

COURT FILE NO.: CV-08-003623270000

DATE: June 18, 2009

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

GLENN HEALY, PAUL KELLY, IAN PENNY and JAMAL MAYERS

Applicants

- and -

JIM GREGORY, CRAIG HARNETT, COLIN CAMPBELL and BILL DALY

Respondents

COUNSEL:

James K. McDonald and Dona L. Campbell for the Applicants
Neil Finklestein and J.A. Prestage for the Respondents

HEARING DATES: June 9 and 10, 2009

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] This Application under rule 14.05 (3)(a) of the *Rules of Civil Procedure* is for the opinion, advice, and direction of the Court about a pre-retirement death benefit in the National Hockey League Players' Pension Plan. More precisely, the Pension Plan is the 1966 Pension Plan that was restated four times between 1966 and 1987, and the precise benefit in question is the pre-retirement death benefit that is available: (a) for former players of NHL clubs for services between April 30, 1952 and July 1, 1986; and (b) for non-player employees of NHL clubs for services between 1961 and July 1, 1994.

[2] There is a dispute about how the pre-retirement death benefit should be calculated.

[3] The Applicants are Glenn Healy, Paul Kelly, Ian Penny, and Jamal Mayers. They are four of the eight members of the Board of Trustees that is the trustee and administrator of the Pension Plan. They were all appointed to the Board by the National Hockey League Players' Association, and their position on this Application is that the pre-retirement death benefit should be calculated using a "pension-based" methodology,

which they say is a calculation that reflects a present value calculation of a stream of future payments.

[4] The Respondents are Jim Gregory, Craig Harnett, Colin Campbell, and Bill Daly, who are the other four members of the Board of Trustees. The Respondents were all appointed by the NHL, and with the exception of Mr. Campbell, their position is that the pre-retirement death benefit does not and never did provide a pension-based methodology for the pre-retirement death benefit. They submit that calculation of the pre-retirement death benefit involves a contribution-based methodology where premium payments are refunded plus interest.

[5] Although technically a party, Mr. Campbell takes no position because he has a conflict of interest being a member of the Pension Plan.

[6] The factum of the Applicants provides an illustration of the significance of the outcome of the Application. This illustration arose when a plan member, through his advisor, inquired about the pre-retirement death benefit. The result of this inquiry was that, if the view of the Respondents is correct, then the pre-retirement death benefit would be \$214,300, while, if the view of the Applicants is correct, then the benefit would be \$668,659. The explanation for this difference is that there is a much higher interest rate applied under the pension-based methodology than used in the contribution-based methodology.

[7] During argument, I was told that the outcome of the Application might affect the calculation of pre-retirement death benefits that have already been paid using a contribution-based methodology. (The Application Record indicates that payments for at least 53 deceased members might be affected.)

[8] I was also told that whatever the outcome, it would affect the retirement planning of members of the plan. As of November 7, 2008, there are 1,115 persons who have not yet begun to receive their pension. If a pension-based methodology is not available for the pre-retirement death benefit, then a plan member would have to make a decision between: (a) starting his pension, which would maximize his survivor's benefit on his death but reduce his potential pension during his lifetime; or (b) deferring the pension, which would maximize the pension but yield a substantially smaller pre-retirement death benefit for his survivor should he die before receiving any pension.

[9] In advancing their several competing arguments and counterarguments about how the pre-retirement death benefit in the Pension Plan should be calculated, both sides refer to the surrounding circumstances and the history of the language used in the Pension Plan documents before the 1966 Pension Plan; namely, the language used in a plan that originated in 1947, and both sides referred to the surrounding circumstances and the history of the language of the 1966 Pension Plan and its four Restatements. The use to be made of the extrinsic evidence was a matter of dispute.

[10] Both sides also referred to the history of a series of group annuity contracts purchased from the Manufacturers Life Insurance Company. The significance of the

Manulife contracts to the determination of the method of calculation of the pre-retirement death benefit in the 1966 Pension Plan and its Restatements is a critical matter in the dispute between the parties. The Respondents' position is that the 1966 Pension Plan and the Manulife contracts are interconnected and must be interpreted accordingly, with the result that the pre-retirement death benefit is limited by the terms of the Manulife contracts, which did not use a pension-based methodology to calculate the pre-retirement death benefit. The Respondents request an order declaring that the pre-retirement death benefit is the amount payable on the death of a member under the terms of the Manulife contracts held by the Trustees in respect of the member.

[11] The Applicants, however, submit that the language of the Pension Plan calls for a pension-based methodology and that the inconsistent language of the Manulife contracts does not govern or dominate the interpretation of the pre-retirement death benefit.

[12] In advancing their arguments, both sides refer to communications to the members about Pension Plan entitlements, and both sides refer to the practical consequences of the possible outcome of this Application about the manner of calculation of the pre-retirement death benefit. One consequence of a decision that the pre-retirement death benefit should use a pension-based methodology is that the pre-retirement death benefit is under-funded. A suggested possible consequence of a decision that the Manulife contracts govern the methodology of calculation of the pre-retirement death benefit is that having entered into such an agreement would be a breach of trust by the trustees of the Pension Plan.

[13] The use to be made of the communications and the use to be made of the practical consequences of the competing interpretations in interpreting the Pension Plan's treatment of the Pre-retirement death benefit is another matter of dispute between the parties.

[14] To provide the advice that the parties are seeking, it will be necessary for me to recount the history of the pre-retirement death benefit, to consider the various matters of dispute, and to come to conclusions about the numerous arguments advanced by the parties. I foreshadow to say that although I do not agree with all of the Applicants' arguments, I agree with their interpretation of the Pension Plan as having a pension-based methodology for the calculation of the pre-retirement death benefit. The result is that for the reasons that follow, the Application should be granted.

The History of the Pre-Retirement Death Benefit and of the Manulife Annuity Contracts

[15] A pension plan for NHL players was first introduced in 1947. The trustee and administrator of the plan was originally the National Hockey League Pension Society ("the Society"). The Society, which was replaced by the Board of Trustees in 1999, continues to act as an administrative agent for the Board. The Board of Trustees is now the Trustee and the Administrator of the Pension Plan

[16] The Pension Plan is a defined contribution pension plan with some aspects of a defined benefit plan. See *Bathgate v. National Hockey League Pension Society* (1992), 11

O.R. (3d) 449 (Gen. Div.), aff'd (1994), 16 O.R. (3d) 761 (C.A.). The current plan is registered in the Province of Ontario under the *Pension Benefits Act*, R.S.O. 1990, c. P.8. The plan is also subject to U.S. and Canadian tax laws, as well as, U.S. laws such as the *U.S. Employee Retirement Income Security Act of 1974* and the *Retirement Equity Act*.

[17] The general scheme of the Pension Plan is that normal pension age is 45 for players and 60 or 65 for non-players depending on the category of employment. The pension is payable in monthly installments for the lifetime of a member and, in any event, 120 installments shall be paid. A person may take an early pension, in which case the amount of the pension is reduced. A participant may defer taking his pension and apparently 50% of participants do so. There is an advantage in postponing the pension because deferral substantially increases the value of the retirement pension when it is received. If a member dies after the commencement of his pension benefits, the remainder of the 120 monthly payments shall be paid to the member's beneficiary.

