SUPREME COURT OF NOVA SCOTIA

Citation: *Wilson v. Benefit Plan Administrators (Atlantic) Limited*, 2023 NSSC 272

Date: 20230901
Docket: Hfx No. 509789
Registry: Halifax

Between:

Jennifer Ann Wilson

Applicant

and

Benefit Plan Administrators (Atlantic) Limited, and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United and Canada

Respondents

DECISION ON APPLICATION

Judge:	The Honourable Justice Ann E. Smith
Heard:	March 22 and 23, 2023, in Halifax, Nova Scotia
Counsel:	Allison Kouzovnikov, for the Applicant Cameron Rempel, for the Respondent – Benefit Plan Administrators (Atlantic) Limited Ronald Pink, K.C., and Mary Rolf, for the Respondent – United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United and Canada

By the Court:

Introduction

[1] On March 1, 2020, Jeffrey Turner died at the age of 40. He left behind his common law spouse, Jennifer Ann Wilson, and her two young children. Although Mr. Turner was initially suspected to have died as a result of a workplace accident, it was later determined that he died by suicide. As Mr. Turner's surviving spouse, Ms. Wilson was entitled to a pension death benefit.

[2] This Application relates to the alleged mishandling of the administration of that benefit, and the losses that Ms. Wilson says she suffered as a result.

Background

[3] Mr. Turner had been a plumber by profession, and a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 56 ("UA Local 56" or the "Union"). Six or seven weeks after Mr. Turner's death, Ms. Wilson received a letter from Benefit Plan Administrators (Atlantic) Limited ("BPA"), as administrative agent for the UA Local 56 Pension Benefit Trust (the "Trust"). In this letter dated April 16, 2020, BPA informed her that, as Mr. Turner's surviving spouse, she was entitled to

a death benefit under his Union pension plan. Ms. Wilson was told that she could choose from four options, two of which were: (1) a lump sum refund of the commuted value of the monthly pension accrued to Mr. Turner's date of death in the amount of $124,638.47, or (2) an immediate monthly pension payable for her lifetime in the amount of $360.76. The death benefit notice concluded, "No further processing will take place until all required completed documentation is returned." The notice was signed by Margo Langille, Pension Manager.

[4] What the death benefit notice *did not* tell Ms. Wilson – and what Ms. Langille herself did not realize at the time – was that Ms. Wilson only had 90 days to inform BPA of her decision or she would be deemed, pursuant to s. 67(4) of the *Pension Benefits Act*, R.S.N.S. 1989, c. 340, to have chosen the immediate monthly pension option. As such, her right to receive the lump sum payment lapsed after 90 days.

[5] According to Ms. Wilson, at the time she received the letter from BPA, she did not know which option to choose. She had not yet been approved for Canada Pension Plan survivor benefits for herself and her children, and she was waiting on the outcome of the Department of Labour's investigation into Mr. Turner's death to know whether she would be eligible for workers' compensation benefits. She was relieved that there was no deadline for her to respond to BPA, and decided to wait

to make her choice until she knew whether she would be approved for CPP and workers' compensation benefits.

[6] In mid-August 2020, Ms. Wilson was informed that the Medical Examiner's office had concluded that Jeffrey Turner had died by suicide, not as a result of a workplace accident. This news left Ms. Wilson in shock and disbelief. It also foreclosed any potential claim by Ms. Wilson for workers' compensation benefits.

[7] Ms. Wilson's entitlement, if any, to CPP survivor benefits took far longer to resolve. Following several requests by Service Canada for more information, Ms. Wilson's application was denied in early September 2020.

[8] According to Ms. Wilson, she called BPA on September 17, 2020 and told Margo Langille's assistant that she needed more time to make her decision about which pension death benefit option she wanted. Ms. Wilson said the assistant told her that she would make a note in the file and that Ms. Wilson should not worry, as there was no deadline for her decision. Ms. Wilson then focused her attention on preparing an appeal of the CPP benefit denial and other matters.

[9] In January 2021, Service Canada again asked Ms. Wilson for more detailed information. On February 5, 2021, Ms. Wilson called BPA for a second time, to provide an update on her situation. She spoke to Margo Langille, who told her that

too much time had passed and the death benefit package would have to be recalculated. Ms. Langille said a new letter would be sent out right away reflecting the revised calculations. Not long after, Ms. Wilson received a death benefit notice from BPA dated February 5, 2021. The notice again gave Ms. Wilson four options, but the lump sum amount had been reduced from $124,638.47 to $36,535.07. The immediate monthly pension amount had been reduced from $360.76 to $210.46.

[10] At that point, Ms. Wilson retained legal counsel. On March 30, 2021, Ms. Wilson's counsel wrote to BPA to indicate that Ms. Wilson had elected to receive the option of a lump sum in the amount of $124,638.47. BPA and the Trust sought legal advice and did not pay Ms. Wilson the $124,638.47, as requested.

[11] On May 7, 2021, Ms. Wilson received a third death benefit notice from BPA. It was dated April 30, 2021. Like the previous two notices, it gave Ms. Wilson four options for her pension death benefit. This time, the lump sum amount had risen from $36,535.07 to $44,493.97. The immediate monthly pension amount had risen from $210 to $235.56.

[12] On October 15, 2021, having received no payments from BPA, Ms. Wilson filed this Application claiming negligence and breach of fiduciary duty against BPA and the Trust. Ms. Wilson pleaded that BPA failed to advise her that she had to

respond with her desired death benefit option within 90 days or be deemed under the governing legislation to have selected an immediate monthly pension.

[13] Ms. Wilson seeks an order directing the Respondents to accept and process her selection of a lump sum death benefit in the amount of $124,637.47. She also seeks general, restitutionary, aggravated and punitive damages.

[14] In their joint Notice of Contest, filed on December 10, 2021, the Trust and BPA deny that they breached any duties owed to Ms. Wilson and say she has suffered no loss. They seek a dismissal of the Application.

Issues:

1. Did the Respondents' failure to advise Ms. Wilson of the effect of the deeming provision amount to a breach of a duty of care in tort or a breach of fiduciary duty? If so, did that breach of duty cause a loss to Ms. Wilson?
2. Did the Respondents breach a duty owed to Ms. Wilson, either in tort or as a fiduciary, when they advised her that the commuted value of her pension death benefit had been recalculated and, as a result, had decreased by approximately $90,000? If so, did that breach of duty cause a loss to Ms. Wilson?
3. Did the Respondents breach the fiduciary duty of loyalty owed to Ms. Wilson? If so, did the breach of duty cause a loss to Ms. Wilson?

The Evidence

[15] The Applicant's evidence consisted of three affidavits of Jennifer Wilson. She also filed a subpoena requiring Margo Langille to appear as a witness. The

Respondents filed affidavits of Darren Muise, the Chair of the Board of Trustees of the Trust; Mary Kate Archibald, a Principal of the firm Eckler Ltd., which provides actuarial consulting services to the Trust; Ross Arsenault, former Vice President, Practice Leader of BPA; and Mary Rolf, a solicitor with Pink Larkin and co-counsel for the Respondents.

[16] Ms. Wilson was not cross-examined on her affidavits. Margo Langille was examined by Applicant's counsel and cross-examined by counsel for the Trust. Mr. Muise, Ms. Archibald, and Mr. Arsenault were cross-examined by Applicant's counsel.

Jennifer Ann Wilson

[17] Jennifer Ann Wilson lives in Milford, Nova Scotia. She is a single mother with two young children. At the time of Jeffrey Turner's death, her children were four and six years old. Ms. Wilson works as an office administrator for a local lumber company, earning about $40,000 annually.

[18] Ms. Wilson began a romantic relationship with Jeffrey Turner in April 2017. They moved in together in a small trailer in Milford in August 2018. They were engaged to be married. Ms. Wilson described herself and Mr. Turner as best friends who loved each other deeply.

[19] On March 1, 2020, Ms. Wilson, her children, and Mr. Turner were supposed to have Sunday dinner at Ms. Wilson's parents' house. Earlier that afternoon, Mr. Turner, a plumber employed by Black & McDonald, texted Ms. Wilson to say that he needed to drop by the airport to check on a job. It was not unusual for Mr. Turner to do work at the airport.

[20] Jeffrey Turner never arrived for dinner. Hours later, airport staff discovered his body in an electrical room. He had been electrocuted. Ms. Wilson was devastated. The Department of Labour commenced an investigation into Mr. Turner's death.

[21] Ms. Wilson wrote Mr. Turner's obituary and made the arrangements for his funeral, which were complicated by the Covid-19 pandemic. The funeral service was held on March 6, 2020. It was not possible to bury Mr. Turner's body because of the frost in the ground. His body was stored temporarily in a utility shed at a nearby cemetery.

[22] Mr. Turner died intestate with no assets other than a small death benefit associated with his health plan and what was left of his pension benefit.

[23] On March 18, 2020, Ms. Wilson applied for CPP survivor benefits for herself and her children. On March 25, 2020, Service Canada wrote to Ms. Wilson requesting additional information. Ms. Wilson provided that information on April

3, 2020. Ms. Wilson also organized the return of Mr. Turner's leased car to the dealership. On April 16, 2020, Ms. Wilson was interviewed by the Department of Labour and the RCMP as part of their investigation into Mr. Turner's death.

[24] Although Ms. Wilson could not remember the exact date, she said it was not long after her interview that she received the letter from BPA regarding her entitlement to the pension plan death benefit. The letter, dated April 16, 2020, stated:

> Please accept our deepest condolences on the loss of your spouse, Jeffrey Turner. As the surviving spouse, you are entitled to receive a Pension Death Benefit under the provisions of the Pension Plan.
>
> Please choose one of the following options:
>
> 1. A lump sum refund of the commuted value of the monthly pension accrued to Mr. Turner's date of death in the amount of **$124,638.47** (**less applicable taxes**) or
> 2. A transfer of **$124,638.47** to a Registered Retirement Savings Plan or
> 3. A monthly pension payable for your lifetime commencing April 1, 2020 in the amount of **$360.76**
> 4. A monthly deferred pension payable for your lifetime commencing August 1, 2037 (normal retirement age 60) in the amount of **$705.77**.

[25] The letter went on to provide blanks for Ms. Wilson to insert her preferred option, the date, her signature and her social insurance number. There was also a blank for the signature of a witness. The letter concluded as follows:

> Please retain the copy for your records and return the completed original letter to my attention. <u>No further processing will take place until all required completed documentation is returned.</u>
>
> If you have any questions, please do not hesitate to contact me.
>
> [Emphasis added]

The letter was signed by Margo Langille, Pension Manager.

[26] Ms. Wilson described the months of March and April 2020 as "chaotic" and "stressful." She said the grieving process was made more difficult due to Covid-19 restrictions and the official state of emergency. Forced to make a bubble, she could not hug her family and friends when she needed them. She said she felt like she was inside a nightmare. Ms. Wilson was homeschooling her two young children and wrapping up Jeffrey Turner's personal affairs. She was participating in many calls to the funeral home, the Workers' Compensation Board, the Department of Labour, Mr. Turner's employer, the Medical Examiner's office, financial institutions, her lawyer and Service Canada. Ms. Wilson said she was relieved when she read the letter from BPA and saw that there was no deadline for her response. She said she felt comforted that there were funds for her family, and that she could decide what to do "when some dust had settled."

[27] According to Ms. Wilson, if she had known that there was a deadline for her to respond with her desired option, she "absolutely would have." She stated that she is an office administrator, and her job is to process paperwork in a timely manner. She added that the pension death benefit would have a huge financial impact on her family, and she "would not drop that ball." She decided to wait to make her decision

until she knew whether she would be approved for CPP and workers' compensation benefits. Ms. Wilson stated at para. 41 of her affidavit filed on October 15, 2021:

> If I had to make a choice about the Pension Death Benefit option before knowing whether my CPP and WCB benefits were approved, I would have selected a monthly payment to better support my family financially on a monthly basis.

[28] At around the same time that Ms. Wilson received the letter from BPA, a mass shooting took place in Nova Scotia. At one point, the gunman was in Shubenacadie, not far from where Ms. Wilson and her children live. She said that she and her children closed the blinds and locked the doors. She described the experience as "surreal" and "frightening." Ms. Wilson said she was told by the Medical Examiner's office that there would be a delay in the investigation into Mr. Turner's death because of the mass shooting.

[29] On May 1, 2020, Mr. Turner was buried. Only five people were allowed to attend. Ms. Wilson said it felt very lonely as he was laid to rest. The provincial state of emergency continued.

[30] On May 14, 2020 and June 15, 2020, Ms. Wilson received letters from Service Canada asking for more information. She responded on July 20, 2020 with additional information. In the meantime, the Department of Labour's investigation continued. Ms. Wilson's worries grew. She said she had assumed that Mr. Turner's death was simply a tragic workplace accident, and she did not understand why the

investigation was taking so long. Despite regular communication with Mr. Turner's employer, the Medical Examiner's office, the WCB and the Department of Labour, Ms. Wilson was unable to obtain any answers.

[31] After her children's school was dismissed in June 2020, Ms. Wilson decided to take a leave of absence with her employer's approval and return to work in September 2020.

[32] Ms. Wilson said that in mid August 2020, she received a call from the Medical Examiner's office and, "with no warning or compassion", she was told "matter-of-factly" that Mr. Turner had died by suicide. Ms. Wilson said she was in shock, unable to speak or breathe, without anyone there to support her, and with two small children at her feet. She said it was "an absolutely brutal experience that I wouldn't wish on my worst enemy." Ms. Wilson received the Medical Examiner's report about a week later. Ms. Wilson stated that through all this turmoil, responding to BPA was the furthest thing from her mind, believing that there was no pressure to make a decision any time soon.

[33] On September 2, 2020, Service Canada advised that it was still denying Ms. Wilson's application for CPP survivor benefits. On September 17, 2020, she contacted BPA to update them that she was still not able to complete the paperwork

for the death benefit. She said she spoke to Margo Langille's assistant who told her she would put a note in the file and that there was no deadline. Ms. Wilson said she felt "a great sigh of relief", and she "could continue to focus on preparing a detailed appeal package to Service Canada."

