IN THE MATTER OF THE *PENSION BENEFITS STANDARDS ACT*

AND

BREWERS' DISTRIBUTOR LTD. PENSION PLAN FOR HOURLY EMPLOYEES IN BRITISH COLUMBIA

RECONSIDERATION PURSUANT TO SECTION 20(4) OF THE *PENSION BENEFITS STANDARDS ACT*

On April 23rd, 2009, counsel for the Brewery, Winery and Distillery Workers, Local 300, (the "Union"), by letter, asked that I make a determination in a dispute regarding the administration of the plan.

Specifically, I was asked to determine the criteria by which certain employees become eligible members of the Brewers' Distributor Ltd. Pension Plan for Hourly Employees in British Columbia (the "Plan"). The Union claimed approximately 20 casual employees met the criteria for Plan membership, but were denied membership in the Plan.

The Union contended that Brewers' Distributor Ltd. ("BDL") should permit any hourly union employee to join the Plan so long as they meet one of the criteria set out in the Plan: the 132/12 criterion or the Minimum Eligibility Test. The Union argues that the basis for such a request is section 25 of the *Pension Benefits Standards Act* (the "Act") and section 23 of the Pension Benefits Standards Regulation ("the Regulation").

BDL was given an opportunity to respond to the request of the Union. Their position was:

- The Superintendent does not have jurisdiction to consider the Union's request since an arbitrator has exclusive jurisdiction over this matter; and
- BDL further claimed that the Union's complaint is time barred by reason of the *Limitation Act* or the doctrine of laches, and in the alternative, that the terms of the Plan setting out different eligibility tests are permissible.

Under the doctrine of laches, a court claim may be barred where there is unexplained delay in pursuing a claim for an unreasonable time resulting in prejudice against the respondent, in this case, BDL.

The sections of the Act and Regulations ("the Legislation") that are relevant to this matter are:

- Section 23 of the Regulation sets out what constitutes a prescribed class of employees and includes, under paragraph (c), employees who are members of a trade union. Subsection 23(2) of the Regulation reads as follows:

  > If there is a dispute as to whether or not an employee is a member of a class of employees for whom a pension plan is established or maintained and the superintendent is of the opinion that, on the basis of the nature of employment or of the terms of employment of the employee, the employee is a member of that class, the superintendent may require the administrator to accept the employee as a member;

- Section 25 of the Act sets out the conditions for members of a prescribed class of employees to join a pension plan. There is no differentiation made between full-time and part-time employees, or any other category of employee, within the wording of section 25 of the Act; and

- Section 71 of the Act authorizes the Superintendent of Pensions (the "Superintendent") to issue orders directing compliance with the Act or the Plan terms.

There were two issues to be dealt with before I could consider the subject of the Union's complaint:

- First, does the Superintendent have jurisdiction, or is the matter subject to the sole jurisdiction of an arbitrator; and

- If the answer to the first question is yes, is the Union's complaint time barred by either the *Limitation Act* or the doctrine of laches, as submitted by BDL?

Dealing with the jurisdiction of the Superintendant first, the following are the relevant pieces of legislation:

- Subsection 71(2) clearly provides the Superintendent with statutory jurisdiction to enforce the Act and the terms of pension plans;

- The Union says that the eligibility requirements do not comply with the requirements of the Act. Subsection 23(2) of the Regulation, quoted above, specifically provides the Superintendent with the authority to make a determination regarding disputes whether an employee is a member of a class of employees; and

- Such statutory jurisdiction cannot be contracted out of by way of the parties being involved in arbitration of the same issue.

Therefore, I concluded the Superintendent has jurisdiction to determine whether the plan eligibility terms for employees complies with the Act and whether "casual" and "part-time" employees are eligible to become members under the same provisions as "full time" employees.