[18] The pre-retirement death benefit that is in dispute in this Application is a benefit to be paid to the beneficiary of a member of the Pension Plan if the member dies before he begins receiving his pension. The death benefit is not available after pension benefits are received. The Pension Plan has always provided a pre-retirement death benefit.

[19] The original pre-retirement death benefit was set out in s. 19 of the "1947 Regulations," which constituted the original pension plan. Under s. 19, the beneficiary of an active player who died would receive a benefit calculated as the greater of two methodologies and the beneficiary of a retired player who died before receiving his pension would receive a benefit based on a single methodology.

[20] The Applicants submit that under s. 19, the two methodologies for active players were a pension-based methodology and a contribution-based methodology and the single methodology for former players was a pension-based methodology. In contrast, the Respondents argue that the two methodologies under the 1947 Regulations are both contribution-based methodologies. For present purposes, so as to not beg any questions that I have to decide, I will not characterize the methodologies in s. 19, and rather I will, with my emphasis added, simply set out s. 19 of the 1947 Regulations, which stated:

19 (a) If a Participant dies while he is a Player, his estate – or beneficiary if one has been nominated by him – shall be entitled to receive an amount of money equal to the commuted value of the Paid-up Pension at Normal Pension Age as calculated by the Actuary to which the Participant would have been entitled at the date of his death, or a sum of money equal to his contributions made under the Plan together with interest thereon as credited by the Society, whichever is greater.

(b) If a Participant dies after he has ceased to be a Player but before his Pension commences, his estate – or beneficiary if one has been nominated by him – shall be entitled to receive an amount of money equal to the commuted value of the Paid-up Pension at Normal Pension Age as

calculated by the Actuary to which the Participant would have been entitled at the date of his death.

[21] Section 18 of the 1947 Regulations required a member's pension entitlement to be secured by an annuity purchased by the trustees of the Pension Plan and held in trust to be assigned to the member at retirement or, in the event of death, to his estate or beneficiary. Until 1952, individual annuity contracts were purchased for players, but beginning in 1952, the Pension Plan's pre-retirement death benefits and the other benefits provided by the Pension Plan were funded by a series of group annuity contracts purchased from Manulife. The requirement that contracts be purchased to secure members' benefits is a feature that continued into the 1966 Pension Plan and its Restatements.

[22] In *Bathgate v. National Hockey League Pension Society*, *supra*, the Court ruled that: "the group annuity contract was more administratively convenient to the Society than the purchase of individual annuities. But no change was made to the Regulation to distinguish between the purchase of individual annuity contracts and the purchase of this ongoing group annuity contract."

[23] Section 23 of the 1947 Regulations stipulated that participants in the Pension Plan would receive a Certificate of Participation. Section 23 stated, with my emphasis added:

23. A Player will receive by becoming a Participant, a certificate of his inclusion in the Plan. The certificate, however, shall not set forth a Participant's rights and privileges, **all of which are subject to these Regulations as well as to the terms and conditions of any Contract entered into between the Society and any Insurance Company or Annuities Branch, Department of Labour, Dominion of Canada, for the benefit of the Participant.** When a Participant's pension commences or he attains Normal Pension Age, whichever event is the first to occur, he shall be entitled to receive from the Society the contract the Society has purchased from an Insurance Company or Annuities Branch, Department of Labour, Dominion of Canada, securing the benefits to which he is or may be entitled. **Such contract shall define his rights thereunder.**

[24] Manulife annuity contract GA 550 was issued on July 3, 1952 with effect from April 13, 1952. This contract provided, with my emphasis added, the following pre-retirement death benefit:

8. Death Benefit In the event of the death of a member before annuity payments commence, any Normal Annuities and Special Annuity purchased in respect to such member shall be automatically cancelled, and there shall be paid to the beneficiary designated by the member by written request filed at the Head Office of the Company, **an amount equal to the total premiums which have been received by the Company in respect of such member, together with interest thereon** at the rate of 2½% per annum compounded annually, interest being computed separately on each premium

from the beginning of the contract year in which the premium was paid to the first day of the month in which death occurs. . . .

[25] Section 1 of contract GA 550 included a definition of "Normal Annuity" and "Special Annuity." A "Normal Annuity" was defined as "that portion of the total annuity which is purchased for a member during any contract year in respect of his years of service subsequent to October 1, 1947. A "Special Annuity" was defined as "that portion of the total annuity which is purchased for a member in respect to his years of service prior to October 1, 1947 ..."

[26] The premiums paid to Manulife under contract GA 550 came from five sources: (1) member contributions, which in the case of hockey players became non-compulsory after 1969 when players were no longer required to contribute; (2) voluntary member contributions; (3) employer contributions; (4) re-allocation of non-vested contribution forfeitures; and (5) special experience rate credits from Manulife allocated to members.

[27] A few weeks before Manulife annuity contract GA 550 was issued, the Society's Directors at a meeting on June 17, 1952 voted to amend the 1947 Regulations as follows, with my emphasis added:

When a contract has been purchased by the Society to secure for any participant all or any portion of the benefits to which he is entitled under these Regulations, **the rights and benefits of such participant shall thereafter be determined in accordance with such Annuity Contract to the extent of the amount of current service benefits provided for in that contract** and, notwithstanding that, the participant may have been either an active player or a retired player who has not yet commenced to receive his pension at the date of his death.

[28] When the Plan was republished in 1958, the June 17, 1952 amendment was not included as expressed above; rather, between 1958 and 1966 the Plan contained the following wording:

The obligation of the Society to a Participant, his estate or his beneficiary shall be completely fulfilled and discharged by and to the extent of the purchase of Annuity Contracts on his behalf under the Plan.

[29] To the current day, the only Pension Plan assets held by the trustees in respect of the pre-retirement death benefits that are the subject matter of this Application are the series of Manulife group annuity contracts. These Manulife contracts provide insufficient funds if a pension-based methodology is used to calculate the pre-retirement death benefit.

[30] In or about 1965, the then trustees of the Pension Plan; that is, the Society, began to take steps to qualify the Pension Plan for recognition under U.S. tax law, and in 1967, the 1947 Regulations were replaced by a new plan, which was effective as of May 1, 1966. This is the 1966 Pension Plan that is at the focal point of the Application now before the Court.

[31] The Respondents submit that the 1966 Pension Plan and its Restatements, like the 1947 Regulations, do not provide for a pension-based methodology for the pre-retirement death benefit. This, of course, is disputed by the Applicants.

[32] At a January 25, 1966 meeting of the Society's Board of Directors, the President, Mr. Clarence Campbell, stated that the new plan would contain substantially the same provisions as the 1947 Regulations, and the following year, at the January 17, 1977 meeting, Mr. Campbell stated that the "provisions for Players' benefits under the Trust Plan are identical to those of the original Plan."

