circumstances that would disentitle them to what a successful litigant should normally expect to receive.

[22] The strict application of Tariff A to the actuarially determined "amount involved" would not produce a substantial contribution to the defendants' actual cost of litigation (reference: **Williamson**, *supra*, **D.W. Matheson & Sons Contracting v. Canada (A.G.)**, [1999] N.S.J. No. 267 (S.C.), and **Founders Square Ltd. v. Nova Scotia (A.G.)**, [2000] N.S.J. No. 220 (S.C.)). A considerable amount of time was spent reaching an agreement regarding certain factual issues. If not for this the actual trial would have taken significantly longer than four days. This out-of-court time should be considered in arriving at a reasonable yet significant contribution towards the defendants' costs.

[23] In order to make a substantial contribution, the plaintiff must pay to the defendants a lump sum of $45,000.00 which is all inclusive of costs and disbursements including all applicable taxes. Unless the parties mutually agree on other more favourable terms of payment, the amount ordered shall become due and payable within 90 days of the date of release of this decision.

Issues on Costs

[93] For convenience, I will repeat the issues with respect to the judge's costs award:

(a) Whether leave to appeal the costs provisions of the order of January 12, 2011 is required and, if so, the appellant should be granted leave to do so;
(b) Whether the judge erred in the amount of his costs award; and
(c) Whether the judge erred in awarding costs against the appellant.

Leave to Appeal

[94] The appellant appeals the judge's order which both dismissed his claim against the Trustees and awarded costs against him.

[95] The Trustees submit that an award of costs is a discretionary order for which leave to appeal is required and leave will be granted only when an appellant can raise a reasonably arguable case for success on the appeal. They say that the appellant must demonstrate that the order on costs is clearly wrong, will cause a serious injustice and that the judge's discretion was not exercised judiciously or was exercised on a wrong principle.

[96] In my view, leave to appeal the costs provisions in the order is not required in this case.

[97] My analysis begins with the provisions of the *Judicature Act*, R.S.N.S. 1989, c. 240 which deal with appeals. Section 38 provides that an appeal lies from any decision of the Supreme Court to the Court of Appeal, subject to ss. 39 and 40. Section 40, which requires leave for an appeal of an interlocutory order is not applicable here. However, s. 39 states:

> 39 No order of the Supreme Court made with the consent of the parties is subject to appeal, and no order of the Supreme Court as to costs only that by law are left to the discretion of the Supreme Court is subject to appeal on the ground that the discretion was wrongly exercised or that it was exercised under a misapprehension as to the facts or the law or on any other ground, except by leave of the Court of Appeal. [Emphasis added]

An appeal of an order as to “costs only” in the discretion of the judge requires leave.

[98] *Rule* 90.01(1) of the *Civil Procedure Rules* defines a "general appeal" to mean "... an appeal other than ... costs only appeal" and defines "appeal as to costs only" to mean "... an appeal in which costs is the only issue". An examination of the entire *Rule* 90 shows that there are different timelines and different procedures for cost only appeals as compared to “general appeals”. See, for example, the reduced deadlines for filing an appeal as to costs only (*Rule* 90.10(2)), and the content of appeal books (*Rule* 90.31) which is less extensive than that required for general appeals.

[99] The *Judicature Act* and the *Rules* make a distinction between a costs only appeal and general appeals and interlocutory appeals. It is clear that this appeal was not limited to costs and, accordingly, leave to appeal is not required.

The Standard of Review - Costs

[100] The standard of review applicable to a decision on costs was recently considered in *DRL Coachlines Ltd. v. GE Canada Equipment Financing G.P.*, 2011 NSCA 23:

> [10] Costs awards are discretionary. Appellate intervention is not warranted unless there has been an application of incorrect legal principles or the decision is so clearly wrong as to amount to a manifest injustice: *Awan v. Cumberland Health Authority*, 2010 NSCA 50.

Analysis

[101] The appellant argues that the judge erred by awarding the Trustees costs against him personally rather than awarding costs to both the Trustees and he, on a solicitor-client basis, from the Plan. I must reject this argument. The judge did not apply incorrect legal principles nor is his decision so clearly wrong as to amount to a manifest injustice.

[102] The Supreme Court of Canada recently considered the issue of payment of costs by a trust in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39. There, the appellant

appealed the unanimous decision of the Ontario Court of Appeal written by Gillese, J.A. which had overturned the Divisional Court's award of costs out of the pension fund.