[34] In early October 2020, Ms. Wilson picked up some mail addressed to Mr. Turner at his parents' house. Included was a September 1, 2020 notice from BPA that certain changes had been made to Mr. Turner's pension plan. Ms. Wilson did not understand the contents of the letter and paid little attention to it since the first page indicated that "no action is required by you in response to this notice." Under the heading "Notice of Changes to Lump Sum Commuted Values Paid from the Plan", the document states:

> **This notice is for information purposes only and is being provided to inform you of changes, which took effect on September 1, 2020, to the prescribed methods which are used to calculate commuted values in the Plan. Members who continue to participate in the Plan, or Members who choose to leave their pension in the Plan when they do terminate participation, will not be affected by these changes. No action is required by you in response to this notice.**
>
> The Trustees wish to inform you that there has been a change to the prescribed standards which dictate how pension commuted values are calculated in the Plan. The Canadian Institute of Actuaries released the final amendments to the standards which prescribe these methods, *Section 3500 of the Practice-Specific Standards for Pension Plans – Pension Commuted Values* ("CV standard"), on January 24, 2020.
>
> **What is a commuted value?**
>
> The commuted value – sometimes known as the "lump sum cash value" or "lump sum transfer value" – is the total value in today's dollars of the lifetime pension you have earned and would be entitled to receive if you left your benefits in the Plan until you reach retirement age. In other words, it is the amount of money that

> must be set aside today to provide your future pension. It is an actuarial calculation that involves many factors, including your age, pension earned to date and interest rates. Many of the factors are dictated by standards set by the Canadian Institute of Actuaries.
>
> **Overview of Changes**
>
> …
>
> The Plan administrator has updated systems to accommodate the changes to the calculation of lump sum payments from the Plan due to the revised CV standard. The impact of the changes will generally result in lower lump sum commuted value payments for members or beneficiaries who elect to transfer out the pension they have earned in the Plan.
>
> **Who will be affected by these changes?**
>
> …
>
> The changes to the CV standard impact the lump sums that are transferred out of the Plan on member termination (leaving before retirement), and at certain other times such as pre-retirement death and marriage breakdown.
>
> If you leave the Plan with a termination date on or after September 1, 2020 and request a lump sum payment in lieu of a deferred pension, your lump sum will be calculated using the revised CV standard. Similarly, if your benefit is subject to a commuted value calculation for other reasons, such as a recalculation, pre-retirement death or marriage breakdown, and the effective date of that calculation is on or after September 1, 2020, the lump sum will be calculated using the revised CV standard.
>
> [Emphasis added]

[35] Christmas 2020 came and went with no news on Ms. Wilson's CPP benefits appeal. In January 2021, Service Canada wrote to her, again requesting further information. Ms. Wilson responded within the 30-day deadline. On February 5, 2021, she called BPA and spoke with Margo Langille, to give her another update on the status of the CPP benefits claim. Ms. Wilson described the conversation in her second supplementary affidavit filed June 6, 2022, at para. 48:

> Ms. Langille told me … that too much time had passed and the benefit package would have to be recalculated. She referred to a table used by actuaries, a board of trustees, and periodic calculations which occur over 90 days. She told me that a new letter would be sent out right away showing the new calculations. I didn't understand the full gist of our conversation. I was left confused, anxious, and scared.
>
> [Emphasis added]

[36] Ms. Langille's notes of this conversation, attached as an exhibit to the same affidavit, stated:

> Jennifer Wilson called to say she is still fighting with CRA [*sic*] to prove she is common law spouse, that is why she hasn't returned this paperwork. I let her know I [*sic*] new package would have to go out and the CV would be significantly lower. She was upset and said she called back in the fall and was told to take her time. No record of any call in the file. She asked me to send new package. She was quite upset.
>
> [Emphasis added]

[37] Not long after the phone call with Ms. Langille, Ms. Wilson received the new package from BPA. The letter, dated February 5, 2021, stated:

> As per the attached notice, enclosed please find the recalculation of your entitlement you are to receive as a Pension Death Benefit under the provisions of the Pension Plan.
>
> Please choose one of the following options:
>
> 1. A lump sum refund of the commuted value of the monthly pension accrued to Mr. Turner's date of death in the amount of **$36,535.07** (**less applicable taxes**) or
> 2. A transfer of **$36,535.07** to a Registered Retirement Savings Plan or
> 3. A monthly pension payable for your lifetime commencing April 1, 2020 in the amount of **$210.46**
> 4. A monthly deferred pension payable for your lifetime commencing August 1, 2037 (normal retirement age 60) in the amount of **$681.75**.
>
> [Emphasis added]

[38] Like the April 16, 2020 letter, the February 5, 2021 letter concluded:

> Please retain the copy for your records and return the completed original letter to my attention. No further processing will take place until all required competed documentation is returned.

[39] Unlike the April 16, 2020 letter, the February 5, 2021 letter came with a one-page document "Appendix – Commuted Values", and a copy of the September 1, 2020 "Notice of Changes to Lump Sum Commuted Values Paid from the Plan". The appendix stated:

> The commuted value shown in the attached Pension Plan Death Benefits Statement was determined in accordance with the Canadian Institute of Actuaries Standards of Practice for Pension Commuted Values and with applicable pension legislation.
>
> The assumptions and methods used in the calculation of the commuted value are as follows:
>
> | | |
> |---|---|
> | Benefits Payable | The benefits that are being commuted are as described in the attached Termination Benefits Statement. |
> | Date of Death | March 1, 2020 |
> | … | |
> | Recalculation | <u>The calculation of Commuted Value remains valid for a period of 90 days from the date the Pension Plan Death Benefits Statement is mailed to you. If a commuted value is payable to you after 90 days has elapsed, a new calculation will be required.</u> |
>
> Because the Commuted Value is based on a number of assumptions, the retirement income provided by the Commuted value may be either greater or less than the pension payments that the member would have Received from the pension plan.
>
> [Emphasis added]

[40] Ms. Wilson was extremely upset upon realizing that the lump sum amount had been reduced by $90,000 from $124,638.47. She immediately called BPA and spoke to Ms. Langille. She cried during the call, and repeatedly asked "Why?" She said Ms. Langille told her that it was due to the actuaries, the board of trustees, and recalculations. According to Ms. Wilson, Ms. Langille mentioned that a letter had been sent in September about the changes and she should have acted then. Ms. Wilson did not know what letter Ms. Langille was talking about. Ms. Langille's notes of the conversation, dated February 17, 2021 and attached as an exhibit to Ms. Wilson's second supplementary affidavit, stated:

> Jennifer Wilson called, crying. She received the new package with the CV calc. She asked why she wasn't called or told to send this back before it got recalculated. She can not believe the difference. She said when she called in the fall she was told to take her time, no rush.
>
> That would not have been told to her as the 90 days to recalc would have been up in July 16, 2020 and if she had called after Sept 1/20 she would have been told of the changes. She is contacting her lawyer to fight this.
>
> I spoke to Janet and she advised me to call Darren @ 56 P+P to let him know.

[41] On February 19, 2021, Ms. Wilson received more correspondence from Service Canada asking for more documents. She replied on March 21, 2021. On March 25, 2021, Ms. Wilson received confirmation from Service Canada that she and her children were entitled to CPP survivor benefits.

[42] On March 30, 2021, Ms. Wilson, through counsel, wrote to BPA and advised that she would like to select the lump sum death benefit of $124,638.47. Ms. Wilson said the Respondents maintained the position that she was only entitled to the much lower options set out in the February 5, 2021 package, or, alternatively, that she was only entitled to the most recent recalculated figures. She said this left her no choice but to start this litigation.

[43] Ms. Wilson said she was blindsided when the Respondents adopted a new position five months into the litigation: that she was only entitled to the monthly pension option originally set out in the April 16, 2020 letter, payable immediately. Ms. Wilson stated that she has wasted a lot of time, money and effort trying to understand the changes to the actuarial standards respecting pension commuted values, including studying the nearly 400 pages of affidavit material filed by the Respondents' witnesses which focused primarily on the new commuted value standard.

[44] On April 22, 2022, Ms. Wilson received correspondence from the Respondents indicating that she would receive a cheque representing the monthly pension amount retroactive to April 1, 2020. She received this amount, with interest, prior to the hearing, without prejudice to her ability to argue that she is entitled to the lump sum amount.

[45] In her second supplementary affidavit, Ms. Wilson described the emotional and physical impact of the Respondents' conduct on her:

> 75. Since I was first advised by BPA more than 15 months ago in February 2021 that the lump sum benefit of $124,637.47 had been reduced down to $36,535.07, I have grieved yet another loss in my life.
>
> 76. In many ways, this loss hits me in a way that is similar to Jeff's death: both involve situations I could never have predicted, and circumstances that are completely outside of my control. Both produced outcomes which I cannot explain to my children, friends, and family. Both leave me wondering what I could have done differently to have prevented this from happening? Both have shaken my confidence in humanity, and the institutions designed to help and protect, not hurt.
>
> 77. It was a surreal time just after Jeff's death in March 2020. I remember just crying constantly. I was numb. I remember feeling sick to my stomach all the time. I would fight back tears until the kids were gone.
>
> 78. I distinctly remember Joe Boyd, Jeff's boss from Black & MacDonald [*sic*], and Darren Muise visiting my home the day after Jeff died. They brought gifts of food and expressed their condolences. They both offered to help me in anyway [*sic*]. I was appreciative and felt reassured by their visit.
>
> …
>
> 80. When I look back on things now, I don't know why Darren Muise came to my house that day. He certainly hasn't helped me in anyway [*sic*]. He is actively fighting against me. This situation exacerbates my emotional anguish as it's one thing for a random bureaucrat to deny you something that's yours, and quite another for someone who looks you in the eye and tells you they are there to support you, then turns around and does the exact opposite. The hurt cuts deeper. It's a betrayal.
>
> 81. BPA betrayed me too. They told me no further processing would take place. Then it did.
>
> 82. For too many nights to count, I couldn't sleep, and I still can't sleep most nights thinking "How could this happen?". I have replayed every last word in BPA's letters to me, every last word discussed on the telephone calls that I recall with them. I couldn't make sense of it. I still can't make any sense of it.
>
> 83. I am an office administrator – a good one. It's part of my identity. I wondered did I make a mistake here? If so, what was the mistake? What should I have done differently to avoid having to spend my limited emotional and financial resources in this litigation?

> 84. I've never missed a deadline in my life. I met each and every deadline set out in my many exchanges of correspondence with CPP. I'm rarely 2 minutes later for the most casual appointment with an old friend.
>
> 85. The Respondents themselves have attacked me in their legal brief, suggesting I am to blame. This has caused me to doubt myself and my abilities. It has reduced my self-esteem.
>
> 86. I have become anxious and depressed. In recent months I developed concerning heart symptoms. My doctor sent me to a specialist. Fortunately, the specialist could find nothing physically wrong with me. I was told to reduce the stress in my life.

[46] Ms. Wilson stated that she "desperately" needs a new water filtration system for her well, and a new roof. She said she has needed these items for several years but has not had the funds to purchase them.

[47] As noted earlier, Ms. Wilson was not cross-examined on her affidavits.

Darren Muise

[48] Darren Muise is the Chair of the Board of Trustees of the Trust, which administers the pension plan fund (the "Pension Plan" or the "Plan") for the more than 1,200 members of UA Local 56.

[49] Mr. Muise has more than 20 years of experience in the construction industry. Early in his career, he worked toward and attained two Red Seal designations, both as a plumber and a steamfitter. He gained extensive experience working in Alberta and Nova Scotia.

[50] In 2015, Mr. Muise became the Assistant Business Manager of UA Local 56. Mr. Muise reported to the Business Manager and oversaw the day-to-day operations of UA Local 56, managing staff and supporting Union members.

[51] In 2018, Mr. Muise was elected Business Manager and Financial Secretary of UA Local 56. In this role, he has oversight of multiple local and national collective agreements and works with the Nova Scotia Construction Labour Relations Association on industry issues affecting contractors and Union members. Mr. Muise is also the Chair of the Trust. He has been the Chair of the Trust and a Trustee since 2018. His role as Chair of the Trust and a Trustee is separate from his role as Business Manager and Financial Secretary of UA Local 56.

[52] In his affidavit, Mr. Muise explained that as Chair of the Trust and a Trustee, he is responsible, along with the other Trustees, for overseeing the financial security and sustainability of the Pension Plan members' retirement pension benefits. The assets held in trust as part of the Pension Plan are approximately $200 million.

[53] There are eight Trustees in total, four employer representatives, and four Union representatives. The Trustees receive training when they join the Board of Trustees, and further training on an annual basis after that. Since assuming the role as a Trustee, Mr. Muise has participated in training covering various pension topics,

including, but not limited to: a) the fiduciary role of the Trustees; b) the legal duties of the Trustees; and c) the requirement that Trustees act impartially.

[54] The Trust administers the Pension Plan in accordance with the Trust Document under which the Pension Plan is established, and the statutory duties and requirements of the Nova Scotia *Pension Benefits Act*, R.S.N.S. 1989, c. 340, the *Pension Benefits Regulations*, N.S. Reg. 200/Regulations, N.S., as well as the federal *Income Tax Act*, R.S.C. 1985, c. 1.

[55] Mr. Muise stated that the Trustees have a fiduciary duty to act in the best interests of all the beneficiaries of the Trust. He outlined his understanding of what that involves. His evidence was that the Trustees concern themselves with the financial health and sustainability of the Pension Plan and make their decisions fairly, equally, and impartially. The Trustees must consider how their decisions affect all beneficiaries, including those who are still working and contributing to the Pension Plan, those who are retired and drawing from the Plan, and those who leave the Plan for any reason, as well as named beneficiaries of Plan members who have died. The Trustees cannot prioritize or favour one category of beneficiaries or one category of interests over another. They must not act in a way that creates a detriment to an individual beneficiary or category of beneficiaries to the benefit of another individual beneficiary or category of beneficiaries. Likewise, they cannot

act in a way that creates a benefit to one individual or category of beneficiaries to the detriment of another individual beneficiary or category of beneficiaries. Mr. Muise stated that, as Trustees, they are constantly balancing competing interests to ensure fair outcomes for all beneficiaries, and they try to protect the long-term financial health and sustainability of the Pension Plan.

[56] Mr. Muise further stated that pension plans are complex and retirement pension benefits are critical to the financial security of the members in their future retirement. For this reason, he considers it part of their duty as Trustees to ensure that they obtain professional advice whenever possible. He said that the Board works closely with the Plan Actuary, the Trust's legal and financial advisors, as well as their pension benefits consultants, to ensure that they are in compliance with all of their legal duties, that they are following best industry practices, and that in every respect they are acting in the best interests of all the beneficiaries and the long-term financial sustainability of the Pension Plan.

[57] Mr. Muise's affidavit also referred to the administrative agency agreement with BPA. The Trust is the statutory administrator of the Pension Plan as defined under s. 2(b) and ss. 18(1) and (3)(e) of the *Pension Benefits Act*. The Trust has contracted with BPA to act as the Trust's administrative agent and perform the day-to-day operational administration of the Pension Plan. The contractual relationship

is governed by an Administrative Agency Agreement dated January 1, 2020, which was attached to Mr. Muise's affidavit.