[33] Whatever, the President of the Society may have said or meant, the language of the 1966 Pension Plan that replaced s. 19 of the 1947 Regulations, namely sections 3.25 and 3.26, is not identical to s. 19. The change in language is the nub of the current dispute between the parties. Also relevant to the dispute are sections 1.11 and 3.29. These sections, with my emphasis added, stated:

1.11 "Participant" means a Player, Protected Player, Accommodation Service Player, Staff Employee or Trainer who is entitled to receive benefits under the Club Pension Plan

3.25 If a person dies while a Participant [which is to say while a non-retired player or employee], his beneficiary shall be entitled to receive the insurance benefit and the greater of: (a) **the commuted value of any contracts purchased for such Participant**, or (b) **the Participant's contributions under the Club Pension Plan, together with interest thereon as credited by the Trustee.**

3.26 If a former Participant dies prior to the commencement of the payment of his pension benefit, the Trustee shall pay to the former Participant's beneficiary an amount of money equal to **the commuted value of any contracts purchased for such former Participant.**

3.29 In lieu of making payment of an amount of money equal to the **commuted value of any contract**, as provided for in §3.25 and §3.26, the Trustee may, if it so desires make such payment in installments for a period certain or for the lifetime of the beneficiary, provided, however, that such **installment payments shall be the actuarial equivalent of such commuted value.**

[34] Pausing here, four points should be kept in mind for the analysis of the parties' competing arguments that will follow later:

- First, the language of the plan has changed from "**the commuted value of the Paid-up Pension**" in the 1947 Regulations to "**the commuted value of any contracts purchased**" in the 1966 Pension Plan.

- Second, as one of their arguments, the Respondents submit that that no version of the Pension Plan provides for a pension-based calculation for the pre-retirement death benefit.
- Third, in what I take to be a mutually exclusive alternative argument, the Respondents submit that the change in language found in the 1966 Pension Plan was indeed a substantive change made to indicate that there was now only a contribution-based methodology and no pension-based methodology.
- Fourth, the Society continued the practice of securing group annuity contracts with Manulife and not individual annuity contracts. The Court in *Bathgate v. National Hockey League Pension Society*, *supra*, at p. 478 made the following observation about this practice: "... like the original Plan, [the 1966 Pension Plan] provided that the Society would purchase individual annuity contracts for players at the end of each season on a basis proportional to the number of games in a hockey season with which a player was credited. For cost considerations and reasons of administrative efficiency, the Pension Society continued with Group Annuity Contract GA 550 and the entitlement of each player to rights under the Plan was monitored."

[35] The group annuity contract that was connected to the 1966 Pension Plan was the already existing Manulife contract GA 550.

[36] The 1966 Pension Plan and all later Restatements of it required the Trustees of the Plan to purchase annually a "contract" in respect of a participant's entitlement. A contract was defined in the 1966 Pension Plan as "an annuity contract purchased from an insurance company and/or Annuities Branch, Department of Labour, Dominion of Canada." The definition of contract was similar in subsequent iterations of the Pension Plan. Manulife contract GA 550 and its successor contracts are within the 1966 Pension Plan's definition of contract.

[37] The 1966 Pension Plan and its subsequent iterations contained the following provision, s. 6.04, which echoes features found in the 1947 Regulations about such matters as the Certificate of Participation. Section 6.04, with my emphasis added states:

6.04 For each year that a Participant is entitled to credit for service, he shall receive a Certificate of Participation showing the amount of such service awarded and the pension entitled corresponding thereto. **The Club Pension Plan contains the terms and conditions and rights and responsibilities of the Participants. It shall not be necessary that the Certificate of Participation set out the Participant's rights and privileges or the terms and conditions of any contract entered into between the Trustee and the insurance company or Annuities Branch, Department of Labour, Government of Canada, for the benefit of the Participant.** When a Participant's pension commences or he attains Normal Pension Age, whichever event is the first to occur, he shall be entitled to receive from the Trustee the contracts that Trustee has purchased from an insurance company

or the Annuities Branch, Department of Labour, Government of Canada, securing the benefits to which he is entitled. **Such contracts shall define his rights thereunder. The Trustee shall supply to each Participant a description of the Club Pension Plan setting out in particular:** (a) eligibility for participation; (b) participation; (c) pension and other benefit formulae; (d) Normal Pension Age; (e) financial arrangements to ensure full funding of pension benefits, other benefits and rights of refund; (f) vesting provisions; (g) voluntary contributions; (h) early retirement provisions; (i) deferred retirement provisions; (j) **death benefits**; (k) management of the Club Retirement Fund; and (l) such other information as the Trustee may deem pertinent to a proper explanation of the Club Pension Plan.

[38] In 1972, the 1966 Pension Plan was restated (the "First Restatement") and the pre-retirement death benefit provision was revised by extending the two methodologies treatment of "Participants" to both "Participants" and "Former Participants." The First Restatement, with my emphasis added, stated:

3.39 If a person dies while a Participant, his beneficiary shall be entitled to receive the insurance benefit, if any, and the greater of: (a) **the commuted value of any contracts purchased for such Participant, or (b) the Participant's contributions and all other contributions, together with interest thereon, as credited by the Trustee.**

3.40 If a Former Participant dies prior to distribution of any benefit to which he was entitled, pursuant to 3.39, the Trustee shall pay to the Former Participant's beneficiary an amount of money equal to the greater of : (a) **the commuted value of any contracts purchased for such Former Participant, or (b) the Former Participant's contributions and all other contributions, together with interest thereon, as credited by the Trustee.**

[39] Between 1972 and 1975, the Society prepared a Handbook to describe the First Restatement, which described the pre-retirement death benefit as follows, with my emphasis added:

If a person, who is vested in the Plan, dies before his retirement, his beneficiary shall be entitled to receive **the commuted value of any contract purchased for the Participant.** If a Participant dies after he has ceased to be a Player, Development Club Player, Team Executive, Staff Employee or Trainer, but before the commencement of the payment of his pension benefit the Trustee shall pay to his beneficiary **an amount of money equal to the commuted value of the paid up pension as calculated by the Trustee's actuary to which the Participant would have been entitled at the date of his death.**

[40] The 1966 Pension Plan was restated in 1977 (the "Second Restatement") with no material change to the pre-retirement death benefit provision.

[41] A Summary Plan Description was provided to participants in respect of the Second Restatement. It advised participants, with my emphasis added, that if a "person dies while a participant, or if a former participant dies prior to receipt of any benefit to which he is entitled, his designated beneficiary will receive **the greater of the commuted value of any annuity contracts purchased for such participant or the participant's own contributions and all other contributions, together with interest thereon.**"

[42] The 1966 Pension Plan was restated in 1986 (the "Third Restatement") and made effective to July 1, 1983. The Third Restatement revised the pre-retirement death benefit to comply with the United States' *Retirement Equity Act*, which required pension plans to provide a "qualified preretirement survivor annuity" to a participant's spouse. The Third Restatement introduced a definition of preretirement survivor annuity that tracked the language of the American statute, with my emphasis added, as follows:

1.32 Preretirement Survivor Annuity means a **monthly annuity** for the life of a Participant's surviving spouse, **the actuarial equivalent of which is one-half of the Participant's account balance** in the Club Pension Plan on the date of death.

[43] The Third Restatement did away with the former two methodologies approach in the description of the pre-retirement death benefit, and it had a new double methodology for the calculation of the benefit that depended upon the preretirement survivor annuity and whether there was a surviving Spouse. The new provision, with my emphasis added, stated:

5.01 If a Participant or Former Participant dies before the commencement of distribution of any benefit and leaves a surviving Spouse, **such surviving Spouse shall receive a Preretirement Survivor Annuity** (unless a Preretirement Survivor Annuity has been waived, as provided in 7.01, or if **the deceased does not leave a surviving spouse, the full commuted value of any Contracts purchased for the deceased** shall be distributed to the Beneficiary last selected by the deceased.