[103] At the Supreme Court of Canada, Rothstein, J.,writing for the majority, stated:

> [124] In *Smith v. Michelin North America (Canada) Inc.*, 2008 NSCA 107, 271 N.S.R. (2d) 274, the Nova Scotia Court of Appeal addressed the question of costs with the benefit of the Ontario Court of Appeal's decision in this case. It agreed with Gillese J.A.'s finding that the key question is whether the litigation is adversarial rather than aimed at the due administration of the pension trust fund. Claims that are adversarial amongst beneficiaries will not qualify for a costs award from the fund. However, not even every claim in which the beneficiaries have a common interest in the litigation will entitle them to their costs from the fund. A claim might still be adversarial, even if it is not adversarial amongst beneficiaries. Costs will only be awarded from the fund where the proceedings are necessary for the due administration of the trust.
>
> [125] Where litigation involves issues, such as in the present case, of a dispute between a settlor of a trust fund and some or all of its beneficiaries, the ordering of costs payable from the fund to the unsuccessful party may ultimately have to be paid by the successful party. In these types of cases, a court will be more likely to approach costs as in an ordinary lawsuit, i.e., payable by the unsuccessful party to the successful party.
>
> [126] In the end, of course, costs awards are quintessentially discretionary. Courts have considered a number of factors in finding that litigation was concerned with due administration of the trust. Courts have noted that the litigation was primarily about the construction of the plan documents *(Huang v. Telus Corp. Pension Plan (Trustees of)*, 2005 ABQB 40, 41 Alta. L.R. (4th) 107, *Patrick v. Telus Communications Inc.*, 2005 BCCA 592, 49 B.C.L.R. (4th) 74, and *Burke v. Hudson's Bay Co.*, 2008 ONCA 690, 299 D.L.R. (4th) 277), clarified a problematic area of the law *(Ontario Teachers' Pension Plan Board v. Ontario* (*Superintendent of Financial Services)* (2003), 36 C.C.P.B. 154 (Ont. Div. Ct.), and *Burke*), was the only means of clarifying the parties' rights (*Burke*), alleged maladministration (*MacKinnon v. Ontario Municipal Employees Retirement Board*, 2007 ONCA 874, 288 D.L.R. (4th) 688), and had no effect on other beneficiaries of the trust fund (*C.A.S.A.W., Local 1 v. Alcan*

> *Smelters and Chemicals Ltd.*, 2001 BCCA 303, 198 D.L.R. (4th) 504, and *Bentall Corp. v. Canada Trust Co.* (1996), 26 B.C.L.R. (3d) 181 (S.C.)).
>
> [127] Courts have refused to award costs when they considered litigation ultimately adversarial. In reaching this conclusion, they have noted the following factors: the litigation included allegations by the unsuccessful party of breach of fiduciary duty *(White v. Halifax (Regional Municipality) Pension Committee*, 2007 NSCA 22, 252 N.S.R. (2d) 39); the litigation only benefited a class of members and it would impose costs on other members should the plaintiff be successful *(Smith, Lennon v. Ontario (Superintendent of Financial Services)* (2007), 87 O.R. (3d) 736 (Div. Ct.), and *Turner v. Andrews*, 2001 BCCA 76, 85 B.C.L.R. (3d) 53); the litigation had little merit *(Smith, White and Lennon)*.

[104] The judge did not err when he described the litigation in this case as adversarial. The appellant's action against the Trustees was not made as a representative claim - that is, one presented on behalf of or for the benefit of all or a group of the beneficiaries of the Plan. It was not necessary for the due administration of the Plan. Rather, his claim was made in his personal capacity to determine his own eligibility for benefits based on his particular factual situation. The appellant in his pleadings also alleged breach of fiduciary duty and breach of trust. His action was pled, presented and argued in an adversarial manner.

[105] The appellant has not satisfied the criteria in *Nolan* for payment of costs out of the funds held by the Plan rather than against him personally.

[106] The costs the judge awarded against the appellant, $45,000 is a considerable amount, particularly for a disabled former longshoreman to pay. However, I can find no basis for disturbing the exercise of the judge's discretion in determining the amount of costs he awarded to the Trustees. In accordance with the case law, the judge awarded an amount which is a substantial contribution to the actual costs of the successful party. He did not apply incorrect legal principles and his decision is not so clearly wrong as to amount to a manifest injustice.

[107] I would dismiss the appeal against the costs provisions in the judge's order.

Disposition

[108] I would dismiss the appeal against the merits of the judge's decision and his costs decision.

[109] The submissions of the parties regarding costs on the appeal were far apart, with the appellant asking for solicitor-client costs for both parties from the Trust fund and the Trustees suggesting 40% of the costs awarded at trial. In response to a question from the panel, counsel for the Trustees acknowledged, quite properly in my view, that it is a good thing to have issues pertaining to the Plan clarified. He also stated that he would not suggest that it's not a benefit, although the Trustees might well be of the view that the litigation was not necessarily the best utilization of resources.

[110] In the particular circumstances of this appeal, I would award costs to the Trustees in the amount of $2,000 inclusive of disbursements.

Oland, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.