[58] Mr. Muise stated that BPA acts solely at the direction of the Trust and reports to the Board of Trustees. He added that the Administrative Agency Agreement contains a detailed indemnity clause which contains the conditions under which the Trust agrees to indemnify BPA.

[59] A significant portion of Mr. Muise's affidavit was devoted to the change in the method of calculating commuted values of pension benefits (the "CV Standard Update"). He said that on March 26, 2020, the Trustees had a Board meeting which included a presentation on the actuarial outlook of the Pension Plan by the Plan Actuary, Mary Kate Archibald from Eckler Ltd. He said that Ms. Archibald advised the Trustees that a new method of calculating commuted values of pension benefits had been announced for plans like the Plan. Ms. Archibald explained that the way actuaries were required to calculate commuted values up to this time resulted in calculations that were too high compared to the monies actually set aside for the pension plan member. This was causing a loss to a pension plan every time a member withdrew from the plan before they were eligible for early retirement or normal retirement.

[60] Mr. Muise said he understood from the presentation that the CV Standard Update was supposed to address the problem and re-align the commuted value with the actual monies set aside for a Pension Plan member. He understood that this new method of calculating commuted values would be more equitable to all Pension Plan members because they would be receiving their proper interest in the pension fund. At the time of the meeting, the CV Standard Update was scheduled to become mandatory on August 1, 2020. That was later delayed to December 1, 2020 as a result of the Covid-19 pandemic. He said that Ms. Archibald advised that the Trust was permitted to adopt the CV Standard Update early if it wished to do so. He said that the Trustees recognized that the CV Standard Update would be beneficial to the Pension Plan and agreed to adopt the new standard as soon as possible.

[61] The Trustees received an update regarding the progress toward early adoption of the CV Standard Update at the June 11, 2020 meeting of the Board of Trustees. The Trustees were advised that BPA needed to update their systems in order to implement the CV Standard Update and would be in a position to implement it by September 1, 2020. The Trustees notified the membership after the CV Standard Update took effect by sending out the "Notice of Changes to Lump Sum Commuted Values Paid from the Plan".

[62] Mr. Muise said that, as Chair, he stressed that it was very important that the Trust implement the CV Standard Update as soon as possible. The Trust had observed a pattern among a group of members who took a commuted value of their pension benefit every time they terminated employment. This was troubling given the information the Trustees were receiving that commuted value calculations were too high and were effectively deteriorating the assets of the other Plan members.

[63] With respect to Mr. Turner's pension, Mr. Muise stated in his affidavit that the CV Standard Update changed the commuted value option of the death benefit available to Ms. Wilson as beneficiary. Mr. Muise also stated in his affidavit:

> 59. I am informed by the Plan Actuary, and do verily believe it to be true, that it is not possible for the Trust to direct that Ms. Wilson receive a commuted value computed using the previous method for calculating commuted values.
>
> 60. Even if it were possible, the former method of computing commuted values would benefit Ms. Wilson to the detriment of the other Pension Plan members. This would be contrary to the Trustees' fiduciary duty.
>
> …
>
> 65. The CV Standard Update took effect on September 1, 2020.
>
> 66. In implementing the CV Standard Update, the Trust sought and followed appropriate advice to ensure it complied with all applicable statutory and other legal duties.
>
> 67. The Trust's decision to implement the CV Standard Update early was made in good faith and for the purpose of promoting the best interests of the Pension Plan's beneficiaries.
>
> 68. <u>Mr. Turner's death benefit was administered in accordance with the CV Standard Update set out by the [Canadian Institute of Actuaries].</u>
>
> [Emphasis added]

[64] When Mr. Muise took the stand at the hearing, he confirmed that the evidence in his affidavit continued to be true. On cross-examination, Mr. Muise was shown the April 16, 2020 letter from BPA to Ms. Wilson. He indicated that form letters are sent out immediately after a Plan member's death, and that there is no deadline stated in the letters. Mr. Muise was referred to the statement in his affidavit that the CV Standard Update "changed the commuted value of Mr. Turner's death benefit" and asked whether he still believed that statement to be true. Mr. Muise responded with, "Yes."

[65] Mr. Muise confirmed that he was aware that since May 2022, Ms. Wilson has been receiving the monthly pension amount included as the third option in the April 16, 2020 letter. When asked what prompted those payments to Ms. Wilson, Mr. Muise said, "Because according to the *Pension Benefits Act*, when there's no election, you're supposed to pay the monthly benefit." He said he first became aware of that provision of the *Pension Benefits Act* during the litigation. Mr. Muise was not certain as to when the deeming provision is triggered, but he believed that it was 90 days.

Mary Kate Archibald

[66] Mary Kate Archibald is a Principal at the firm Eckler Ltd. She has been a fully qualified actuary since 2009 and has been a Principal of Eckler since 2015. She specializes in defined benefit actuarial consulting in the areas of pension valuation and pension risk management.

[67] Ms. Archibald stated in her affidavit that the actuarial profession is self-regulating in Canada. The Canadian Institute of Actuaries (the "CIA") is the professional governing body for the actuarial profession in Canada. The Actuarial Standards Board is the body of the CIA that directs and manages the actuarial standard-setting process in Canada. Work performed in Canada by an actuary is expected to confirm to these standards of practice.

[68] Ms. Archibald provides actuarial consulting services with respect to the Pension Plan administered by the Trust. She has been involved in Eckler's work for the Trust since 2008 and has been the Plan's Actuary for approximately five years.

[69] Ms. Archibald stated that as Plan Actuary, her role is to provide high level strategic actuarial consulting advice to the Trust as it oversees the Pension Plan. She performs the actuarial calculations for the Pension Plan as a whole. She emphasized that this is distinct from performing pension administration calculations for individual Pension Plan members, which she does not do. She provides advice on

the valuations of the Pension Plan assets and liabilities for funding and plan sustainability, terms, documentation, relevant pension legislation, including the *Income Tax Act* and the Nova Scotia *Pension Benefits Act,* and other actuarial issues.

[70] Ms. Archibald stated that Eckler's actuarial consulting services for the Pension Plan are distinct from the day-to-day pension administration of the Pension Plan, which is provided by BPA. Eckler works with BPA when day-to-day administration and actuarial matters intersect. For example, Ms. Archibald noted, certain member communications discuss actuarial issues, so she contributes to the drafting of these communications so that they are compliant with the *Income Tax Act* and *Pension Benefits Act*. BPA provides Eckler with membership and financial data which forms the basis for much of the actuarial work for the Pension Plan.

[71] Ms. Archibald explained that the Pension Plan administered by the Trust is a multi-employer pension plan ("MEPP") as defined in the *Pension Benefits Act* and a Target Pension Arrangement ("TPA"), as defined in the CIA standards of practice for calculating pension commuted values. Unionized employers in the plumbing and pipefitting industry who employ members of the Union make contributions on behalf of their employees on an hourly basis. These monies are pooled together in the Trust to provide pensions for all Pension Plan members. Contributions to the

Pension Plan are negotiated as part of a construction-industry wide collective agreement.

[72] Unlike a single-employer plan which may be terminated if the employer chooses or becomes insolvent, MEPPs like the Pension Plan are supported by many different employers for a trade like the plumbing and pipefitting trade. This means there is a much lower likelihood that a MEPP will be terminated. Employers participate in the plan and make contributions; sometimes they cease participation, for example when they stop operating in the construction industry. Generally, new employers join the plan when they become certified in the construction industry.

[73] Ms. Archibald stated that the Trustees of the Trust, as with other pension benefit trusts, focus on ensuring financial sustainability of the Pension Plan for all members.

[74] With respect to commuted values, Ms. Archibald explained that when someone leaves a pension plan before they are eligible for retirement, they may be able to take a lump sum amount of money in lieu of receiving future pension payments from the plan. This is called the "commuted value" of their pension benefit. Ms. Archibald attached a fact sheet produced by the CIA which outlined the following basic facts about commuted values:

a. The commuted value is the lump sum current value of what the pension plan member could have received in the future if they received a monthly pension at retirement.

b. Commuted values are calculated by making actuarial assumptions about several factors: the member's likely retirement age, what kind of pension payments they might have received, and how long they and their spouse might live. Interest rates are also an important factor.

c. The commuted value of a member's pension benefit can fluctuate over time based on interest rates, the age of someone leaving a pension plan, and life expectancy.

d. The method of calculating the commuted value of a pension benefit must be fair and consistent and must consider the interests of all stakeholders, including both members staying in the plan and those leaving.

[75] Ms. Archibald stated that up until 2020, the same methods for calculating commuted values were applied to TPAs and non-TPAs. In January 2020, the ASB released the CV Standard Update, which prescribed a new approach applicable to TPAs. The addition of new methods for TPAs in the CV Standard Update was driven by recognition of the disconnect between the way TPAs are most often funded and the way commuted values were being calculated, as well as to recognize the target nature of the pension.

[76] Historically, pension plans have been required to be funded based on both a going concern and solvency valuation. The solvency valuation is an actuarial valuation of a pension plan's assets and liabilities in the hypothetical scenario that the pension plan is wound up, and all benefits are settled by paying commuted values

to young members and annuities are purchased for pensioners and older members. A solvency valuation is a stress test for a pension plan which demonstrates whether it has the necessary assets to pay all the plan members out (liabilities) on the valuation date.

[77] Up until the CV Standard Update, commuted values for TPAs (as well as non-TPAs) were calculated on a basis similar to the solvency valuation. This solvency-like basis meant that the commuted value of a member's pension was not consistent with the going concern value of the pension used for funding the pension plan. When a commuted value was paid out on this solvency-like basis, in particular when interest rates were low, the amount paid was often more than the amount of money set aside for the foregone pension through going concern funding. Each time this happened, there would be a detrimental impact on the going concern funded position of the plan for the remaining members.

[78] Ms. Archibald indicated that the new methods or TPAs in the CV Standard Update aimed to address the unique nature of TPAs, including the target nature of the pension benefit, as well as the focus on going concern funding.

[79] Ms. Archibald stated that as a result of the CV Standard Update, commuted values for TPAs have in most cases been significantly reduced. She added that

although the CV Standard Update has changed the calculation of the present-day value of pension benefits, it still represents an actuarial valuation of the same pension benefit earned by a member, but it is calculated using different assumptions and methods based on the going concern valuation of the Pension Plan.

[80] The balance of Ms. Archibald's affidavit deals with the implementation of the CV Standard Update. She advised the Trust that it would be required to implement the CV Standard Update by December 1, 2020, but that it could do so earlier if it wished. The Pension Plan implemented the CV Standard Update on September 1, 2020, three months earlier than required. Ms. Archibald concluded her affidavit with the following statement at para. 63:

> I confirm that any calculation of a commuted value for this Pension Plan which has an effective date on or after September 1, 2020 was required to use the new method of calculating commuted values based on the decisions taken by the Trustees. This includes any recalculations with effective calculation dates on or after September 1, 2020.

[81] On cross-examination, Ms. Archibald was shown the "Appendix – Commuted Values" document that was included with the February 5, 2021 letter from BPA to Ms. Wilson, and which includes the following statement:

> The calculation of Commuted Value remains valid for a period of 90 days from the date the Pension Plan Death Benefits Statement is mailed to you. If a commuted value is payable to you after 90 days has elapsed, a new calculation will be required.

[82] Ms. Archibald stated that a pension commuted value is generally applicable for a period of time, after which it must be recalculated. She said a 90-day recalculation period is fairly standard.

[83] Ms. Archibald confirmed that she is aware of the deeming provision in the *Pension Benefits Act* that applies to pension death benefits. Her understanding was that, under the *Act*, the spouse is entitled to several options, including a lump sum commuted value, as well as an immediate or deferred pension of equivalent value. If no election is made and communicated back to the administrator within 90 days, the spouse is deemed to have elected the immediate pension option. Ms. Archibald agreed that, contrary to the statement in the appendix sent by BPA to Ms. Wilson, if the deeming provision applied, no recalculation of the commuted value would be necessary. Instead, the spouse would be deemed under the *Act* to have elected the monthly pension. The option of a lump sum refund of the commuted value would therefore cease to be available after 90 days.

[84] Ms. Archibald testified that she was not familiar with the deeming provision until this case.

Ross Arsenault

[85] Ross Arsenault is the former Vice President, Practice Leader of BPA. At the time he swore his affidavit, he was still in that role. During his testimony, he clarified that he resigned from BPA in January 2023. He said he resigned for personal issues with the company that owns BPA.

[86] Mr. Arsenault has over 25 years of experience in benefits plan and trust fund advising and consulting. He specializes in trust fund consulting and is certified in health and wellness benefit plan consulting. From April 1, 2011 until August 31, 2021, Mr. Arsenault worked as a Benefits Consultant with BPA. From September 1, 2021 to January 2023, he assumed the role of Vice President, Practice Leader.

[87] Mr. Arsenault explained that since December 2019, BPA has provided operational pension administration services with respect to the Pension Plan administered by the Trust. BPA entered into an Administrative Agency Agreement with the Trust in January 2020. As the Trustee's administrative agent, BPA is responsible under the Agency Agreement for the day-to-day administration of the Pension Plan, including but not limited to:

[88] Mr. Arsenault stated that under the Administrative Agency Agreement, BPA is responsible for administrative functions that include, but are not limited to:

a. Maintaining all employer and employee records to do with contributions and benefits, which are referred to as "hour bank records";

b. Maintaining a complete set of financial records of the Trust, legal documents and opinions, actuarial reports, and statutory filings;

c. Handling logistics regarding meetings of the Trustees (agendas, notice of meetings, booking rooms, etc.) and attending meetings of the Trustees;

d. Executing tasks as directed and approved by the Board of Trustees;

e. Preparation and distribution of communications with Pension Plan members about their benefits and assisting Pension Plan members when they have questions;

f. Corresponding when necessary with various third parties (employers, employer associations, union members, insurance companies, and third party benefit providers);

g. Record keeping and maintaining custody of permanent documents of the Trust; and

h. Providing financial and statistical data to the Plan Actuary as required.

[89] At the time BPA entered into the Administrative Agency Agreement, he said that Len Tompkins was BPA's primary consultant for the Trust. Mr. Tompkins retired on August 31, 2021. Mr. Arsenault became the primary trust fund consultant for the Trust on September 1, 2021. When he took on that role, he took on all of Mr. Tompkins' former responsibilities, which included:

a. Overseeing BPA's client service to the Trust;

b. Attending each meeting of the Board of Trustees to report on the financials and operational administration of the Pension Plan; and

c. Providing the Trustees, the Plan Actuary, and the Trust's other consultants with information required to address any matter related to the administration of the Pension Plan.