[44] A Summary Plan Description was provided to explain the Third Restatement. It stated, with my emphasis added:

The participant's surviving spouse will be entitled to receive a preretirement survivor annuity from the Plan. However, no preretirement survivor annuity will be payable to the surviving spouse if the participant and his spouse waive the preretirement survivor annuity prior to the participant's death.

In addition to the preretirement survivor annuity payable to the surviving spouse, **a death benefit equal to one-half of the commuted value of the annuity contracts purchased for the participant will be distributed to his designated beneficiary. If the participant and his spouse waived the preretirement survivor annuity prior to his death, or if the participant**

does not have a surviving spouse, the total commuted value of the annuity contracts purchased for the participant will be distributed to his designated beneficiary.

[45] The 1966 Pension Plan was restated in 1987 (the "Fourth Restatement"). The Fourth Restatement amended the definition of Preretirement Survivor Annuity to differentiate between Canadian and U.S. residents. The new provision for the pre-retirement pension benefit, with my emphasis added, stated:

5.01 If a Participant or Former Participant dies before the commencement of a distribution of any benefit and leaves a surviving Spouse, such surviving Spouse shall receive a Preretirement Survivor Annuity (unless a Preretirement Survivor Annuity has been waived, as provided in §7.01), and the balance of the commuted value of any Contracts purchased for the deceased shall be distributed to the Beneficiary last selected by the deceased. If a Preretirement Survivor Annuity has been waived, as provided in §7.01, or if the deceased does not leave a surviving Spouse, the full commuted value of any contracts purchased for the deceased shall be distributed to the Beneficiary last selected by the deceased.

[46] A Summary Plan Description was provided to explain the Fourth Restatement. It stated, with my emphasis added:

The participant's surviving spouse will be entitled to receive a Preretirement Survivor Annuity from the Plan. No Preretirement Survivor Annuity will be payable to the surviving spouse, however, if the participant and his spouse waived the Preretirement Survivor Annuity prior to his death or, if in the case of a participant who is a Canadian resident, the participant is living separate and apart from his spouse on the date of his death.

If the participant is a U.S. resident, in addition to the Preretirement Survivor Annuity payable to the surviving spouse, **a death benefit equal to one-half of the value of the participant's Plan benefits will be distributed to the participant's designated beneficiary.** If the participant is a Canadian resident living separate and apart from his spouse on the date of his death, or if the participant and his spouse waived the Preretirement Survivor Annuity prior to his death, or if the participant does not have a surviving spouse, **the total value of his Plan benefits will be distributed to his designated beneficiary.**

[47] As already noted above, Participants in the 1947 Regulations and the 1966 Pension Plan received an annual "Certificate of Participation". Until 1967, the Certificate did not address the pre-retirement death benefit. From 1967 to 1988, the Certificates referred Participants to the Handbook for information about the pre-retirement benefit. In 1988 and in subsequent years, the Certificate indicated that the pre-retirement death benefit was equal to all contributions plus interest.

[48] The first Manulife group contract, GA 550 was the operative contract for the 1966 Pension Plan and for the First Restatement and the Second Restatement. The provisions in Contract GA 550 for pre-retirement death benefits remained unchanged throughout the duration of that contract (1952-1983), save that the interest rate changed from time to time. Although Contract GA 550 provides for one methodology to calculate the pre-retirement pension benefit, as already noted, the 1966 Pension Plan used two methodologies until the Third Restatement, when new methodologies were introduced.

[49] In 1985, contract GA 550 was replaced effective June 30, 1983 by three new contracts. Two of the contracts, namely, GA 20900 (Canadian dollar contract) and GA 20902 (U.S. dollar contract) covered services under the Pension Plan to June 30, 1983. The third contract, GA 20901, covered services after June 30, 1983. The Manulife contracts continued to use only one methodology to calculate the pre-retirement death benefit. The pre-retirement death benefit provision in Manulife contract GA 20900 was as follows, with my emphasis added:

DEATH BENEFIT. In the event of the death of a participant before annuity payments commence, all annuities purchased hereunder to which such participant would otherwise be entitled shall be automatically cancelled and a Death Benefit shall be paid to the beneficiary upon the written direction of the Trustee. Such Death Benefit shall be an amount as shown under the column titled "DEATH BEN" in Appendix X for such participant, together with interest thereon at the rate of 5% per annum

[50] As appears, in Manulife contract GA 20900, instead of expressing a methodology, the pre-retirement death benefit is actually calculated. The calculation found in Appendix A was not a pension-based calculation but rather was based on premiums paid; it is a contributions-based methodology.

[51] Manulife Contract GA 20902 is similar to Manulife contract GA 20900. It contains a schedule that calculates the pre-retirement death benefit. Today, there are no longer potential pre-retirement death benefit beneficiaries under GA 20902, so practically speaking, it is significant only as part of the history of the 1966 Pension Plan and as part of the interpretative problems to be solved.

[52] Contract GA 20901 provided benefits for service after June 30, 1983. More particularly, Contract GA 20901 covered service for players from June 30, 1983 to June 30 1986 and for non-players from June 30, 1983 to June 30, 1994. Using language similar to that of contract GA 550, it provided for pre-retirement death benefits, with my emphasis added, as follows:

DEATH BENEFIT. In the event of the death of a participant before annuity payments commence, all annuities purchased hereunder for such participant shall be automatically cancelled, and a Death Benefit shall be paid to the beneficiary upon the written direction of the Trustee. Such Death Benefit shall be an amount equal to all premiums which have been received by the Company for such participant, together with interest thereon at the

rate of 5% per annum, compounded annually, computed from the beginning of the contract year in which such premium was due in respect of any contributions made on a lump sum basis) to the first day of the calendar month in which death occurs.

[53] Effective July 1, 1986, players' benefits ceased to be funded under the group Manulife contract and contributions were instead paid into separate earmarked investment accounts established for players. Benefits for non-player Participants continued to be funded under the Manulife contract until July 1, 1994. Thus, at issue in this Application now before the court is the calculation in respect of pre-retirement death benefits in respect of players who had service under the Pension Plan before July 1, 1986 and non-players who had service under the Pension Plan before July 1, 1994.

[54] Up until this Application, the records indicate that pre-retirement death benefits have been calculated and paid in accordance with the formula set out in the Manulife contracts, which is also to say that they were not calculated with reference to the present value of the pension benefits that the deceased member would have received as at the date of his death. The Respondents' submit, but the Applicants strongly deny, that if the payments were made in a greater amount, then the Pension Plan would be disqualified as a defined contribution pension plan under U.S. tax law, with resulting adverse tax consequences for both participants and contributing employers.

[55] To conclude this account of the history of the pre-retirement death benefits and the Manulife annuity contracts and before proceeding to the analysis, it will prove helpful to make two observations.