With respect to the latter issue, this argument has been raised previously in the matter of Interior Lumbermen's Pension Plan (Reconsideration decision of June 13, 2007, upheld by the Financial Services Tribunal in its decision of June 23, 2008), wherein the Superintendent cited Langley (Township) v Wood (1999), 173 D.L.R. (4th) 695 in support of the finding that, the doctrine of estoppel or laches does not attach to a regulator in carrying out its duties and powers:

> *The Superintendent's duties and powers to carry out the provisions of the legislation are, like those of municipalities, "...of such public nature that they cannot be waived, lost, or vitiated by mere acquiescence, laches or estoppel."*
>
> *Interior Lumbermen's*, at p. 5, citing Langley (Township) v Wood

As in Interior Lumbermen's, there is no submission that there is an estoppel on the Superintendent enforcing the legislation:

> *There is no submission from the Trustees that there is an estoppel on the Superintendent enforcing the legislation. ...it would be against public policy to deny a plan member the ability to make a complaint to a regulatory body due to acquiescence.*
>
> *Interior Lumbermen's, at p. 6.*

Therefore, I concluded BDL's contention that the Union's complaint is barred by either the *Limitation Act* or the doctrine of laches is not supported at law.

As a result, I then turned my attention to the Union's complaint. After reviewing all the facts and the relevant legislation I directed, pursuant to section 71(2) of the Act that BDL offer all affected employees membership in the Plan by January 15, 2010.

After reviewing the materials submitted by both BDL and the Union with respect to this reconsideration, for the purposes of section 20(4) of the Act, I hereby confirm the Direction of December 9th, 2009 (copy attached). My reasons are set out below:

1. BDL contends I made a series of factual errors that demonstrate a lack of understanding and which, therefore, undermine my analysis. This is incorrect. The collective agreement describes the entitlements of a "casual" employee, but does not define what a "casual" employee is. For the purposes of section 25 of the Act, there is no distinction between a "regular" and "casual" employee. As stated at paragraph 33 of the Direction:

   > An employee may join the Plan upon satisfying either the more generous 132/12 criteria or the Minimum Eligibility Test established under the Act. **If BDL had set up separate plans for its part-time or casual employees, as is permitted under section 25(4) of the Act, it would have had to do so with similar eligibility provisions; that is, part-time or casual employees would be eligible to join upon satisfaction of either the 132/12 criteria or the Minimum Eligibility Test.**
   >
   > (emphasis added)

2. BDL argues that the exclusion of the word "other" from my description of the Plan's entry criteria was a significant error. I disagree. The inclusion or exclusion of this word has no bearing on the statutory interpretation.

3. BDL contends that:

   - I did not understand the transition from casual to regular status, and
   - I did not understand the distinction between regular and casual status.

   The transition from one category of employment for which membership in a plan is available to another category of employment for which membership in the same plan is available is irrelevant. Further, for the purposes of determining eligibility for membership in the Plan, under section 25 of the Act, there is no distinction between regular and casual employees.

4. BDL argues that I erred in the description of the enrolment process and attaches significant weight to the use of the terms "full-time" and "part-time". With all due respect to these arguments, the description set out in the Direction does not in any way turn on the inclusion or exclusion of these terms, and there is no change to the statutory interpretation and description of the process.

5. BDL contends that I do not have jurisdiction or, in the alternative, if there is shared jurisdiction with a labour arbitrator, I should cede jurisdiction to the arbitrator. As set out in section 2 of the Act, I am the chief officer charged with administration and enforcement of the Act. There is no authority for me to cede jurisdiction to another party.

BDL claims *Bisaillon v. Concordia University, [2006] 1 S.C.R., 2006 SCC 19* as authority that a labour arbitrator has sole jurisdiction. I find that this matter is distinguishable from *Bisaillon*. *Bisaillon* does not stand for the proposition asserted. Instead it stands for the principal that a union member cannot launch a class action lawsuit against its employer in a collective bargaining issue on behalf of the other unionized members since the union is the only recognized bargaining agent. Only the union may launch such a court action. This is not a court action, nor is it a matter of a union member attempting to act on behalf of other union members in a court action against its employer.

6. BDL argues that I erred in failing to consider that the complaint was barred by the *Limitation Act* or, in the alternative, the doctrine of laches. As stated in the Direction, BDL does not cite any case law involving regulatory authorities in its submission that the Union is barred from complaining based on the *Limitation Act* or the doctrine of laches and the same omissions occur here.