[90] Mr. Arsenault stated that BPA works closely with the Trustees, the Plan Actuary and Luedey Consultants Inc., another consultant, to execute the decisions made by the Trustees.

[91] Mr. Arsenault's evidence concerning how BPA produces pension benefit valuations was as follows. BPA has a team of three pension benefit administrators in its Halifax office who administer the Pension Plan. Margo Langille is BPA's Pension Manager and manages the pension benefits administrators. Mr. Arsenault said he was informed by Ms. Langille and verily believes that:

a. BPA uses Creative Actuary, a software program that produces valuations of members' pension benefits.

b. The pension benefits administrators enter the relevant information into Creative Actuary, including but not limited to: date of birth, date of death, retirement age, monthly pension amount, and the discount rate that applies to the Pension Plan (the 'Valuation Variables"). The actuarial variables BPA uses such as a mortality tables [*sic*] and discount rate are provided by the Plan Actuary. Creative Actuary then produces a valuation of the members' pension benefit.

c. The Trust undergoes an annual audit every March or April. The auditors randomly select approximately ten member files to audit. The auditors check the valuations of these members' pension benefits which BPA has prepared using Creative Actuary in the normal course of administering the members' pension benefits.

d. BPA has never received notice of any issue with the valuations produced by Creative Actuary following an annual audit.

e. The pension benefits administrators use the valuations produced by Creative Actuary when communicating the valuation of pension benefits to members and beneficiaries.

f. Before BPA communicates a pension benefit valuation to a member or beneficiary, a second pension benefits administrator double checks that all Valuation Variables were entered into Creative Actuary correctly. The pension benefits administrator confirms the Valuation Variables with a check mark and this record of the valuation produced by Creative Actuary is placed on the member's pension file.

[92] With respect to BPA's process when administering death benefits, Mr. Arsenault stated that BPA is typically notified of the death of a plan member by the Union or by the member's beneficiary. Sometimes, if there is a claim for life insurance, the pension benefits administrators receive and internal notification from BPA's Claims Department.

[93] The pension benefits administrators use Creative Actuary to produce the valuation of the member's death benefit. The pension benefits administrators use the valuation information to prepare a death benefit notice to the beneficiary. The death benefit notice form is a standard form created in house by BPA. Mr. Arsenault stated that, "BPA updates the death benefit notice form when needed, generally in response to legislative changes, to ensure compliance with the requirements of the Nova Scotia *Pension Benefits Act*."

[94] Mr. Arsenault stated that Jeffrey Turner was a member of the Pension Plan, and he died on March 1, 2020. BPA administered Mr. Turner's death benefit on behalf of the Trust. BPA sent Jennifer Wilson a death benefit notice dated April 16, 2020. The notice provided Ms. Wilson with the valuation of the options available to her. He said that Ms. Wilson did not respond to the notice at that time. Mr. Arsenault said BPA does not begin to initiate payments to a beneficiary until the death benefit notice is completed and returned by the beneficiary. The death benefit notice contains information necessary to initiate these payments.

[95] The next portion of Mr. Arsenault's affidavit addressed BPA's implementation of the CV Standard Update. At the direction of the Trustees, BPA updated its systems to implement the CV Standard Update effective September 1, 2020. The Plan Actuary provided new mortality tables and discount rates for the Pension Plan. BPA pre-loaded this information into Creative Actuary. Mr. Arsenault attached several memos BPA received from the Plan Actuary regarding the CV Standard Update, along with emails between Mr. Tompkins and Ms. Langille regarding implementation by the Trust. The Plan Actuary worked with BPA to finalize the September 1, 2020 Notice of Changes to Lump Sum Commuted Values Paid from the Plan, which BPA circulated to Pension Plan members. BPA sent the

notice to the address Jeffrey Turner had on file, which was different from Ms. Wilson's address.

[96] Mr. Arsenault stated that BPA keeps records of all calls from beneficiaries, and it has no record of a call from Ms. Wilson on September 17, 2020. BPA's file does show that Ms. Wilson telephoned BPA on February 5, 2021 and spoke to Ms. Langille. Ms. Langille documented that she advised Ms. Wilson that Mr. Turner's death benefit would need to be recalculated and that there would be a reduction in the lump sum commuted value option.

[97] Ms. Arsenault's evidence was that on February 17, 2021, Ms. Wilson telephoned BPA and spoke to Ms. Langille again. She had received the updated valuation information and was upset about the change in the commuted value valuation.

[98] Mr. Arsenault stated that BPA normally receives responses from beneficiaries regarding death benefit notices in well under 90 days, and that it is very uncommon for a beneficiary to wait to respond.

[99] Mr. Arsenault noted that since BPA sent Ms. Wilson her first death benefit notice, BPA added an appendix to its standard form which states that the commuted value must be recalculated after 90 days.

[100] Mr. Arsenault added that Ms. Wilson's status as Mr. Turner's common law spouse had no bearing on her status as the named beneficiary of his pension death benefit. In other words, Ms. Wilson's entitlement to the pension death benefit had no relationship to a finding by Service Canada that she was Mr. Turner's common law spouse. Mr. Arsenault concluded his affidavit as follows:

> 50. To date, Ms. Wilson has not completed the most recent death benefit notice and has not provided BPA with the information required to initiate any form of payment to her.

[101] On cross-examination, Mr. Arsenault testified that he was familiar with the April 16, 2020 and the February 5, 2021 death benefit notices sent to Ms. Wilson. He said he had not initially been aware that a third death benefit notice had been sent to Ms. Wilson on April 30, 2021. Mr. Arsenault could not explain why it was not included in BPA's file materials related to Mr. Turner's pension, which were attached as an exhibit to his affidavit. He did not dispute that the third letter was sent, however. Mr. Arsenault agreed that there was nothing in the April 16, 2020 notice that would make Ms. Wilson believe that she had a certain window of time in which she could choose her desired option.

[102] When asked why BPA declined to process Ms. Wilson's selection of the lump sum refund when she submitted it on March 30, 2021, Mr. Arsenault said it was because the commuted value rule had changed, and, as a result, the amount stipulated

in the April 16, 2020 letter was no longer available. When asked if a recalculation was necessary once the CV Standard Update came into effect on September 1, 2020, Mr. Arsenault said, "Yes."

[103] Mr. Arsenault indicated that BPA did not send out a recalculation to Ms. Wilson on its own initiative. He said that was not BPA's standard practice, due to limited resources. Mr. Arsenault explained that there were only three pension staff dealing with hundreds of applications through Atlantic Canada. As a result, when a pension benefit notice is sent out, it is up to the beneficiary to return the completed notice indicating their desired option. BPA then processes the documentation. He said BPA does not have the human resources available to follow up with individual beneficiaries once their benefit documents have been mailed out. Mr. Arsenault stated that BPA has no "bring forward" system in place to remind them that a beneficiary has not yet responded.

[104] Mr. Arsenault confirmed that if a beneficiary does not respond within 90 days, BPA takes no action. No "processing" occurs until the beneficiary returns the completed documentation. When Mr. Arsenault was asked whether he would consider a recalculation of Ms. Wilson's benefits to be a type of processing, he said, "I guess you could call it reprocessing."

[105] Applicant's counsel directed Mr. Arsenault to his statement at para. 50 of his affidavit that, "To date, Ms. Wilson has not completed the most recent death benefit notice and has not provided BPA with the information required to initiate any form of payment to her." When asked what specific information BPA required, Mr. Arsenault said BPA needed Ms. Wilson's social insurance number and her selected option. He confirmed that BPA had Ms. Wilson's SIN as of March 30, 2021, when she returned the April 16, 2020 notice, indicating that she had chosen the original lump sum amount of $124,638.47.

[106] Counsel asked Mr. Arsenault what BPA would have done if Ms. Wilson had completed and returned the February 5, 2021 death benefit notice with her selection of one of the much lower, recalculated options. Mr. Arsenault stated that if Ms. Wilson had responded to the February 5, 2021 document and chosen an option, BPA would have processed her selection. He added that the same would be true if she had chosen one of the options set out in the April 30, 2021 document and returned it to BPA.

[107] Applicant's counsel asked Mr. Arsenault about how the 90-day deeming provision in the *Pension Benefits Act* worked, in light of his statement that BPA could not initiate payment to Ms. Wilson because she had "not completed the most recent death benefit notice." Mr. Arsenault said he understood that the deeming

provision states that after 90 days, Ms. Wilson would be deemed to have selected the monthly pension option on the death benefit notice. Applicant's counsel responded, "But in spite of that, you were prepared to simply process the most recent updated statement, correct?" Mr. Arsenault said "Correct." Mr. Arsenault confirmed that after he took over for Mr. Tompkins, he did not make any changes to the systems at BPA with respect to member communications. Finally, Mr. Arsenault said he was aware that Ms. Wilson began receiving the monthly pension amount in May 2022. He said that happened because BPA got direction from the Trustees and legal counsel.

[108] On re-direct, counsel for the Trust noted that Applicant's counsel had talked about the Covid-19 pandemic and other events in 2020, and said it was suggested that there was too much going on for Ms. Wilson to respond to BPA regarding the death benefit notice. Mr. Arsenault was then asked whether Ms. Wilson had an entitlement to a life insurance policy. He said she did, and that she made a claim for that in March 2020. When asked how timely the application was, Mr. Arsenault stated that he understood that Canada Life paid out the life insurance policy within the same month that Mr. Turner died.

[109] On re-cross, Mr. Arsenault stated that he believed the policy was for $70,000 and that, unlike the death benefit notice, there was no choice to be made by Ms. Wilson. There was only a lump sum.

Margo Langille

[110] Margo Langille testified under subpoena. She has been BPA's Pension Manager for 23 years. Prior to that, she worked in BPA's Claims Department. Ms. Langille said she is familiar with Ms. Wilson's file and is the person from BPA who interacted with her. She said she would have sent the April 16, 2020 and February 5, 2021 death benefit notices. She did not recall the April 30, 2021 notice.

[111] Ms. Langille was asked whether BPA's standard death benefit forms had changed since February 2021. She said there is now a back page with an appendix stating when everything was calculated. Ms. Langille confirmed that she was referring to the one-page document "Appendix – Commuted Values".

[112] Ms. Langille confirmed that BPA does not reach out to beneficiaries after 90 days. She also confirmed that death benefit notices are sent by regular mail and that unless a letter is returned as undelivered, she would not know if it ever reached its recipient.

[113] When asked how BPA calculates the 90 days, Ms. Langille said, “From the date it’s mailed.” As to how BPA “tracks it”, she responded, “If it’s returned and it’s past that date, that’s how we would track it.” Ms. Langille said there are no electronic systems designed to alert them that a beneficiary has not responded.

[114] Ms. Langille stated that she first became aware of the deeming provision in the *Pension Benefits Act* “when this case came up.” She indicated that she had never had a death benefit claim returned beyond the 90-day time frame. She agreed that there could be circumstances where a person would not be able to respond within 90 days.

[115] On cross-examination, Ms. Langille said she receives approximately 15 to 20 death benefit claims every year, and that that figure has been standard over the last 20 years. She confirmed that there are two situations where BPA pays out, or can pay out, commuted values. The first is where a member dies and a death benefit becomes payable. The second is where a member retires or leaves the Pension Plan and a “termination benefit” becomes payable. Ms. Langille agreed that it is in the case of a general termination benefit, *not* a death benefit, where a member has to respond within 90 days before the commuted value must be recalculated. She confirmed that she now knows that in the case of a death benefit, if the beneficiary does not make an election within 90 days, they are deemed to have chosen the

immediate monthly pension. She agreed that no one at BPA was aware of the deeming provision until this case.

Positions of the Parties

[116] In her second amended notice of application in court, filed on April 25, 2022, Jennifer Wilson alleges that both the Trust and BPA were negligent in tort and negligent as a fiduciary, and that they breached the duty of good faith and loyalty owed by a fiduciary to a beneficiary.

[117] Ms. Wilson alleges that BPA was negligent in tort by:

a. Advising Jennifer Wilson in April 2020 that no further processing would take place on her file until she completed and returned the required documentation;
b. Not advising Jennifer Wilson that she had to respond with her desired Death Benefit option within a 90-day period or she would be deemed to have selected to receive a monthly pension, payable for her lifetime, effective April 1, 2020 as required by the governing legislation and regulations;
c. Not following up with Jennifer Wilson after it sent its original April 2020 correspondence;
d. Not following the deeming provision once the 90-day period had passed and making the monthly pension come into pay as required by the governing legislation and regulations;
e. Leading Jennifer Wilson to believe that the new Commuted Value standard applied to her benefits resulting in an ~$90,000 loss;
f. Causing Ms. Wilson loss, the particulars of which will be set out in her supplementary affidavit and brief.

[118] Ms. Wilson alleges that the Trust was negligent in tort by:

a. Failing to ensure that BPA carried out its pension administrative duties in accordance with the governing legislation and regulations, the common law, and the laws of equity.

[119] Ms. Wilson alleges that BPA was negligent as a fiduciary by not taking the positive step of contacting her within the 90-day period to:

a. Ensure that she had actually received their April 2020 Package;

b. Ascertain if she had any questions regarding same; and

c. Discuss the 90-day limitation period and the consequences of not responding within that period,

…

and by:

d. Advising Jennifer Wilson in April 2020 that no further processing would take place on her file until she completed and returned the required documentation;

e. Leading Jennifer Wilson to believe that the new Commuted Value standard applied to her benefits resulting in an ~$90,000 loss;

f. Causing Ms. Wilson loss, the particulars of which will be set out in her supplementary affidavit and brief.

[120] Ms. Wilson alleges that the Trust was negligent as a fiduciary by not ensuring that BPA took the positive step of contacting Ms. Wilson within the 90-day period to:

a. Ensure that she had actually received their April 2020 Package;

b. Ascertain if she had any questions regarding same; and

c. Discuss the 90-day limitation period and the consequences of not responding within that period,

…

and by:

d. Advising Jennifer Wilson in April 2020 that no further processing would take place on her file until she completed and returned the required documentation;

e. Leading Jennifer Wilson to believe that the new Commuted Value standard applied to her benefits resulting in an ~$90,000 loss;

f. Causing Ms. Wilson loss, the particulars of which will be set out in her supplementary affidavit and brief.