[56] The first observation is to note that at the very centre of the dispute between the parties about the interpretation of the pre-retirement death benefit are the references in the 1947 Regulations, the 1966 Pension Plan, and the Restatements to a "commuted value." Thus, in s. 19 of the 1947 Regulation, the reference is to: "**the commuted value of the Paid-up Pension at Normal Pension Age as calculated by the Actuary to which the Participant would have been entitled at the date of his death.**" In the 1966 Pension Plan, the reference changed to: **the commuted value of any contracts purchased for such former Participant.**" In the First and Second Restatements, this reference is continued. In the Third and Fourth Restatements, the reference changed to: "**commuted value of any Contracts purchased for the deceased.**"

[57] The second observation is to note that the language of "commuted value" is used in other parts and with respect to other provisions of the 1947 Regulations and other provisions in the 1966 Pension Plan and its Restatements. Thus, the 1966 Pension Plan and the First Restatement dealt with the settlement of small pensions by payment of a lump sum and, in this regard, referred to: "**the commuted value of his pension.**" The comparable provision in the Second and Third Restatements was: "**the present value of [a member's] accrued pension benefit.**"

Analysis: Interpretative Principles

[58] The parties made many arguments, but the one thing the parties did not argue about was the principles for courts to apply when asked to interpret contracts and trust instruments. I was referred to the advice of Justice L'Heureux-Dubé in *Mamulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415 who stated at para. 41 :

[T]he "modern contextual approach" for statutory interpretation with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation. In the instant case, the methodological reference provided by R. Sullivan in *Drieger on the Construction of Statutes* (3rd ed. 1994) at p. 131, applies equally to contractual interpretation:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of [that which is to be judicially determined] in its total context, having regard to [its] purpose, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of ... meaning

[59] I was referred to the advice of Justice Doherty in *Glimmer Resources Inc. v. Exall Resources Ltd.*, [1999] O.J. No. 1357 (C.A.), who stated at paras. 16 and 17:

16. When interpreting the provisions of a written contract, the court must look first at the language used in that contract. If the language reveals no ambiguity, there is no need to go outside of the agreement for assistance in the interpretive exercise. As Iacobucci J. recently said in *Eli Lilly and Co. v. Novopharm Ltd.* (1998), 161 D.L.R. (4th) 1 at 27:

The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face ...

When there is no ambiguity of the wording of the document the notion in *Consolidated-Bathurst* [[1980] 1 S.C.R. 888] that the interpretation which produces a "fair result" or a "sensible commercial result" should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties if the goal is to ascertain their true contractual intent. However, to interpret

a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words. [Emphasis added.]

17. That is not to say that each word in an agreement must be placed under the interpretative microscope in isolation and given a meaning without regard to the entire document and the nature of the relationship created by the agreement. Context can elucidate and assist in revealing the plain meaning of words used in a contract. One part of an agreement may enlighten as to the meaning to be given to words used in another part of the agreement. Similarly, the relationship created by the agreement and its overall purpose as indicated in the agreement may assist in giving meaning to particular words or phrases within the agreement. Context in this sense does not, however, refer to extrinsic evidence of the conduct of the parties or expert evidence as to the meaning of words used in the agreement.

[60] In *British Columbia Hydro and Power Authority v. BG Checo International Ltd.*, (1993), 99 D.L.R. (4th) 577 (S.C.C.), a case about contract interpretation but which recites the general principles of interpretation, La Forest and McLachlin, JJ. stated at pp. 581-2:

It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole. Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective. In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term. A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms -or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.

[61] Although, with a few narrow exceptions for situations of ambiguity, evidence of negotiations and of the parties' subjective intent is not admissible, in interpreting a document, the court may have regard to the surrounding circumstances; that is, the factual background and the purpose of the document: *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.); *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A.). The admissibility of evidence of surrounding circumstances does not depend upon a finding that the document is ambiguous: *Ahluwalia v. Richmond Cabs Ltd.*, [1996] 1 W.W.R. 656 (B.C.C.A.); *ACLI Ltd. v. Cominco Ltée* (1985), 61 B.C.L.R. 177 (B.C.C.A.).

The Structure of the Competing Arguments

[62] Of course, agreement about the principles of contract interpretation does not entail agreement about the outcome of the application of the principles, and here the debate of the parties was vigorous.

[63] The superstructure of the Applicants' primary argument was that the language of the 1966 Pension Plan and its several Restatements governed, and under the 1996 Pension Plan, and its predecessor, the 1947 Regulations, there was clear and unambiguous language stipulating a pension-based methodology. An aspect of the Applicants' primary argument was that the operation or language of the Manulife contracts cannot and does not alter the meaning of the 1966 Pension Plan and its Restatements.

[64] The superstructure of the Applicants' secondary and tertiary arguments was that if there is any ambiguity in the interpretation of the 1966 Pension Plan and the Restatements, then a resort to extrinsic aids and to consequences reveals that the intention of the parties was that the Pension Plan must use a pension-based methodology for the calculation of the pre-retirement death benefit.

[65] The superstructure of the Respondents' competing primary argument was two-branched. The first branch was the submission that the language of the 1947 Regulations, the 1966 Pension Plan, and its several Restatements never provided a pension-based methodology but rather always stipulated a contribution-based methodology. The second branch of the primary argument was the mutually exclusive argument that the 1966 Pension Plan was a substantive change that made it clear that there was now only a contribution-based methodology. The Respondents submit that the words "commuted value of any contracts" do not require reference to a present value calculation and can reasonably be understood to refer to any lump sum payment under the Manulife annuity contracts. The return of premiums provision in the Manulife contract is thus a "commuted value of the contract."

[66] An aspect of both branches of the Respondents' primary argument is that the Pension Plan must be read and interpreted along with the Manulife Contract. Thus, the Respondents submit that since the Pension Plan contains terms that limit entitlements to the amounts payable under the purchased annuity contracts, it follows that "commuted value of any contracts" means the lump sum payment made available under the Manulife contracts. The Respondents further submit that when a present value calculation is called for, the plan language is specific, and this design of the Pension Plan precludes "commuted value of the contract" meaning a present value and pension-based methodology.

[67] The superstructure of the Respondents' secondary and tertiary arguments was that if there is any ambiguity in the interpretation of the 1966 Pension Plan and the Restatements, then a resort to extrinsic aids and to consequences reveals that the intention of the parties was that the Pension Plan use a contribution-based methodology for the

calculation of the pre-retirement death benefit; that contribution-based methodology was the return of premiums calculation found in the Manulife contracts.

Analysis: The Meaning of "Commute" and "The Commuted value of any contracts"

[68] My own analysis may begin with the meaning of the word "commute." In this regard, the Respondents provided excerpts of the definition of "commute" from several dictionaries, as follows:

- ... 2 To change an obligation etc. into something lighter or more agreeable ... 4 To change one kind of payment or obligation into or for another (*Shorter Oxford English Dictionary* (3rd ed.), 1968)
- ... change one kind of payment or obligation for (another) – replace (an annuity or other series of payments) with a single payment (*Concise Oxford English Dictionary* (10th ed.), revised 2002)
- ... 3 change (one kind of payment) for another; make a payment to change (an obligation etc.) for another ... 4 a, exchange; interchange (two things), b change (to another thing) (*Oxford Canadian Dictionary*, 2002)
- ... 2 to exchange for another or for something else; give and take reciprocally; interchange ... 4 to change (one kind of payment) into another, as by substitution ... 6 to make substitution. 7, to serve as a substitute (*The Random House Dictionary of the English Language* (2nd ed., unabridged 1987)

[69] Accepting these definitions as helpful to resolving the problems of the case at bar, five analytical points may be made about the competing interpretations of the 1966 Pension Plan and its Restatements:

- First, to "commute" something is to end that thing and to substitute a different thing, and in the case of the 1966 Pension Plan and its Restatements, the thing that is ended is the annuity purchased to secure the pension benefits of the Participant. The Applicants and the Respondents do not dispute the first point.
- Second, for a Participant or a Former Participant, the thing that is being substituted or exchanged for the annuity is a lump sum payment of money. The Applicants and the Respondents do not dispute the second point.
- Third, under the language of the pre-retirement death benefit clause of the 1966 Pension Plan and its First and Second Restatements, the amount of the substituted lump sum payment is: (a) the commuted value of the [Manulife] contracts purchased for the Participant; or (b) the participant's contributions and all other contributions plus interest. The Applicants and the Respondents cannot dispute the third point because it is merely to recite what the 1966 Pension Plan and its Restatements say.