7. BDL contends that I erred in failing to consider the argument that all members gained entry into the Plan on the same criteria. BDL then argues, at length, that the minimum criteria set out in section 25 of the Act was used as the sole means of determining eligibility for membership in the Plan, notwithstanding the provisions of section 3.02(a) and (b) of the Plan. This concerns me, as it appears from this argument that BDL, in its role as administrator of the Plan, is admitting that it (BDL) has not been administering the Plan in accordance with the Plan's own terms, as required by section 8(2) of the Act. It further appears to me that BDL is admitting to a violation of the Act and the Plan terms, but seeking to excuse this violation by claiming "historical leftover."

Based on my findings, I confirm the Direction and require that BDL offer all affected employees membership in the Plan by May 14, 2010.

W. Alan Clark
Superintendent of Pensions

Dated at Surrey, BC

This 27th Day of April, 2010

BRITISH COLUMBIA
The Best Place on Earth

Financial Institutions Commission

December 11, 2009
Plan Number: P086221-1

REGISTERED MAIL

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Vancouver, BC V6H 3H4

Mr. Keith Murray
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Dear Messrs. Glavin and Murray:

Re: Brewers' Distributors Ltd. Pension Plan for Hourly Employees in British Columbia (the "Plan")

This letter is in response to your various submissions on behalf of your clients concerning the eligibility of certain members of the Brewery, Winery and Distillery Workers Local 300 (the "Union") to join the Plan, sponsored by the employer, Brewers' Distributors Ltd. ("BDL").

After reviewing the materials, I am of the opinion that any member of the Union who met the eligibility provisions of either the Plan or section 25 of the *Pension Benefits Standards Act* (the "Act") on or before April 20, 2007 must be offered membership in the Plan. The reasons for reaching this opinion are set out below.

1. Under cover of a letter dated April 23, 2009, the Union asked the Superintendent of Pensions (the "Superintendent") to order BDL to enrol certain members of the Union into the Plan. BDL provided its response to the Union's request in August 2009, and the Union provided its final submissions in September 2009.

2. The collective agreement between BDL and the Union incorporates the Plan by reference.

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3. Section 2.23 of the Plan defines an "employee" as a Union employee who is paid on an hourly basis and who is employed on a regular full-time or part-time basis. The definition of employee specifically excludes "casual", "seasonal" or "temporary" employees. Neither the Plan nor the collective agreement defines what is meant by "casual", "seasonal" or "temporary" employees. Section 2.31 of the Plan defines a "member" as an eligible employee who has enrolled in the Plan in accordance with Article 3 of the Plan.

4. The Union contends that BDL should permit any hourly union employee to join the Plan so long as they meet one of the criterion set out in section 3.02 the Plan text. The criteria set out in section 3.02 of the Plan text are:

    a) In the period from August 1, 1995 to December 31, 1996, any employee who works on a non-permanent part-time basis may join after working 132 days in any 12-month period (the "132/12 criteria");

    b) On and after January 1, 1997, any employee may join after satisfying the 132/12 criteria; and

    c) As required by the Act, on and after January 1, 1993, any employee may join the Plan following the completion of 2 consecutive calendar years of employment with earnings of at least 35% of the Year's Maximum Pensionable Earnings ("YMPE") in each of the 2 years (the "Minimum Eligibility Test").

5. Section 23(1)(b) of the Act permits an employer to include benefits, rights, entitlements and obligations that are more favourable than required by the Act. With respect to eligibility to join the Plan, in my opinion the 132/12 criteria is more favourable than the Minimum Eligibility Test.

6. The Plan was closed to new members effective April 21, 2007. Employees hired on and after that date are enrolled in the group registered retirement savings plan ("RRSP") established by BDL pursuant to Pension Plan Letter of Understanding No. 17 Between Brewery, Winery and Distillery Workers, Locals (sic) 300 and Brewers' Distributors' Ltd. signed May 2, 2007.

7. The collective agreement provides that there are two groups of hourly employees: Regular and Casual. Casual employees are "not entitled to benefit status" until they reach a certain length of service or based on seniority where there is a vacancy in the number of Regular employee positions, at which point they become Regular employees.