[121] Finally, Ms. Wilson alleges with respect to both the Trust and BPA "did not act in the utmost good faith owed by a fiduciary to a beneficiary as established in common law, and its actions constitute a breach of its duty of loyalty to Ms. Wilson by acting unethically in:

a. Not taking responsibility for their many mistakes, including but not limited to, not advising her of the 90-day limitation period, and not causing the death benefit to come into pay after that period had expired retroactive to April 1, 2020;

b. Not honouring Ms. Wilson's selected option to receive a lump sum of $124,637.48 in light of their mistakes;

c. Forcing her to file this application in court."

[122] Ms. Wilson is seeking damages for "emotional hardship and economic loss." She claims "compensatory, general, punitive, aggravated and/or restitutionary damages."

[123] In their joint amended Notice of Contest, filed on May 5, 2022, the Trust and BPA deny that BPA owed any duties to Ms. Wilson, as BPA "acts only at the direction of the Trustees." The Respondents acknowledge that the April 2020 death benefit notice did not advise Ms. Wilson that if she did not elect one of the four options within 90 days, she would be deemed, by operation of s. 67(4) of the *Pension Benefits Act*, to have elected the immediate monthly pension option. The

Respondents state that the Trust had no duty to advise Ms. Wilson of the deeming provision, nor to ensure that she made the optional election within the 90-day period. At para. 37, the Respondents state:

> 37. Ms. Wilson was given her options, and the Trustees awaited her decision. It was Ms. Wilson's duty to inform the Trustees. It is not the duty of the Trustees to ensure she made the optional election under s. 67(4) of the Act.

[124] The Respondents further plead that CV Standard Update had no impact on Ms. Wilson's entitlement to the immediate monthly pension pursuant to s. 67(4) of the *Pension Benefits Act*. They dispute that the February 2021 death benefit notice gives rise to any cause of action or caused Ms. Wilson any loss. The Respondents plead that in April 2022, Ms. Wilson received a retroactive lump sump payment for missed monthly pension payments for the period of April 1, 2020 – April 30, 2022, with interest calculated at the rate of return of the pension plan. As of May 1, 2022, Ms. Wilson has been in receipt of an immediate monthly pension in the amount of $360.76 per month. The Respondents say the Applicant has therefore been made whole.

Law and Analysis:

<u>The Characterization of the Claim for Economic Loss</u>

[125] Ms. Wilson's negligence claim for $124,637.48 is a claim for pure economic loss. In *Halsbury's Laws of Canada - Torts (2020 Reissue)* (online) at HTO-156,

Bruce Feldthusen & Louise Bélanger-Hardy explain the difference between pure economic loss and consequential economic loss:

> It is necessary to distinguish pure economic loss from consequential economic loss in negligence cases. Consequential economic loss is financial loss causally connected to physical damage to the plaintiff's own person or property. An injured employee, for example, may suffer consequential economic loss in the form of medical expenses or loss of earnings. Consequential loss is usually governed by the same principles of recovery that apply to the physical damage itself. On the other hand, a pure economic loss is a financial loss which is not causally connected to physical injury to the plaintiff's own person or property.
>
> [Emphasis added]

[126] In *1688762 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, the majority of the Supreme Court of Canada stated:

> [18] To recover for negligently caused loss, irrespective of the type of loss alleged, a plaintiff must prove all the elements of the tort of negligence: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant's conduct breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. To satisfy the element of damage, the loss sought to be recovered must be the result of an interference with a legally cognizable right. As Cardozo C.J. explained in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928), "[n]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right" (p. 99; see also *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 45; *Livent*, at para. 30; R. Stevens, *Torts and Rights* (2007), at p. 24). It is well established that the law imposes liability for negligent interference with and injury to the rights in bodily integrity, mental health and property (*Saadati*, at para. 23, citing A. Ripstein, *Private Wrongs* (2016), at pp. 87 and 252-53). Recovery for injuries to these rights is grounded in the duty of care recognized in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).
>
> [19] This explains why the common law has been slow to accord protection to purely economic interests. While this Court has recognized that pure economic loss may be recoverable in certain circumstances, there is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss. For example, economic loss caused by ordinary marketplace competition is not, without something more, actionable in negligence .. Such loss falls outside the scope of a plaintiff's legal rights — the loss is *damnum absque injuria* and unrecoverable (E.

J. Weinrib, "The Disintegration of Duty" (2006), 31 Adv. Q. 212, at p. 226; D. Nolan, "Rights, Damage and Loss" (2017), 37 Oxf. J. Leg. Stud. 255, at pp. 262-68). Indeed, the essential goal of competition is to attract more business, which may mean taking business away from others. Absent a contractual or statutory entitlement, there is no right to a customer or to the quality of a bargain, let alone to a market share. As Taylor J.A. wrote for the British Columbia Court of Appeal in *Kripps v. Touche Ross & Co.* (1992), 94 D.L.R. (4th) 284, at p. 297:

> It seems possible that pure economic loss *simpliciter* accounts for the overwhelming majority of all loss suffered by one person as a foreseeable and proximate result of the acts or omissions of another . . . . This must necessarily be so in a free market for goods and services, employment and investment, and the continuing struggle for property, promotion and profit.

[20] Citing the work of Professor Feldthusen (B. Feldthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1991), 17 Can. Bus. L.J. 356, at pp. 357-58; B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss* (2nd ed. 1989), at para. 200 (currently in its sixth edition)), this Court has applied a classificatory scheme that identifies four categories of pure economic loss that can arise between private parties (*Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1049; *Winnipeg Condominium*, at para. 12). In *Livent*, the Court effectively reduced the categories to three, by its treatment of two of the previously stated categories — negligent misrepresentation, and negligent performance of a service — as a single kind of pure economic loss. This made sense, because the considerations that inform the proximity analysis are identical for both. In particular, the same two factors — the defendant's undertaking, and the plaintiff's reliance — are in such cases determinative of the proximity analysis (para. 30), upon which we will elaborate below.

[21] The current categories of pure economic loss incurred between private parties are, therefore:

(1) negligent misrepresentation or performance of a service;

(2) negligent supply of shoddy goods or structures; and

(3) relational economic loss.

The distinguishing feature among each of these categories is that they describe how the loss occurred. Focussing exclusively upon how the loss occurs can, however, put strain on the analysis by obfuscating both fundamental differences and similarities among cases of pure economic loss (J. Stapleton, "Duty of Care and Economic Loss: A Wider Agenda" (1991), 107 Law Q. Rev. 249, at pp. 262 and 284). Further, it obscures the starting point in a principled analysis of an action in negligence, which is to identify what rights are at stake and whether a reciprocal duty of care exists (*Livent*, at para. 30). It is proximity, and not a template of how a loss factually occurred, that remains a "controlling concept" and a "foundation of

> the modern law of negligence" (*Norsk*, at p. 1152; *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at para. 25).
>
> [22] Properly understood, then, these categories are simply "analytical tools" that "provide greater structure to a diverse range of factual situations . . . that raise similar . . . concerns" (*Martel*, at para. 45; *Design Services*, at para. 31). Organizing cases in this way was and is therefore done for ease of analysis in ensuring that courts treat like cases alike. The fact that a claim arises from a particular kind of pure economic loss does not necessarily signify that such loss is recoverable. Where the loss is recoverable, however, this Court has clarified that the decided cases within these categories should be regarded as reflecting particular kinds of proximate relationships (*Cooper*, at para. 36; *Livent*, at paras. 26-27). But to be clear, the invocation of a category, by itself, offers no substitute for the necessary examination that must take place "of the particular relationship at issue in each case" between the plaintiff and the defendant (*Livent*, at para. 28; …). In other words, what matters is whether the requirements for imposing a duty of care are satisfied — and, in particular, whether the parties were at the time of the loss in a sufficiently proximate relationship. Where they are, it may be because the relationship falls within a previously established category of relationship in which the requisite qualities of closeness and directness were found, or is analogous thereto (*Livent*, at para. 26; …). Or, a plaintiff may seek to establish a "novel" duty of care after undertaking a full *Anns/Cooper* analysis.
>
> [Emphasis added]

[127] The majority explained that in cases of negligent misrepresentation or performance of a service, proximity will be found where the defendant undertakes to provide a representation in circumstances which invite reasonable and detrimental reliance by the plaintiff:

> [30] Under the *Anns/Cooper* framework, a *prima facie* duty of care is established by the conjunction of proximity of relationship and foreseeability of injury. As this Court affirmed, "foreseeability alone" is insufficient to ground the existence of a duty of care. Rather, a duty arises only where a relationship of "proximity" obtains (*Cooper*, at paras. 22 and 30-32; see also *Livent*, at para. 23). Whether a proximate relationship exists between two parties at large, or inheres only for particular purposes or in relation to particular actions, will depend on the nature of the relationships at issue (*Livent*, at para. 27). It may also depend on the nature of the particular kind of pure economic loss alleged.

[31] A party may seek "to base a finding of proximity upon a previously established or analogous category" (*Livent*, at para. 28). But where no established proximate relationship can be identified, courts must undertake a full proximity analysis in order to determine whether the close and direct relationship — which this Court has repeatedly affirmed to be the hallmark of the common law duty of care — exists in the circumstances of the case (ibid., at para. 29; *Saadati*, at para. 24; *Cooper*, at para. 32).

[32] In cases of negligent misrepresentation or performance of a service, two factors are determinative of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance (*Livent*, at para. 30). Specifically, "[w]here the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care", and "the plaintiff has a right to rely on the defendant's undertaking to do so" (ibid.). "These corollary rights and obligations", the Court added, "create a relationship of proximity" (ibid.). In other words, the proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose (P. Benson, "Should White v Jones Represent Canadian Law: A Return to First Principles", in J. W. Neyers, E. Chamberlain and S. G. A. Pitel, eds., *Emerging Issues in Tort Law* (2007), 141, at p. 166).

[33] Taking *Cooper* and *Livent* together, then, this Court has emphasized the requirement of proximity within the duty analysis, and has tied that requirement in cases of negligent misrepresentation or performance of a service to the defendant's undertaking of responsibility and its inducement of reasonable and detrimental reliance in the plaintiff. Framing the analysis in this manner also illuminates the legal interest being protected and, therefore, the right sought to be vindicated by such claims. When a defendant undertakes to represent a state of affairs or to otherwise do something, it assumes the task of doing so reasonably, thereby manifesting an intention to induce the plaintiff's reliance upon the defendant's exercise of reasonable care in carrying out the task. And where the inducement has that intended effect — that is, where the plaintiff reasonably relies, it alters its position, possibly foregoing alternative and more beneficial courses of action that were available at the time of the inducement. That is, the plaintiff may show that the defendant's inducement caused the plaintiff to relinquish its pre-reliance position and suffer economic detriment as a consequence.

[34] In other words, it is the intended effect of the defendant's undertaking upon the plaintiff's autonomy that brings the defendant into a relationship of proximity, and therefore of duty, with the plaintiff. Where that effect works to the plaintiff's detriment, it is a wrong to the plaintiff. Having deliberately solicited the plaintiff's reliance as a reasonable response, the defendant cannot in justice disclaim responsibility for any economic loss that the plaintiff can show was caused by such reliance. The plaintiff's pre-reliance circumstance has become "an entitlement that runs against the defendant" (Weinrib, at p. 230).

[Emphasis added]

[128] It follows that in order for Ms. Wilson's claim for economic loss to succeed, she must establish that it falls within one of the recognized categories of pure economic loss. Based on her pleadings and submissions, the basis for Ms. Wilson's claim that she is entitled to the lump sum refund of $124,637.48 is that:

> (1) the Respondents owed her a duty of care with respect to the administration of her pension death benefit entitlement;
>
> (2) the Respondents gave her incomplete and misleading information in the April 16, 2020 death benefit notice;
>
> (3) the Respondents acted negligently in providing the incomplete and inaccurate information;
>
> (4) Ms. Wilson relied in a reasonable manner on the Respondents' representations; and
>
> (5) she suffered economic loss as a result of that reliance.

[129] These are the elements of a claim for pure economic loss arising from negligent misrepresentation (*Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87). Although the Applicant's pleadings do not specifically refer to negligent misrepresentation, I am satisfied that the Respondents were well aware of the constituent elements of her claim and addressed them in their submissions. I find that there is no prejudice arising from the Court applying the law of negligent misrepresentation to the statements made in, or omitted from, the April 16, 2020 death benefit notice.

Legislative Scheme

[130] The *Pension Benefits Act* is provincial pension standards legislation that governs certain employer-sponsored pension plans established in respect of Nova Scotia employees. The *Act* establishes minimum funding standards and minimum benefit standards in respect of eligibility requirements, vesting and locking-in, employer contributions, transfer rights, spousal benefits, and disclosure of information.

[131] The Superintendent of Pensions is responsible for the administration of the *Act*. The Superintendent's duties are outlined in s. 13:

> 13 The Superintendent shall
>
> (a) promote the establishment, extension and improvement of pension plans throughout the Province;
>
> (b) make recommendations to the Minister in respect of pension plans throughout the Province;
>
> (c) supervise all persons who establish or administer a pension plan within the meaning or this Act and all employers or other persons who on an employer's behalf are required to contribute to any such pension plan; and
>
> (d) perform such functions and discharge such duties as are assigned from time to time by the Governor in Council or the Minister.

[132] The Nova Scotia Court of Appeal in *Central Guaranty Trust Company v. Spectrum Pension Plan*, 1997 NSCA 107, described the purpose of the *Pension Benefits Act* as "to establish laws regulating pension plans in the Province and to provide for administrative framework in which the Superintendent can see to it that

the laws and regulations made under the *Act* are complied with and that administrators in administering such plans act in accordance with the law" (p. 51).

[133] The *Pension Benefits Act* requires that every pension plan have an "administrator" (s. 18(1)). In the case of a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, like the Pension Plan in this case, the administrator must be a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan (s. 18(3)). The statute contemplates the existence of only one administrator.

[134] The administrator's paramount duty under the *Pension Benefits Act* is to "ensure that the pension plan and the pension fund are administered in accordance with this Act and the regulations" (s. 30(1)). It is a breach of the legislation to administer a pension plan contrary to the terms of the plan (s. 30(3)).

[135] Section 33 outlines the degree of care, diligence, knowledge and skill required of an administrator under the *Act*. It also authorizes the administrator to employ an agent. Section 33 states:

> 33 (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> (2) The administrator of a pension plan shall use in the administration of the pension plan, and in the administration and investment of the pension fund, all relevant

> knowledge and skill that the administrator possesses or, by reason of profession, business or calling, ought to possess.
>
> …
>
> (4) Where it is reasonable and prudent in the circumstances to do so, an administrator may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.
>
> …
>
> (6) An administrator who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.
>
> (7) An employee or agent of an administrator is also subject to the standards that apply to the administrator pursuant to subsections (1) to (3).