- Fourth, the Manulife contracts are contracts for an annuity, which is to say a stream of payments, and a stream of payments has a value that can be calculated by a present value calculation. A present value calculation of the annuity payments as the substituted payment for the cancelled annuities is the interpretation of the pre-retirement death benefit being advanced by the Applicants. For their part, the Respondents acknowledge in their factum that when used in reference to a stream of payments, the term “commuted value” is capable of meaning the present value of the stream of payments; however, the Respondents submit that the issue in the case at bar is not the calculation of the commuted value of the annuity but the meaning of the phrase “commuted value of any contracts.”
- Fifth, under the language of the Manulife contracts – but not the language of the pre-retirement death benefit section of the 1966 Pension Plan and its Restatements – the substitute for the annuity payments is “an amount equal to the total premiums which have been received by the Company in respect of such member together with interest thereon.” The Respondents submit that the amount equal to the Manulife premiums plus interest is the substitute payment for the annuity and that this payment satisfies the meaning of the phrase “commuted value of any contracts purchased for the Participant.”

[70] From these five analytical points, it may be seen that the precise difference between the parties about the substitute for the cancelled annuity contract is that the Respondents would substitute what it cost to purchase the contract for an annuity (the premiums, a contribution-based methodology) and the Applicants would substitute the value of the annuity purchased by the contract (a pension-based methodology). Speaking metaphorically, the Respondents would substitute the cost of the box (contribution-based methodology) and the Respondents would substitute the value of what is in the box (pension-based methodology). For the reasons that follow, my opinion is that the pension-based methodology is what is intended by the 1966 Pension Plan and its Restatements.

[71] A problem for the Respondents’ interpretation is that it makes the “greater than” choice that is available in the 1966 Pension Plan for a Participant and that is available in the First and Second Restatements for both Participants and Former Participants meaningless, which would offend the normative principles of document interpretation.

[72] Using s. 3.39 of the First Restatement to make this point, s. 3.39 gives a beneficiary of a Participant who dies the choice of the greater of: “(a) the commuted value of any contracts purchased for such Participant” or (b) the Participant’s contributions and all other contributions, together with interest thereon. The Respondents’ interpretation of clause (a) is that “the commuted value of any contracts purchased for such Participant” is equal to: “the total premiums which have been received by [Manulife] in respect of such member together with interest thereon.” That interpretation, however, is also the meaning of clause (b) in section 3.39, with the result that one or the other of clauses (a) and (b) of section 3.39 is meaningless.

[73] A related problem for Respondents' interpretation is that their effort to constrain the meaning of the words "commuted value" to a contribution-based methodology by its modification by the prepositional phrase "of any contracts purchased for such Participant" strains rather than constrains the meaning of the words "commuted value," which in the context of a contracts for an annuity would more typically denote and connote a methodology that requires a present value calculation and the assistance of an actuary.

[74] As the Applicants note in their list of definitions of "commuted value," *Black's Law Dictionary* defines "commuted value" to mean "the value of future payments when discounted to present value." The *Dictionary of Canadian Law* defines "commuted value" as follows: "In relation to benefits that a person has at present or future entitlement to receive, the actuarial value of those benefits determined, as of the time in question, on the appropriate basis of actuarial assumptions and methods that are adequate and appropriate and in accordance with generally accepted actuarial principles." See also *Opoku v. Pal*, [1999] O.J. No. 1777 (S.C.J.), aff'd [2000] O.J. No. 1700 (C.A.); *Rebecca K. Chown Income Charitable Fund v. Commissioner of Internal Revenue* (1992), 98 T.C. No. 25 (Westlaw), aff'd 8 F. (3d) 571 (7th Circuit 1993); *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 1(1) and Reg. 909, s. 19 (1.2), R.R.O. 1990. The definitions and the case law suggest that if a draftsman uses the word "commuted value," then he or she means something more substantial than a premium refund plus interest.

[75] Another related problem for the Respondents' interpretation is that while it is true that the substitution of "the total premiums which have been received by [Manulife] in respect of such member together with interest thereon" for the cancelled annuity payments is to change or exchange one kind of payment for another and thus to fall within a definition of a "commuted value," nevertheless, in the context of a pension plan obligation to purchase an annuity for the participants, this usage of the words "commuted value" is over-inclusive and captures a substitute payment that, in my opinion, was not intended by the draftsman. Put somewhat differently, the draftsman of the 1966 Pension Plan and its Restatements intended "commuted value" to mean something more than a refund plus interest and the draftsman connected the words "commuted value" with a present value calculation of some sort.

[76] That the draftsman intended something more than a contribution-based methodology for the words "commuted value of the contracts" is supported by having regard to s. 3.29 of the 1966 Pension Plan, which for convenience I set out again below:

3.29 In lieu of making payment of an amount of money equal to the **commuted value of any contract**, as provided for in §3.25 and §3.26, the Trustee may, if it so desires make such payment in installments for a period certain or for the lifetime of the beneficiary, provided, however, that such **installment payments shall be the actuarial equivalent of such commuted value.**

[77] Section 3.29 provides for what might be described as a second or derivative commuting of the "commuted value of any contract." This second substitute payment of

installment payments for the “commuted value of any contracts” is subject to the precondition that the installments “be the actuarial equivalent of such commuted value.” An actuarial equivalent for the derivate substitute payment suggests a present value calculation and this, in turn, suggests that the root substitution also involves a present value or pension-based methodology.

[78] The interpretation of the words “commuted value for the contract” as involving something more than a contribution-based methodology is also supported by the usage of “commuted value” in other parts of the 1966 Pension Plan and the Restatements, where commuted value is connected with a pension-based methodology. As already noted in the concluding observations of the previous part of these Reasons for Decision, the 1966 Pension Plan and the First Restatement dealt with the settlement of small pensions by payment of a lump sum and in this regard referred to: “**the commuted value of his pension.**” The comparable provision in the Second and Third Restatements was: “**the present value of [a member’s] accrued pension benefit.**” In these provisions, there is the connection of “commuted value” with a pension-based methodology and in my opinion the “commuted value of any contracts” should be treated in a consistent fashion.