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8. The number of Regular employees is capped by the collective agreement. That being said, so-called Casual employees perform the same work under the same job classification and are subject to the same collective agreement as Regular employees. The only difference between Regular employees and Casual, seasonal or temporary employees is their length of service.

9. It has been BDL's administrative practice to enrol "Casual" (as the term is used in the collective bargaining agreement) and regular "Part-time" employees into the Plan when they qualify under section 3.02(c), that is, on the first day of the month next following satisfaction of the Minimum Eligibility Test set out under section 25(1) of Act.

10. BDL has also enrolled regular "full-time" employees on the first day of the month next following satisfaction of the 132/12 criteria.

11. The Union claims that approximately 20 "casual" employees have met the 132/12 criteria, however, they have not been permitted to join the Plan by BDL since they did not qualify under the Minimum Eligibility Test.

12. BDL states first that the Superintendent does not have jurisdiction to consider the Union's request since an arbitrator has exclusive jurisdiction over this matter. BDL further claims that the Union's complaint is time barred by reason of the *Limitation Act* or the doctrine of laches, and in the alternative that the terms of the Plan setting out different eligibility tests are permissible.

The Legislation

13. Section 25 of the Act sets out the conditions for members of a prescribed class of employees to join a pension plan. There is no differentiation made between full-time and part-time employees, or any other category of employee, within the wording of section 25 of the Act.

14. Section 23 of the Regulation sets out what constitutes a prescribed class of employees and includes, under paragraph (c), employees who are members of a trade union.

15. Subsection 23(2) of the Regulation reads as follows:

> "If there is a dispute as to whether or not an employee is a member of a class of employees for whom a pension plan is established or maintained and the superintendent is of the opinion that, on the basis of the nature of employment or of the terms of employment of the employee, the employee is a member of that class, the superintendent may require the administrator to accept the employee as a member."

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16. Section 71 of the Act authorizes the Superintendent of Pensions (the "Superintendent") to issue orders directing compliance with the Act or the Plan terms.

17. There are two issues to be dealt with before the Superintendent can consider the subject of the Union's complaint:

    - First, does the Superintendent have jurisdiction, or is the matter subject to the sole jurisdiction of an arbitrator?
    - If the answer to the first question is yes, is the Union's complaint time barred by either the *Limitation Act* or the doctrine of laches?

Jurisdiction of the Superintendent

18. Subsection 71(2) clearly provides the Superintendent with statutory jurisdiction to enforce the Act and the terms of pension plans.

19. The Union says that the eligibility requirements do not comply with the requirements of the Act. It submits, and I agree, that subsection 23(2) of the Regulation, quoted above, specifically provides the Superintendent with the authority to make a determination regarding disputes whether an employee is a member of a class of employees.

20. Such statutory jurisdiction cannot be contracted out of by way of the parties being involved in arbitration of the same issue.

21. Therefore, I am of the opinion that the Superintendent has jurisdiction to determine whether the plan eligibility terms for employees comply with the Act and whether "casual" and "part-time" employees are eligible to become members under the same provisions as "full time" employees.

Whether the complaint is barred due to the *Limitation Act* and the doctrine of laches

22. BDL also submits in the alternative that if the Superintendent has jurisdiction in this matter, the complaint is time barred due to the *Limitation Act* or the doctrine of laches.

23. BDL does not cite any case law involving regulatory authorities in its submission that the Union is barred from complaining based on the *Limitation Act* or the doctrine of laches.

24. This argument has been raised previously in the matter of *Interior Lumbermen's Pension Plan* (Reconsideration decision of June 13, 2007, upheld by the Financial Services Tribunal in its decision of June 23, 2008), wherein the Superintendent cited *Langley (Township) v Wood (1999)*, 173 D.L.R. (4th) 695 in support of the finding that, the doctrine of estoppel or laches does not attach to a regulator in carrying out its duties and powers:

> *The Superintendent's duties and powers to carry out the provisions of the legislation are, like those of municipalities, "...of such public nature that they cannot be waived, lost, or vitiated by mere acquiescence, laches or estoppel."*
>
> *Interior Lumbermen's*, at p. 5, citing *Langley (Township) v Wood*

25. As in *Interior Lumbermen's*, there is no submission here that there is an estoppel on the Superintendent enforcing the legislation, and such an argument would fail:

> *There is no submission from the Trustees that there is an estoppel on the Superintendent enforcing the legislation. ...it would be against public policy to deny a plan member the ability to make a complaint to a regulatory body due to acquiescence.*
>
> *Interior Lumbermen's, at p. 6.*

26. Therefore, in my opinion BDL's contention that the Union's complaint is barred by either the *Limitation Act* or the doctrine of laches is not supported in law.