[136] Section 67 of the *Pension Benefits Act* deals with the benefits available to the spouse of a member of a pension plan who is entitled to a deferred pension but who dies before the first payment is made:

> 67 (1) Where a member of a pension plan who is entitled under the pension plan to a deferred pension described in Section 53 dies before payment of the first instalment is due or where a former member or retired member dies before payment of the first instalment of the deferred pension or pension of the former member or retired member is due, the spouse of the member, former member or retired member on the date of death is entitled to
>
> > (a) receive a lump sum payment equal to the commuted value of the deferred pension;
> >
> > (b) require the administrator to pay an amount equal to the commuted value of the deferred pension into a registered retirement savings arrangement; or
> >
> > (c) receive an immediate or deferred pension, the commuted value of which is at least equal to the commuted value of the deferred pension.
>
> …
>
> (4) A spouse may exercise the spouse's entitlement under subsection (1) or (2) by delivering a direction to the administrator within the prescribed period and, where the spouse does not do so, the spouse is deemed to have elected to receive an immediate pension.

…

(13) It is the responsibility of the person entitled to the payment to provide to the administrator the information needed to make the payment.

[Emphasis added]

[137] The term "commuted value" is defined at s. 2(h):

"commuted value" means the value, calculated in the prescribed manner and as of a fixed date, of a pension, a deferred pension, a pension benefit or an ancillary benefit;

[138] Where a member's death results in their spouse, beneficiary or estate becoming entitled to a benefit under the plan, the administrator is required, pursuant to s. 78 of the *Pension Benefits Regulations*, to provide the spouse, beneficiary or estate with a death benefit statement containing certain information:

78 If the death of a member, former member or retired member results in their spouse, beneficiary or estate becoming entitled to a benefit under the plan, the administrator must, no later than 60 days after receiving notice of the death, provide the spouse, beneficiary or personal representative with a statement that contains at least all of the following information, as is recorded in the administrator's records for the plan:

(a) the name of the plan and its Provincial registration number;

(b) the name of the deceased member or former member;

(c) the amount of the benefit and how it will be paid;

(d) any amount payable as a lump sum under subsection 55(4) of the Act;

(e) any indexing under the plan that applies to a pension;

(f) the amount of any pension resulting from additional voluntary contributions and optional contributions, if applicable;

(g) the amount of any pension purchased with contributions resulting from a transfer made on behalf of the member from another pension fund;

(h) <u>for a spouse, the options available under Section 63 or 67 of the Act.</u>

[Emphasis added]

[139] As noted earlier, under s. 67(4) of the *Act*, a spouse may exercise the spouse's entitlement under s. 67(1) or (2) by delivering a direction to the administrator within "the prescribed period", or the spouse will be deemed to have elected to receive an immediate pension. Section 132 of the *Regulations* prescribes a period of 90 days after the date the spouse receives the death benefits statement:

> 132 (1) To exercise their entitlement under 67(1) or (2) of the Act, a spouse must deliver a direction to the administrator no later than 90 days after the date they receive the death benefits statement referred to in Section 78.
>
> (2) An administrator must comply with an election delivered under subsection (1) no later than 60 days after the date it is received.

Duties of a Pension Plan Administrator and its Agents

[140] As noted earlier, s. 33 of the *Pension Benefits Act* imposes a statutory duty of care on a pension plan administrator. In Ari Kaplan & Mitch Frazer, *Pension Law*, 3d ed. (Toronto: Irwin Law, 2021), the authors describe the nature of a pension plan administrator's statutory obligations at pp. 324-326:

> The broad range of an administrator's functions in connection with a pension plan and pension fund situates it in a sobering position with respect to its potential for regulatory action under the PBA and liability to plan beneficiaries including for damages in civil actions.
>
> …
>
> a) Statutory duty of care
>
> Because the plan administrator is the ultimate authority accountable for the administration and investment of the pension plan and fund, the administrator owes its constituency a "special" duty of care as a fiduciary in connection with its statutory functions.

> Under the PBA, an administrator is responsible for administering the pension plan and investing its assets using "all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess." In addition, an administrator must administer and invest the pension fund in a manner "that a person of ordinary prudence would exercise in dealing with the property of another person." … When exercising its duty to administer and invest the pension fund, the plan administrator's principal regard must be for the purpose of preserving the fund for payment of pension benefits. …
>
> While the distinction may be a fine one, the duties of care owed by an administrator under the PBA are "statutory obligations" that are enforceable by the [Superintendent] and are "independent of causes of action in tort, fiduciary or trust law." The relevance of the distinction between the extent of an administrator's so-called statutory and common law fiduciary duties goes more to the remedy and forum in which a person alleging a breach of the duty pursues that remedy, than it does to the qualitative content of the duty.

[141] With respect to the common law duty of care owed by a pension administrator, the authors state at p. 326:

> Independent of its statutory obligations, a pension plan administrator is a fiduciary at common law vis-à-vis the beneficiaries of the pension fund and, as such, can be liable for damages, restitution, or other equitable relief for a breach thereof. A person owes another a fiduciary duty at common law where there is evidence of a dependency relationship in which that person is reasonably reposed with trust and confidence by the other to act in their best interests. It is "virtually self evident" that a pension plan administrator meets these criteria in light of the administrator's statutory obligations and the fact that plan beneficiaries are always dependent on the administrator to manage the plan and protect the fund. In short, a pension plan administrator "owes a duty of care to members of the pension plan" and, correspondingly, employees can reasonably expect the administrator to act in their best interests.
>
> But regardless of the course of the duty, what is clear is that an administrator must comply with both the statutory and common law standards.

[142] In *Burke v. Hudson's Bay Co.*, 2010 SCC 34, the Supreme Court of Canada commented as follows regarding the duty of an administrator of a private pension plan[i]:

> [41] Subject to the text of the plan, the terms of the trust agreement, and relevant statutes, there is no doubt that HBC had wide discretion with respect to the pension plan, which it could exercise unilaterally and which could affect the interests of the employees, and to which exercise of discretion the employees were vulnerable. Therefore, I agree with Gillese J.A. that in these circumstances HBC, as plan administrator, was a fiduciary and that a fiduciary relationship existed between HBC as administrator and the employees/beneficiaries under the pension plan. …

[143] Likewise, in *Indalex Ltd (Re)*, 2011 ONCA 265, varied on other grounds, 2013 SCC 6, the Ontario Court of Appeal stated:

> [117] It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries. These obligations arise both at common law and by virtue of s. 22 of the PBA.
>
> [118] The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests. The key factual characteristics of a fiduciary relationship are the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power.
>
> [119] It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

[144] The authors of *Pension Law*, 3d ed. examine the content of the statutory and common law duties owed by pension plan administrators in some detail. With respect to the duty to use "all relevant knowledge and skill that the administrator

possesses or, by reason of the administrator's profession, business or calling, ought to possess", they write at pp. 329-330:

> Pension plan administrators and their agents and employees are deemed to possess "specialized" and "expert" knowledge and skill, which must be exercised when discharging their statutory functions and common law duties. Accordingly, a prudent administrator will ensure that its employees, agents, and, if the administrator is a board of trustees, its board members, possess the relevant "qualifications, resources and experience to carry out their function and have access to appropriate education. Continuing education and training is especially important in jointly governed pension plans, such as MEPPs …, where the composition of the board often includes laypersons, and also, where governance issues may conflict with the collective bargaining.
>
> …
>
> The duty of knowledge and skill extends not only to the investment of the pension plan, but to all aspects of pension plan administration, including communications with employees and beneficiaries, the interpretation of plan documentation, the calculation and payment of pension benefits, regulatory filings, and dealings with the [Superintendent].
>
> [Emphasis added]

[145] The duties owed by a pension plan administrator include a duty to inform and disclose. The authors of *Pension Law* explain this duty at p. 341:

> The PBA prescribes a host of specific disclosure requirements for a plan administrator vis-à-vis employees and the regulator. In addition to these specific requirements, a plan administrator's general communications with employees and beneficiaries are subject to a fiduciary responsibility to disclose material information sufficient to permit that person to make a fully informed decision respecting their rights and entitlements. This is both a common law duty and part of the statutory duty of care imposed upon administrators in the PBA.
>
> In the context of pension administration, the duty to inform is usually applied as part of the law of negligent misrepresentation, the principle being that "the failure to divulge material information may be just as misleading as a positive misstatement." It is also a fiduciary duty.
>
> In short, the scope and nature of the duty to inform is "fact based" and, therefore, "each case turns on its facts."

[Emphasis added]

[146] In *Hembruff v. Ontario (Municipal Employees Retirement Board)*, [2005] O.J. No. 4667 (Ont. C.A.), the Ontario Court of Appeal noted at para. 76:

> [A] pension plan administrator has an obligation to disclose "highly relevant" information. Failure to disclose accurate and complete information regarding a pension plan's existing terms and options can amount to an untrue, inaccurate or misleading representation.

[147] Courts have held pension plan administrators liable for damages in negligent misrepresentation and breach of fiduciary duty where they have failed to disclose material information, or have provided erroneous information, regarding the terms of the pension plan.

[148] For example, in *Smith v. Canadian National Railway Company*, 2002 NSSC 148, the plaintiff's spouse, Mr. Curley, was an employee of Canadian National Railway and a member of its pension plan when he died. The plaintiff began living with Mr. Curley just before he applied for disability benefits under CNR's pension plan. His application took more than one year to be approved. When the application was approved, CNR advised Mr. Curley that a survivor pension would be paid to the plaintiff as his common law spouse. After Mr. Curley's death, the plaintiff applied for survivor benefits. Her application was refused based on the fact that she had not lived with Mr. Curley for one year prior to the date he applied for disability benefits. The plaintiff argued that CNR negligently misrepresented that survivor benefits

would be paid, causing her to forego attempting to discuss other arrangements with Mr. Curley. Allowing her claim, the court reasoned as follows:

> [45] The law of the tort of negligent misrepresentation is founded on the case of *Hedley Byrne & Company Limited -versus- Heller & Partners Limited* [1964], A.C. 465 (H.L.). In *Queen v. Cognos Inc.* [1993], 99 D.L.R. (4th) 626. The Supreme Court of Canada summarized the cases on the issue of negligent misrepresentation and indicated: (p. 643)
>
> > The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this court cited above suggest five general requirements:
> >
> > (1) There must be a duty of care based on a "special relationship" between the representor and the representee.
> >
> > (2) The representation in question must be untrue, inaccurate, or misleading.
> >
> > (3) The representor must have acted negligently in making said representation.
> >
> > (4) The representee must have relied, in a reasonable manner, on the said negligent misrepresentation; and
> >
> > (5) The reliance must have been detrimental to the representee in the sense that damages resulted.
>
> SPECIAL RELATIONSHIP
>
> [46] I find that the plaintiff was in a special relationship with the defendant in this case. She was living with Mr. Curley at the time he made his application for disability benefits and the defendant was aware of her status based on Mr. Curley's statutory declaration and other correspondence between them.
>
> [47] Witnesses for the defendant fairly acknowledged that the defendant had a responsibility to the spouse of a pensioner member. Therefore, I find that the defendant would reasonably foresee that the plaintiff would rely on the representation made to Mr. Curley. I see no policy reason that would negate the duty of care owed by the defendant to the plaintiff.
>
> [Emphasis added]

[149] In *Ault v. Canada (Attorney General)*, 2011 ONCA 147, the Ontario Court of Appeal held that a plan administrator's failure to disclose concerns expressed by the

CRA over the plan's non-compliance with federal tax laws constituted a breach of its duty of care and fiduciary obligations owed to the employees. The court found that the administrator failed to disclose information to the employees that was material to their respective decisions on whether to resign from their employment and transfer their accrued pension entitlements to the new pension plan and was accordingly liable to the employees in negligent misrepresentation and breach of fiduciary duty. See also *Spinks v. R.*, 1996 CarswellNat 326 (Fed. C.A.); and *Calder v. Alberta*, 2017 ABQB 162.

[150] Courts have also imposed tort liability on a pension plan administrator's agent for providing incomplete or misleading information to a potential beneficiary. In *Deraps v. Labourers' Pension Fund of Central & Eastern Canada (Trustee of)*, 1999 CarswellOnt 2896 (Ont. C.A.), the Ontario Court of Appeal, *per* Abella, J.A. (as she then was), described the issue before it as follows:

> 1 The issue in this appeal is the scope of a pension counsellor's duty in communicating information to potential beneficiaries of a pension plan. The pension plan advisor in this case failed to inform a union member and his wife in express terms that if the wife signed a spousal waiver, she would receive no benefits when her husband died.
>
> 2 The question to be decided is whether or not the failure to provide this specific information breached a duty of care owed by the pension advisor to the wife.
>
> 3 The trial judge, McGarry J., found that the pension advisor did not fully inform the union member and his wife of the implications of signing the waiver and, accordingly, found that the wife's waiver was null and void. (*Deraps v. Labourer's Pension Fund of Central and Eastern Canada* (1997), 146 D.L.R. (4th)

> 321.) On appeal to the Divisional Court, this finding was overturned (Cunningham J. for the majority, A.G. Campbell J. dissenting: *Deraps v. Labourer's Pension Fund of Central and Eastern Canada* (1998), 18 C.C.P.B. 293.
>
> 4 The respondents acknowledged at the outset of the appeal that the pension advisor was the agent of both the union and the pension fund.