[79] With respect, although the Respondents purport to rely on a principle of interpretation, which they describe as the presumption of consistent expression, they misapply the principle. The presumption of consistent language entails that: (a) a draftsman will use language consistently; (b) a draftsman’s use of different words indicates an intention to refer to different things; (c) a draftsman will not use different words to refer to the same thing; and (d) different words should not be interpreted to mean the same thing. See: *Prestcold (Central) Ltd. v. Minister of Labour*, [1969] 1 W.L.R. 89 (C.A.) at p. 97; *Jarvis (John) Ltd. v. Rockdale Housing Association Ltd.*, [1986] 3 Const. L.J. 24 (C.A.) at p. 30. K. Lewison, *Interpretation of Contracts* (London: Sweet & Maxwell, 1989) at para. 6.02.

[80] From these principles, the Respondent makes the following argument set out in para. 46 of their factum:

46. When the [Pension] Plan meant to refer to the present or commuted value of the benefits it did so in clear language and not by using the phrase “commuted value of any contracts.” Applying the presumption of consistent expression, it should be assumed that if the draftsman had intended in respect of pre-retirement death benefits to refer to the commuted value or present value of the retirement benefits payable, he would have said so as he did in the Plan provisions relating to the settlement of small pension entitlements. In those provisions the Plan clearly refers to the commuted value or the present value of the “pension benefit” not the “contract.” The fact that the draftsman chose different terminology indicates that he intended the pre-retirement death benefit to be determined in a different way and without reference to future pension benefits.

[81] With respect, in my opinion, the Respondents are looking through the wrong end of the interpretive binoculars. The consistent use of the words “commuted value” in the

1966 Pension Plan and its restatements is to connect them to a pension-based methodology.

[82] Yet another problem with the Respondents' interpretation, which eschews any pension-based methodology, is that this interpretation does not fit with the language of the Third and Fourth Statements that introduced a "preretirement survivor annuity," which has to be calculated and carved out of the pre-retirement death benefit. In other words, these Restatements require a pension-based methodology to be paid to a surviving spouse and the amount of the "preretirement survivor annuity" would be an actuarial calculation and something quite different from a refund of Manulife premiums plus interest. The beneficiary of the pre-retirement death benefit then receives "the balance of the commuted value of any Contracts purchased for the deceased." It does not make sense that determining the "balance of the commuted value" should involve starting a contribution-based methodology when the already calculated "commuted value" involves a pension-based methodology.

[83] The numerous problems confronting the Respondents' interpretation support the Applicants' arguments about how the pre-retirement death benefit should be interpreted. Pausing here, the above considerations are enough to lead me to the provisional conclusion that the Applicants' interpretation of the pre-retirement death benefit in the 1966 Pension Plan is the correct interpretation. My conclusion is provisional, however, because I still must consider what I take to be the Respondents' strongest arguments. I turn now to those arguments advanced by the Respondents.

The Respondents' Arguments Premised on Whether the Language and Meaning of the Pre-retirement Death Benefit Changed

[84] The Respondents rely on the principle of interpretation that in placing a document in its context of surrounding circumstances for the purpose of interpreting the document, a court may consider predecessor agreements, and from predecessor documents a court may decide that when the wording of a document differs from its predecessors, the change in wording indicates a change of meaning: *Punjab National Bank v. De Boinville*, [1992] 1 W.L.R. 1138 at p. 1149; *HIH Casualty and General Insurance Company v. New Hampshire Insurance Co.*, [2001] 2 Lloyd's 161 (C.A.) at para. 83.

[85] From this principle, the Respondents argue that the change in the pre-retirement death benefit from "the commuted value of the Paid up Pension at Normal Pension Age" in the 1947 Regulations to "commuted value of any contracts" indicates an intention to make a substantive change and shows that the pre-retirement death benefit no longer referred to a pension-based methodology. In other words, conceding for the purpose of the argument that the 1947 Regulations involved a pension-based methodology, the Respondents then submit that the change in language in the 1966 Pension Plan indicates that the new plan was not to have a pension-based methodology for the pre-retirement death benefit.

[86] I do not agree with the Respondents' argument. Rather, I agree with the submission of the Applicants that although the phrase "the commuted value of any

contracts” in the 1966 Pension Plan replaced the phrase “paid-up pension at normal pension age,” in the 1947 Regulation, there was no change of meaning. I come to this conclusion largely for the reasons already expressed above that show that the meaning of the phrase “the commuted value of any contracts” is effectively the same as saying “paid-up pension at normal pension age.” Both phrases entail the same pension-based methodology.

[87] This brings me to the other branch of the Respondents’ primary argument. As I noted earlier, it was a branch of the Respondents’ primary argument that the phrase “paid up pension at normal pension age” in the 1947 Regulations does not involve a pension-based methodology. In other words, it was the Respondents’ alternative submission that the 1947 Regulations never provided for anything other than contribution-based methodologies. Presumably, the Respondents made this argument because if it succeeded, then *a fortiori* their argument that “the commuted value of any contracts purchased for such Participant” involves a contribution-based methodology must also succeed.

[88] During argument, the Respondents explained that keeping in mind that there were five sources for contributions, it followed that the reference in s. 19 (a) of the 1947 Regulations to “the commuted value of the Paid-up Pension at Normal Pension Age as calculated by the Actuary” was a reference to a sum equal to all five sources of contribution for the benefit of the Participant plus interest, which is a contribution-based methodology. Further they explained that the reference in s. 19 (a) to “a sum of money equal to his contributions made under the Plan together with interest” (my emphasis added) was a reference to a sum equal to two sources of contribution, namely, compulsory contributions by plan members and voluntary contributions by plan members, again a contribution-based methodology.

[89] I find the Respondents’ arguments to make the point that the 1947 Regulations did not include a pension-based methodology to be very strained and farfetched. For instance with respect to s.19 of the 1947 Regulations, there should be no need for the involvement of an actuary to make the proposed contribution-based calculations but an actuary’s involvement is specified by s. 19 (a). Conversely, calling for the employment of an actuary makes sense if a pension-based methodology was directed by s. 19 (a), which I conclude is the correct interpretation of the pre-retirement death benefit. Further, that the draftsman of s. 19(s) intended both a pension-based methodology and a contribution-based methodology is supported by comparing and contrasting the use of the words “an amount of money equal to” in the first branch of s. 19(a) with the use of the words “sum of money equal to” in the second branch. The words “an amount of money equal to” are consistent with a pension-based methodology to be determined by an actuary while the words “sum of money equal to” are consistent with a contribution-based methodology where arithmetical expertise in multiplying sums by specified interest rates would be sufficient.

Respondents' Arguments Based on the Role of the Manulife Contracts

[90] More worthy are the Respondents' arguments about the influence of the references to the contracts purchased for the Participants (the Manulife contracts) that are found in the 1947 Regulations and the 1966 Pension Plan and its Restatements. I turn now to those arguments.

[91] The Respondents rely on the principles of interpretation that the words of a document must be construed cohesively and harmoniously and that individual provisions must be construed in the context of the whole document and along with the other provisions of the document: *McClelland & Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6; *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.* [1986] 1 S.C.R. 57; *Glimmer Resources Inc. v. Exall Resources Ltd.*, [1999] O.J. No. 1357 (C.A.); *Manitoba Hydro Electric v. John Inglis Co.* (1999), 181 D.L.R. (4th) 470 (Man. C.A.); *Canada Deposit Insurance Corp. (CDIC) v. Canadian Commercial Bank*, [1991] 4 W.W.R. 418 (Alta. C.A.).