The Union's Complaint

27. As it has been determined that the Superintendent has jurisdiction on the issue, and the Union's complaint is not barred by the *Limitation Act* or the doctrine of laches, I can now consider whether BDL acted in contravention of the Act and Regulation by refusing to enrol employees who satisfied the 132/12 criteria.

28. As stated above, neither the collective agreement nor the Plan defines what is meant by "casual", "seasonal" or "temporary" employees.

29. As set out in section 25 of the Act and section 23 of the Regulation, pension plans for only certain classes of employees, including hourly and unionized employees, are permitted. All of the employees in question are hourly and belong to the Union; therefore, under the Act the "seasonal", "casual" or "temporary" employees are indistinguishable from "regular" employees. This means that, for the purposes of the Act, there is no basis for not applying the 132/12 criteria to "casual", "seasonal" or "temporary" employees, as is done for regular employees.

30. The way BDL administered the Plan provisions had the effect of excluding a certain sub-group within a class of employees ("season/casual/temporary"). The "fix" to this has been not to entirely exclude them, but to allow them to join the plan under the Minimum Eligibility Test only.

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31. The Plan had also been administering different eligibility provision for the sub-group of regular "part time" employees by only applying the minimum statutory provision of Minimum Eligibility Test. Now all "regular" employees (full time and part time) qualify only under the less onerous 132/12 criteria.

32. Subsections 25(4) and (5) of the Act contemplate that an employer may provide a separate pension plan for employees of a covered class who are employed on a less than full time basis. If the employer establishes a separate plan for those employees, that plan must have similar benefit or contribution provisions as the plan for full time employees taking into account the hours worked in the relevant period of employment.

33. As described above, within the Plan there have been and continues to be different eligibility requirements. An employee may join the Plan upon satisfying either the more generous 132/12 criteria or the Minimum Eligibility Test established under the Act. If BDL had set up separate plans for its part-time or casual employees, as is permitted under section 25(4) of the Act, it would have had to do so with similar eligibility provisions; that is, part-time or casual employees would be eligible to join upon satisfaction of either the 132/12 criteria or the Minimum Eligibility Test.

34. The legislation does not contemplate permitting BDL to do something in the single Plan what it cannot do in a separate plan. I therefore find that this means that all employees must have similar eligibility provisions in the Plan. Therefore, all employees should have been eligible under both tests: the 132/12 criteria and the Minimum Eligibility Test, whichever comes first.

35. Since the Union and BDL agreed to close membership effective April 21, 2007, I find that only those eligible employees who met the eligibility criteria on or before April 20, 2007, should be permitted to join the Plan.

As you likely know, paragraph 2(2)(f) of the Regulation provides that a retirement savings plan is exempt from the definition of plan or pension plan set out in the Act.

Therefore, this decision applies only to the Plan, and must not be interpreted as having application to the group RRSP instituted by virtue of Pension Plan Letter of Understanding No. 17 Between Brewery, Winery and Distillery Workers, Locals (sic) 300 and Brewers' Distributors' Ltd. signed May 2, 2007.

Based on my findings, I direct pursuant to section 71(2) of the Act that BDL offer all affected employees membership in the Plan by January 15, 2010.

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Please contact Michael Peters, Executive Director, Pensions, if you have any questions concerning this matter.

Yours truly,

W. Alan Clark
Superintendent of Pensions

pc: Brewers' Distributors Ltd.
Attention: Mr. David Granger

Brewery, Winery and Distillery Workers, Local 300
Attention: Mr. Gerry Bergunder

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