[151] After thoroughly reviewing the law of negligent misrepresentation, Abella, J.A. stated:

> 49 Based on the foregoing legal framework, several observations arise.
>
> 50 Gloria Hickey was the agent of the pension plan and she was retained by the union to provide information to union members with respect to, among other things, the terms and conditions of the pension plan.
>
> 51 Section 23(2) of the *Pension Benefits Act* states:
>
> > (2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possess or, by reason of the administrator's profession, business or calling, ought to possess.
>
> 52 This duty was assigned to Ms. Hickey by virtue of s. 23(5) of the *Pension Benefits Act* which states:
>
> > (5) Where it is reasonable and prudent in the circumstances so to do the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.
>
> 53 Ms. Hickey had, and was deemed to have, specialized knowledge and skill in her position as agent of the administrator of the pension plan. The Deraps were entitled to rely on information provided by Ms. Hickey, given the letter from the union to its members, the expertise Ms. Hickey was presumed to possess, and the dependence of Mrs. Deraps and her husband on this information.
>
> 54 Ms. Hickey's failure to advise Monique Deraps at all, let alone in a clear way, that she would receive nothing when her husband died if she signed the waiver, was misleading and a misrepresentation.
>
> 55 Because she had a responsibility to provide complete and clear information, Ms. Hickey's failure to do so amounts to a breach of her duty of care. This duty was best characterized by Linden J.A. in *Spinks v. R.* (1996), 134 D.L.R. (4th) 223 (Fed. C.A.), where he said:
>
> > ... It seems to me that where one party is advising another, the failure to divulge material information may be just as misleading as a positive

> misstatement. Missing information can be just as harmful as mistaken information. Both types of advice are equally erroneous. This is especially the case where, as here, the information in question is of a specialized nature, which is easily available to the advisor but not easily obtainable by the party being advised. In such a context, the duty of an advisor is to advise competently, accurately, and fully. (at p. 230).
>
> 56 Ms. Hickey was trained to provide pension information, was held out by the union to have the necessary expertise and specialized knowledge, and union members were encouraged to seek her assistance in determining what benefits they were entitled to. In that capacity, Ms. Hickey should have been aware that there were serious implications for Monique Deraps in signing the waiver, implications which were profoundly different from what Ms. Hickey had told Mr. Deraps at their meeting in April, and implications she knew, or ought to have known, would be of particular interest to Monique Deraps as the surviving spouse.
>
> 57 In my view, the failure to provide Monique Deraps or her husband with complete information on what the implications of signing the waiver would be, represented a breach of a duty to exercise reasonable care in providing information to persons who would be expected to rely on it. The purpose for which the information was being sought was apparent to Ms. Hickey. She knew that the parties would want to know, and in fact Mr. Deraps specifically asked, what would be the result in monthly amounts of Monique Deraps' signing the waiver. It was reasonably foreseeable that Monique Deraps would rely on any information Ms. Hickey provided, and that the implication of not giving full information could be devastating to someone in Mrs. Deraps' circumstances.
>
> 58 The failure to obtain and disclose this material information, as she told Mr. Deraps in early April she would do, was a breach of Ms. Hickey's duty to him and to his spouse, and the failure in particular to disclose to Monique Deraps that her signature would result in no pension, is negligent misrepresentation.
>
> [Emphasis added]

[152] Based on the *Deraps* decision, a pension administrator's agent retained to communicate with members and beneficiaries (including potential beneficiaries) and provide them with information about their pension entitlements has a duty to provide complete, clear, and accurate information. A breach of that duty may result in liability in negligent misrepresentation. It is unclear, however, whether the agent, like the pension administrator, owes a similar duty as a fiduciary.

[153] While an agent retained by a pension plan administrator clearly owes fiduciary duties to the administrator, the law is unsettled as to whether the agent owes fiduciary duties to members and beneficiaries. Neither the Applicant nor the Respondents engaged with the issue and the Court's own research failed to turn up any authorities considering the issue in a dispositive manner.[ii] However, on the facts of this case, the Court's determination of liability and damages does not turn on whether BPA is a fiduciary *vis-à-vis* members and beneficiaries of the Pension Plan. For this reason, I leave the issue to be decided on another day where the Court will hopefully have the benefit of more fulsome submissions.

The April 16, 2020 Death Benefit Notice – Alleged Negligence

[154] I will begin with a determination of liability by BPA in relation to the April 16, 2020 death benefit notice.

[155] Did BPA breach its duty of care to provide complete and accurate information to Ms. Wilson about her pension entitlement when it failed to inform her that if she did not communicate her preferred option within 90 days of receiving the notice, she would be deemed under the *Pension Benefits Act* to have selected an immediate monthly pension?

[156] The Respondents argue that BPA's failure to advise Ms. Wilson of the effect of the deeming provision cannot amount to a breach of the standard of care because neither the *Pension Benefits Act* nor the Regulations state that a beneficiary must be informed of the 90-day period.

[157] They submit that s. 67(4) of the *Act* does not state that the beneficiary must be advised of the 90-day period, nor that a beneficiary is required to make an election at all. The *Act* specifically states that a beneficiary *may* exercise their entitlement by delivering a direction to the administrator, and clearly establishes a default selection (an immediate monthly pension) if the beneficiary does not deliver a direction. Section 132 of the *Regulations* states that in order to exercise the options set out in s. 67(1) of the *Act*, the spouse must deliver a direction within 90 days.

[158] The Respondents say that these provisions do not impose any freestanding obligation to deliver such a direction. They say, "This prescribed period is only relevant if the beneficiary wishes to make an election, otherwise the statutory default set out in section 67(4) of the *Pension Benefits Act* will apply."

[159] The Respondents further submit that the 90-day period is not included in the minimum information which must be provided to the beneficiary under s. 78 of the *Pension Benefit Regulations*. Again, that section states:

> 78 If the death of a member, former member or retired member results in their spouse, beneficiary or estate becoming entitled to a benefit under the plan, the administrator must, no later than 60 days after receiving notice of the death, provide the spouse, beneficiary or personal representative with a statement that contains at least all of the following information, as is recorded in the administrator's records for the plan:
>
> (a) the name of the plan and its Provincial registration number;
>
> (b) the name of the deceased member or former member;
>
> (c) the amount of the benefit and how it will be paid;
>
> (d) any amount payable as a lump sum under subsection 55(4) of the Act;
>
> (e) any indexing under the plan that applies to a pension;
>
> (f) the amount of any pension resulting from additional voluntary contributions and optional contributions, if applicable;
>
> (g) the amount of any pension purchased with contributions resulting from a transfer made on behalf of the member from another pension fund;
>
> (h) for a spouse, the options available under Section 63 or 67 of the Act.
>
> [Emphasis added]

[160] The Respondents contrast s. 78 with ss. 76, 79, 80, and 81 of the *Regulations*, which, in the context of other pension benefit statements, require the administrator to advise the beneficiary of "the time period" for exercising certain options.

[161] The Respondents submit that if the Court finds it necessary to consider the Applicant's negligence claim beyond the straightforward Application of the legislation, expert evidence would be required.

[162] The *Pension Benefits Act* and the *Regulations* prescribe the minimum standards applicable to an administrator and its agents. The standards are enforceable by the Superintendent. These legislative provisions do not preclude the

Court from determining that more is required on the part of an administrator or its agent to fulfill their duties to beneficiaries at common law.

[163] I find that when BPA sent Ms. Wilson the April 16, 2020 death benefit notice, it failed to provide her with complete, clear, and accurate information concerning her pension death benefit entitlement and the options available to her for payment. By not informing Ms. Wilson that if she did not respond with her selection within 90 days, she would be deemed to have selected an immediate monthly pension commencing April 1, 2020, BPA failed to disclose material information sufficient to permit Ms. Wilson to make a fully informed decision respecting her rights and entitlements.

[164] This omission, coupled with BPA's statement that "[n]o further processing will take place until all required completed documentation is returned" left Ms. Wilson with the reasonable but inaccurate understanding that all of the payment options would remain available to her until she communicated her selection to BPA. In other words, BPA misled Ms. Wilson into believing that she was free to take as long as she needed before deciding which form of payment best suited her family's needs.

[165] As agent for the Trust, BPA is deemed to have specialized knowledge and skill, including knowledge of the provisions of the *Pension Benefits Act* and Regulations that govern administration of the Pension Plan. The Court does not need expert evidence to find that BPA's failure to be aware of s. 67(4) of the *Act* and to communicate its effect to Ms. Wilson was negligent. I further find that it was entirely reasonable for Ms. Wilson to rely on the information provided to her by BPA on behalf of the Trust.

[166] However, where Ms. Wilson's claim in relation to the April 16, 2020 death benefit notice fails is on the issue of damages.

[167] As of May 2022, the Respondents acknowledged that the CV Standard Update had no application to Ms. Wilson's death benefit, and that she was therefore entitled to the immediate monthly pension based on the original commuted value referenced in the April 16, 2020 notice. Although Ms. Wilson argued that if BPA had informed her of the 90-day deadline, she would have chosen the lump sum refund of the commuted value of $124,638.47, her own affidavit evidence contradicts that assertion. The only evidence on the record concerning what Ms. Wilson would have done if she had known about the deeming provision is found at para. 41 of her Affidavit filed on October 15, 2021:

> If I had to make a choice about the Pension Death Benefit option before knowing whether my CPP and WCB benefits were approved, I would have selected a monthly payment to better support my family financially on a monthly basis.

[168] The 90-day period expired on or about July 31, 2020. Ms. Wilson did not learn that she was not eligible for WCB survivor benefits until mid-August 2020. Ms. Wilson was advised that she was approved for CPP survivor benefits in March 2021.

[169] Accordingly, Ms. Wilson's own evidence is that she would have selected the monthly payment option had she been forced to make a choice before knowing whether her CPP and WCB benefits were approved.

[170] Applicant's counsel made the unusual submission that Ms. Wilson's evidence on this point was "wrong", and that, in any event, it amounted to speculation that should be given no weight. Moreover, Applicant's counsel argues that the evidence concerning Ms. Wilson's interactions with BPA in February 2021 contradict her evidence. Counsel writes in Ms. Wilson's reply brief at pp. 11-12:

> 71. When Ms. Wilson's statement is read within the context it was made, it is clear that paragraph 41 is written with a view to the time period which starts in April 2020 when four options were communicated to her by BPA, and ends when Ms. Wilson knew whether her CPP and WCB benefits were approved.
>
> 72. Ms. Wilson knew that she would not receive any WCB survivor benefits in mid-August 2020 when the Medical Examiner told her they determined Jeff died by suicide. She finally learned that her CPP survivor benefits were approved about seven months later in March 2021. Yet, from Margo Langille's notes from her telephone calls with Ms. Wilson on February 5th and 17th 2021, we can infer that Ms. Wilson was most interested in the commuted value options at that time. So

> clearly, Ms. Wilson was interested in the commuted value option *before* she learned the final outcome of whether she would receive her CPP and WCB benefits. The statement she made in her affidavit at paragraph 41 was wrong, just like her memory about her interactions with BPA in February 2021.

[171] There are a few problems with this submission. First, and most importantly, the relevant time period for proof of damages is the 90 days following Ms. Wilson's receipt of the April 16, 2020 death benefit notice, which Ms. Wilson said was not long after her interview with the Department of Labour and the RCMP on April 16, 2020. Even if we assume that Ms. Wilson did not receive the notice until two weeks later, on April 30, 2020, the 90-day period would have expired at the end of July 2020, several weeks before Ms. Wilson learned that she would not receive any WCB benefits. Accordingly, Ms. Wilson's statement at para. 41 is the only evidence available pertaining to the relevant time period. Even if the Court were to disregard it, as Applicant's counsel urges, the outcome would be that the Applicant led no evidence whatsoever to prove that she suffered a loss as a result of the misrepresentation.

[172] Ms. Wilson was "made whole" by BPA's payment of monthly benefits and there is no evidence before the Court that the monthly benefits over Ms. Wilson's lifetime amount to less than a lump sum payment paid at present. In fact, it seems that the option of an immediate lump sum payment and the option of life-time monthly payments may be actuarily equivalent.

[173] Second, the evidence regarding Ms. Wilson's conversations with Ms. Langille does not establish that she intended to choose the lump sum option at that time, or at any earlier time. Ms. Wilson's evidence was that she called Ms. Langille at BPA on February 5, 2021 to give her an update on the status of her CPP benefits claim. She said Ms. Langille told her that the benefit package would have to be recalculated. Ms. Langille's notes of the conversation state, "I let her know I [*sic*] new package would have to go out and the CV would be significantly lower." Contrary to Applicant's counsel's submission, Ms. Langille's reference to the commuted value does not prove that Ms. Wilson was asking specifically about the lump sum refund option or intended to select that option. As Ms. Archibald, the Plan Actuary, testified, the lump sum refund option and the immediate and deferred pension options are actuarially equivalent. In other words, they all represent the same commuted value. Accordingly, Ms. Langille was merely advising Ms. Wilson that the commuted value underlying *all* of the options would be significantly lower. This evidence does not assist Ms. Wilson in establishing that if BPA had advised her of the 90-day deadline, she would have chosen the lump sum refund option.

[174] Ultimately, the only person who could give evidence concerning what Ms. Wilson would have done if BPA had advised her of the 90-day period is Ms. Wilson herself, and she gave that evidence in her initial affidavit. Her evidence was that she

would have chosen the immediate monthly pension. If that evidence was inaccurate, Ms. Wilson should have corrected it in one of her two supplemental affidavits, or filed an additional supplemental affidavit. Without such a correction on the record, however, Ms. Wilson's statement that she would have chosen the immediate monthly pension is uncontradicted. There is simply no basis upon which the Court should reject it.

[175] As a result, Ms. Wilson's claim against BPA for damages arising out of the misrepresentations in the April 16, 2020 death benefit notice cannot succeed. It follows that any claim against the Trust in relation to the April 16, 2020 death benefit notice fails for the same reason. This includes the claim for restitutionary damages, by which Ms. Wilson seeks damages in the amount of the actual growth on the lump sum commuted value since April 2020 (if that amount was higher than pre-judgment interest of 5%).

The February 5, 2021 Death Benefit Notice – Alleged Negligence

[176] It remains to consider whether BPA breached its duty of care to Ms. Wilson in February 2021 when it advised her, incorrectly, that the commuted value of her pension death benefit entitlement had been reduced by approximately $90,000 as a

result of the CV Standard Update – a position which BPA and the Trust maintained until May 2022 – and, if so, whether she suffered damages as a result.

[177] As noted earlier, BPA had a duty to provide Ms. Wilson with complete, clear, and accurate information concerning her pension death benefit entitlement and the options available to her. In the conversation between Ms. Langille and Ms. Wilson on February 5, 2021, and in the death benefit notice bearing the same date, BPA advised Ms. Wilson that the commuted value of her entitlement had been reduced to $36,535.07. This was wrong.

[178] Accompanying the February 5, 2021 death benefit notice was a one-page "Appendix – Commuted Values" which advised, in part:

> The calculation of Commuted Value remains valid for a period of 90 days from the date the Pension Plan Death Benefits Statement is mailed to you. If a commuted value is payable to you after 90 days has elapsed, a new calculation will be required.
>
> [Emphasis added]

The latter statement was also wrong. Once 90 days has elapsed without an election by the spouse, the spouse is deemed pursuant to s. 67(4) of the *Act* to have chosen the immediate monthly pension option. No recalculation is required.

[179] In making these statements to Ms. Wilson, BPA breached its duty to provide her with accurate information regarding her pension death benefit. The statements were incorrect, misleading, and inconsistent with the provisions of the *Pension*

Benefits Act which govern administration of the Pension Plan. Again, the Court needs no expert evidence to find that BPA was negligent in making these misrepresentations to Ms. Wilson.