[92] From these principles, the Respondents argue that the words "commuted value of any contract" that define the pre-retirement death benefit when read in the context of the provisions of the 1966 Pension Plan and its Restatements that stipulate that "when a contract is purchased ... the rights and benefits of such participant shall thereafter be determined in accordance with such Annuity Contract," only yield the interpretation that the words "the commuted value of any contracts" means the lump sum death benefit paid under such contracts.

[93] An immediate problem with this argument by the Respondents is that if it is correct, the result is a serious inconsistency or conflict within both the 1947 Regulations and also the 1966 Pension Plan and its Restatements. On one hand, the pension plans as prescribed in the plan documents provide both a pension-based and a contribution-based methodology for the pre-retirement death benefit but, on the other hand, the Manulife contracts provides only the singular methodology of a contribution-based methodology of the return of premiums of interest. Further, the Third and Fourth Restatements of the 1966 Pension Plan require a preretirement survivor annuity which is not to be found in the Manulife annuity contracts.

[94] The conflict, however, can be avoided or resolved in three ways. First it can be avoided if the words "such Annuity Contract" is interpreted to mean "the prescribed Annuity Contract or "an Annuity Contract purchased in accordance with this Pension Plan and Trust." Such an interpretation gives rather than negates the meaning of the language of the Pension Plan and does not set a trap for members of the Pension Plan who would not realize from reading the Pension Plan that the conferral of benefits had been negated by the manner of their conferral or that a provision designed to secure the benefits of the pension plan had the result of reducing and eliminating the benefits set out in the language of the Pension Plan.

[95] Second, the conflict can be avoided by interpreting the words "the rights and benefits of such participant shall thereafter be determined in accordance with such

Annuity Contract" as essentially being an administrative or procedural provision rather than a substantive one. The plan member would be left to understand that his entitlements would be prescribed by the 1966 Pension Plan and the implementation of the receipt of the benefits would be as set out in the Manulife contracts.

[96] Third, the conflict can be resolved by conceding that it exists and then resolving the conflict in favour of the language of the pre-retirement death benefit as it is set out in the 1966 Pension Plan.

[97] The Respondents' argument has gravitas only because the Manulife contracts were already in existence when the 1966 Pension Plan was signed and this contextual fact gives more weight to the language that "the rights and benefits of such participant shall thereafter be determined in accordance with such Annuity Contract." However, it may be that unlike the situation for the pre-retirement death benefit, for the other pension benefits provided by the Manulife annuity contract, there is no conflict between what was specified and what was delivered. Whether or not that is the case and the explanation for the drafting, it is my opinion that the intent of the draftsman was not to specify a pre-retirement death benefit and then diminish it.

[98] To give effect to the Respondents' argument that the contribution-based methodology of the Manulife contracts substantively determines the rights of the members of the 1966 Pension Plan is to accept an opaque interpretation of the Pension Plan that hides, negates, removes, or overturns the language of the pre-retirement death benefit.

[99] Indeed, if the Respondents' argument is correct it becomes futile to interpret what the words of the pre-retirement death benefit might mean because whatever they might mean the Participants' benefits are determined by the meaning of the Manulife contracts. In my opinion, the interpretative tide should flow the other way and the language of the pre-retirement death benefit should define what should have been provided by the Manulife annuity contract. I, therefore, reject the Respondents' arguments based on the role of the Manulife contracts.

The Respondents' In Terrorem Arguments

[100] The Respondents made several arguments to the effect that if the pre-retirement death benefits were interpreted to require a pension-based methodology, the consequences would be bad for the Pension Plan and for the members of the plan. Thus, it was submitted that if the 1966 Pension Plan was interpreted to require a pension-based methodology, the Manulife contracts would be an inadequate resource to satisfy the pre-retirement death benefit obligations, the Pension Plan would be under-resourced, the Trustees would not have carried out their duties, the Pension Plan would lose its status as a defined contribution pension plan, there would be adverse tax consequences, the Pension Plan would be non-compliant with regulatory requirements.

[101] I regard these *in terrorem arguments* as not justifying interpreting the pre-retirement death benefit other than in accordance with its meaning as I have found it to

be. All of these bad consequences do not emerge from the language of the 1966 Pension Plan but rather they arise because the Trustees did not purchase contracts that accorded with the language of the 1966 Pension Plan and its Restatements. Put somewhat differently, an interpretation of the pre-retirement death benefit that involves a pension-based methodology is not inherently problematic or illegal.

[102] As an answer to the Respondents' *in terrorem* arguments, the Applicants responded with evidence to suggest that the problems did not exist or if they existed, they could be solved, but it is not necessary for me to make any finding in this regard. My point is that in the case at bar, aversion to the consequences of a pension-based methodology is not a reason for interpreting the pre-retirement death benefit otherwise than in accordance with the normal principles of interpretation.

[103] In advancing their *in terrorem* arguments, the Respondents quoted the following passage from J. McCamus, *Law of Contracts* (Irwin Law, 2005) at p. 729 where Professor McCamus states:

[W]here an agreement admits of two possible constructions, one of which renders the agreement lawful and the other of which renders it unlawful, courts will give reference to the former interpretation.

[104] To similar effect, the Respondents relied on *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (C.A.) at para. 57; *Calgary (City) v. International Assn. of Fire Fighters, Local 255* (2008), 65 C.C.P.B. 165 (Alta. C.A.); and *Fausset v. Carpenter*, [1831] 2 Dow & Cl 232 (H.L.). I do not dispute the interpretative principle, however, I do not view the pre-retirement death benefit as admitting of two possible interpretations, and I do not view the interpretation with a pension-based methodology as one that would render the pre-retirement death benefit inherently unlawful.

[105] Therefore, I reject the Respondents' *in terrorem* arguments.

Other Arguments

[106] Having considered and rejected the Respondents' strongest arguments, I am satisfied that my provisional conclusion was correct, and I therefore grant the Application.

[107] In reaching my decision, I find no ambiguity in the language of the pre-retirement death benefit and the 1966 Pension Plan and its Restatements that would justify resort to extrinsic sources as an aid to interpretation. I, therefore, did not rely on the extrinsic sources such as the Handbook, the representations of the President of the Society, or the Certificates of Participation, conduct of the parties, etc. that were advanced as interpretative tools by both sides. In these circumstances, I will not say anything further about the merits of the competing arguments and counterarguments.

Conclusion

[108] For the above reasons, I grant the Application and advise the Trustees that a pension-based methodology should be used to calculate the pre-retirement death benefit.

[109] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Applicants within 20 days of the release of these Reasons for Decision followed by the Respondents within a further 20 days.

[110] Finally, I am grateful to counsel for their well prepared and very well presented arguments, which were of considerable assistance to me.

[111] Order accordingly.



Perell, J.

Released: June 18, 2009

COURT FILE NO.: CV-08-003623270000

DATE: June 18, 2009

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**GLENN HEALY, PAUL KELLY, IAN
PENNY and JAMAL MAYERS**

Applicants

- and -

**JIM GREGORY, CRAIG HARNETT,
COLIN CAMPBELL and BILL DALY**

Respondents

REASONS FOR DECISION

Perell, J.

Released: June 18, 2009