[180] With respect to the Trust, Ms. Wilson did not plead vicarious liability. This fact does not insulate the Trust from a finding of liability, however. When the Trust learned of the situation from BPA, it had the opportunity to correct BPA's negligent misrepresentations. That is not what happened. Instead, the Trust adopted BPA's negligent misrepresentations as its own. It too took the position that the CV Standard Update applied to Ms. Wilson's pension death benefit – a stance it would later abandon. In so doing, the Trust was negligent and breached its fiduciary duty of care, skill, and diligence.

[181] Ms. Wilson's reliance on the information provided by BPA and the Trust was reasonable.

[182] Again, however, Ms. Wilson is unable to establish economic loss flowing from that reliance. In May 2022, the Respondents belatedly acknowledged that s. 67(4) of the *Pension Benefits Act* applied to Ms. Wilson and began making monthly pension benefit payments to her. They also paid her $9,019 for payments due April

1, 2020 to April 1, 2022, along with interest of $587.13. Accordingly, Ms. Wilson has been made whole in terms of the economic loss portion of her claim.

General Damages

[183] Ms. Wilson also claims general damages. In her second supplementary affidavit, Ms. Wilson addressed the emotional and physical impact of the Respondents' misrepresentation that her pension death benefit entitlement had been reduced by almost $90,000. She stated that she was very upset when she learned that she stood to lose such a "huge amount of money." She said she was crying and extremely emotional when she spoke to Ms. Langille, and that she was shaking in disbelief. Ms. Wilson stated that she has had many sleepless nights, plagued by self doubt, wondering if she did something wrong. She indicated that she has become anxious and depressed, and developed "concerning heart symptoms." She said her doctor sent her to a specialist, but the specialist found nothing physically wrong with her.

[184] Ms. Wilson's claim for damages related to negligent injury to or interference with her mental health is governed by the ordinary duty of care analysis (*Saadati v. Moorhead*, 2017 SCC 28, at para. 23). Both BPA and the Trust owe a duty to spouses of recently deceased members to take reasonable care in the administration

of their pension death benefit. It was entirely foreseeable that a person like Ms. Wilson, experiencing the recent tragic loss of her spouse, could suffer harm if the Respondents did not provide her with complete, clear, and accurate information about her pension benefit entitlement.

[185] In *Saadati*, the Supreme Court of Canada noted that "negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one's mental health" (para 23). Justice Brown, for the court, clarified that although relevant expert evidence is often helpful in determining whether a claimant has proven a mental injury, it is not required as a matter of law (para. 38). Nor is it required for the claimant to prove that they have been diagnosed with a recognizable psychiatric illness (para. 38).

[186] The Supreme Court of Canada cautioned, however, that "mental injury is not proven by the existence of mere psychological upset" and that "there is no legally cognizable right to happiness" (para. 37). Citing *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27, Brown, J. stated that claimants must show "that the disturbance suffered by the claimant is 'serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears' that come with living in civil society" (para. 37).

[187] Of course, the claimant must also prove that the mental injury was caused by the defendant's negligence. The Respondents say that Ms. Wilson has not proven that her alleged psychological symptoms were caused by their conduct, and not attributable instead to the loss of her spouse to suicide, the stress of the pandemic, the strain of this litigation, or some other factor.

[188] While Ms. Wilson's evidence on the impact of the Respondents' conduct on her mental health could have been more detailed, and I make no finding with respect to "concerning heart issues", I am fully satisfied that she suffered serious and prolonged stress and anxiety – over and above the grief, stress, and anxiety caused by the other factors identified by the Respondents – as a result of being told in February 2021 that the commuted value of her pension death benefit had been reduced by almost $90,000. The disturbance to Ms. Wilson's mental health certainly exceeded the "ordinary annoyances, anxieties and fears that come with living in civil society."

[189] I award Ms. Wilson $20,000 in general damages to be paid by the Respondents, on a joint and several basis.

Aggravated Damages

[190] Ms. Wilson is also seeking aggravated damages. In a letter to Respondents' counsel dated April 4, 2022, and entered into evidence, Ms. Wilson's counsel said the following about her client's claim for aggravated damages on p. 3:

> Ms. Wilson seeks $25,000 in aggravated damages to compensate her for the distress caused by the Defendants [*sic*] actions and inactions, particularly since February 2021.

[191] Aggravated damages are described in Lewis Klar et al., *Remedies in Tort* (Thomson Carswell Proview, 2023) at §30:9:

> Aggravated damages are awarded in tort for aggravation of the injury by the defendant's high-handed or otherwise offensive conduct. They provide compensation for the injured feelings of the plaintiff where such injury has been caused by the tortfeasor's malice or outrageous conduct. Although aggravated damages are typically awarded in intentional tort actions, such damages may also be granted in negligence cases if the plaintiff's emotional trauma is heightened by the defendant's recklessness. … Aggravated damages differ from punitive damages in that the latter are imposed to punish the defendant while the former are intended to compensate the plaintiff.

[192] The Ontario Court of Appeal said the following about aggravated damages in *Weingerl v. Seo*, 2005 CarswellOnt 2474 (Ont. C.A.):

> 69 General non-pecuniary damage should be assessed after taking into account any aggravating features of the defendant's conduct. The court may separately identify the aggravated damages, however, in principle they are not to be assessed separately. The purpose of aggravated damages, in cases of intentional torts, is to compensate the plaintiff for humiliating, oppressive, and malicious aspects of the defendant's conduct which aggravate the plaintiff's suffering. In cases of negligence, aggravating factors can also be taken into account where the defendant's conduct recklessly disregards the plaintiff's rights.

[193] In my view, aggravated damages are not appropriate in this case. Although the Respondents' conduct was staggeringly incompetent, I cannot conclude that it rose to the level of "reckless disregard" for Ms. Wilson's rights. *Black's Law Dictionary*, 11th ed. (St. Paul, Minn: Thomson Reuters, 2019) defines "reckless" as follows:

> Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. • Reckless conduct is much more than mere negligence: it is a gross deviation from what the reasonable person would do.

[194] It defines "reckless disregard" as follows:

> 1. Conscious indifference to the consequences of an act. 2. *Defamation*. Serious indifference to trust or accuracy of a publication. … 3. The intentional commission of a harmful act or failure to do a required act when the actor knows or has reason to know of facts that would lead a reasonable person to realize that the actor's conduct both creates an unreasonable risk of harm to someone and involves a high degree of probability that substantial harm will result.

[195] While it was certainly negligent for the Respondents to have been unaware of s. 67(4) of the *Pension Benefits Act* and its impact on a spouse's pension death benefit options, negligence is not the same as reckless disregard. There is no evidence that either Respondent recognized that its conduct created a substantial risk of harm to Ms. Wilson and were consciously indifferent to that risk. Ms. Langille's evidence was that BPA had never previously encountered a situation where a spouse did not respond to a pension death benefit notice within 90 days. Both BPA and the

Trust were unfortunately oblivious of the risk to Ms. Wilson created by their failure to be aware of s. 67(4) and to communicate its effect to her.

Punitive Damages

[196] Ms. Wilson seeks punitive damages in the amount of $25,000. The law with respect to punitive damages was succinctly summarized by Chipman, J. in *Park Place Centre Ltd. v. Manga Hotels (Dartmouth) Inc.*, 2022 NSSC 317, at paras. 82-83:

> To obtain an award of punitive damages, a plaintiff must meet two basic requirements. First, the plaintiff must show that the defendant's conduct was reprehensible. Second, the plaintiff must show that a punitive damages award, when added to any compensatory award, is rationally required to punish the defendant and to meet the objectives of retribution, deterrence and denunciation. …
>
> In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 94, the Supreme Court of Canada stated, among other things, that punitive damages are very much the exception rather than the rule, and they can be imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.

[197] Ms. Wilson submits that punitive damages should be awarded because the Respondents have learned nothing from her case. She points out that on cross-examination, Mr. Muise was referred to the statement in his affidavit that the CV Standard Update "changed the commuted value of Mr. Turner's death benefit" and asked whether he still believed that statement to be true. Mr. Muise responded with, "Yes." Mr. Arsenault, for his part, testified that he is now aware of the deeming

provision and understands that after 90 days of receiving the April 16, 2020 death benefit notice, Ms. Wilson would be deemed to have elected the immediate monthly pension option. Confusingly, however, Mr. Muise then testified to his belief that if Ms. Wilson had responded to either the February 5, 2021 death benefit notice or the April 30, 2021 death benefit notice with her selection of one of the options, BPA would have processed it. The evidence of both witnesses suggests that although they are now aware of the deeming provision, they still do not understand its implications. This is troubling.

[198] Let me be clear, the Respondents have put a grieving widow through the wringer as a result of their carelessness and ineptitude. What happened to Ms. Wilson should never have happened to her. That said, while I am sympathetic to Ms. Wilson's position that punitive damages are necessary to deter the Respondents from repeating their negligent conduct, the Supreme Court of Canada has held that punitive damages are only available where there has been "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency" (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at para. 36).

[199] In *Honda Canada Inc. v. Keays*, 2008 SCC 39, Bastarache, J., for the majority, noted at para. 62 that "punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own"

(emphasis added). The Respondents' conduct can be described as negligent, careless and sloppy, but it was not malicious, oppressive, high-handed or advertent. In *All-Up Consulting Enterprises Inc. v. Dalrymple*, 2013 NSSC 46, LeBlanc, J. declined to award punitive damages where the defendant's "negligent conduct was characterized by incompetence, inattention, and sloppiness" rather than actual malice (para. 256). In dismissing the claim, he noted:

> As blameworthy as RSA's handling of this matter was, it was nevertheless fundamentally characterized by negligence rather than by intent.
>
> (para. 256)

The same is true here. I find that the Respondents' conduct, like that of RSA, was blameworthy, but fundamentally characterized by negligence rather than by intent. Punitive damages are not available.

Breach of the Duty of Loyalty

[200] I will now briefly deal with Ms. Wilson's claim for breach of the fiduciary duty of loyalty. Again, Ms. Wilson pleaded that both the Trust and BPA "did not act in the utmost good faith owed by a fiduciary to a beneficiary as established in common law, and its actions constitute a breach of its duty of loyalty to Ms. Wilson by acting unethically in:

a. Not taking responsibility for their many mistakes, including but not limited to, not advising her of the 90-day limitation period, and not causing the death

benefit to come into pay after that period had expired retroactive to April 1, 2020;

b. Not honouring Ms. Wilson's selected option to receive a lump sum of $124,637.48 in light of their mistakes;

c. Forcing her to file this application in court."

[201] The Respondents submit that these allegations cannot amount to a breach of the duty of loyalty owed by a fiduciary. I agree.

[202] The content of the fiduciary duty of loyalty was concisely summarized in Edward J. Waitzer and Douglas Sarro, "The Public Fiduciary: Emerging Themes in Canadian Fiduciary Law for Pension Trustees", 2013 CanLIIDocs 187, a journal article relied on by both the Applicant and the Respondents. The authors state at pp. 183-184:

> The duty of loyalty requires that the fiduciary act in the best interests of the beneficiary. This general principle has provided the foundation for most of the concrete rules courts have traditionally imposed on fiduciaries. The duty of loyalty has been held to prohibit fiduciaries from (a) using their powers to their own advantage; (b) using their powers to provide benefits for a third party; (c) delegating their powers to a third party; and (d) agreeing to act as a fiduciary for multiple persons who may have conflicting interests, without the informed consent of each person. It also has been held to require fiduciaries acting for multiple beneficiaries to (e) treat those beneficiaries impartially. This list is by no means exhaustive. Some of these rules, most notably (as noted above) the rule against delegation of powers, have been modified by statute and regulation.

[203] As I indicated earlier, the law is unsettled as to whether the agent of a pension plan administrator has fiduciary obligations to beneficiaries of the plan. However, even if BPA, like the Trust, does owe fiduciary duties to beneficiaries, the conduct cited by Ms. Wilson does not amount to a breach of the fiduciary duty of loyalty.

[204] With respect to not honouring Ms. Wilson's selected option to receive the lump sum option of $124,637.48, the Respondents had legitimate concerns that paying her the lump sum after the 90 days had expired would amount to a breach of their obligation to administer the Pension Plan in compliance with the *Pension Benefits Act*, including s. 67(4).

[205] The Respondents' failure to cause the monthly death benefit to come into play after the 90 days expired was not a breach of the duty of loyalty. Nor was "forcing" Ms. Wilson to file this Application. The Respondents' conduct once the Application was filed, however, will be a factor in awarding costs.

[206] The Respondents were put on notice of the deeming provision when Ms. Wilson filed her application in October 2021. Instead of investigating and properly conceding that Ms. Wilson was entitled – at a minimum – to the original immediate monthly pension amount, the Respondents contested the Application on the basis that the CV Standard Update applied to Ms. Wilson's death benefit. They went on to file extensive evidence in support of this assertion – only to submit in closing that the entire issue was a "red herring".

[207] The Court will expect the parties to address these matters in their costs positions.

Conclusion

[208] Ms. Wilson is entitled to general damages in the amount of $20,000. The claims for restitutionary, aggravated, and punitive damages are dismissed.

[209] BPA and the Trust are jointly and severally liable to pay $20,000 in general damages to Ms. Wilson. This payment shall be made within 20 calendar days of the release of this decision.

[210] If the parties are unable to agree on costs, I will accept written submissions within 30 calendar days of the release of this decision.

Smith, J.

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[i] The Supreme Court of Canada clarified in *Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, that it is only administrators of *private* pension plans that owe fiduciary duties to pension plan members:

> [117] The administrator/pension Plan member relationship was dealt with in *Burke*. This Court found that the indicia of an *ad hoc* fiduciary relationship were met.
>
> [118] However, the authority of *Burke* on this point is limited to the private pension plan context. Participants in public pension plans are not subject to the same vulnerabilities or risks as participants in private pension plans. The government stands behind the pension plans that it provides for its employees, and is not subject to the same sort of credit risks as are private entities. Furthermore, the Court recognized in *Elder Advocates* that while the Crown is subject to the normal requirements for establishing as *ad hoc* fiduciary relationship, "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances" (para. 37).

[ii] In *McLaughlin v. Falconbridge Ltd.* [1999] O.J. No. 2403 (S.C.J.), leave to appeal to Div. Ct. refused, [1999] O.J. No. 5641, Winkler J. (as he then was) held, at paras. 31-32, that it was not plain and obvious that a claim by

beneficiaries of a pension plan against an agent (the plan actuary) for breach of fiduciary duty could not succeed. A similar conclusion regarding was reached in *MacKinnon v. Ontario (Municipal Employees Retirement Board)*, 2007 ONCA 874, at paras. 55-57; and *Chapman v. Benefit Plan Administrators Ltd.*, 2013 ONSC 3318, at paras.40-43.