

Citation: ***Manion v. Western Pulp
Limited Partnership***
2001 BCCA 124

Date: 20010221
Docket: CA026206
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

WALDIE MANION

PLAINTIFF
(APPELLANT)

AND:

WESTERN PULP LIMITED PARTNERSHIP

DEFENDANT
(RESPONDENT)

Before: The Honourable Mr. Justice Cumming
The Honourable Madam Justice Rowles
The Honourable Madam Justice Huddart

Richard H. Hamilton Q.C.

Counsel for the Appellant

Randy J. Kaardal and
Joanne R. Lysyk

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia
January 31, 2001

Place and Date of Judgment:

Vancouver, British Columbia
February 21, 2001

Written Reasons by:
The Honourable Madam Justice Rowles

Concurred in by:

The Honourable Mr. Justice Cumming
The Honourable Madam Justice Huddart

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Introduction

[1] The appellant is entitled to receive a pension from the respondent, Western Pulp Limited Partnership ("Western"), but the parties are unable to agree on the amount. The main issue on appeal concerns the construction to be placed on a provision in a pension plan under which the appellant is entitled to benefits.

[2] Western established two non-contributory pension plans under which the appellant is entitled to benefits: the Western Forest Products Limited Registered Retirement Plan for Salaried Employees (the "Registered Plan") and the Western Forest Products Supplementary Retirement Plan (the "Supplementary Plan") (collectively the "Western Plans").

[3] Under the *Income Tax Act*, a limit is imposed on the amount of annual pension benefits a retiree may receive under a registered pension plan. The maximum annual pension that is allowed under the *Income Tax Act* is referred to as the "Cap". Western established the Supplementary Plan in order to offer its senior employees a pension commensurate with their salary levels without regard to the Cap.

[4] Western acknowledges that the appellant, who is now 72 and retired, is entitled to receive pension benefits under both the Western Plans but the amount payable is in dispute. The question that divides the parties is the construction to be given to Appendix B(b) of the Registered Plan. Appendix B applies only to those members who are designated by Western to be members of the Supplementary Plan.

[5] The appellant submits that the form of pension he is entitled to receive is governed by paragraph (b) of Appendix B which stipulates what the "Normal Form" of pension will be for members who are participants in the Supplementary Plan. Appendix B(b) provides:

[2] The Normal Form of pension for Participant Members will be a pension payable monthly for the life of a Participant Member commencing on the day on which the Participant Member retires, and payable after the Participant Member's death to the Participant Member's Spouse for life in monthly instalments equal to 60% of the amount of each monthly instalment paid during the life of the Participant Member. The monthly pension payable shall cease with the last monthly payment paid for the month in which the Participant Member dies, or if later, the month in which the Participant Member's Spouse dies.

[6] Western argues that the "Normal Form" set out in Appendix B(b) must be interpreted as an "LG5" form of pension regardless of the fact that the plain wording of Appendix B(b) would not support that construction. The form of pension referred to as "LG5" is one in which a member is entitled to receive monthly payments for life but in the event he or she dies before the end of five years, the member's surviving spouse, designated beneficiary, or estate is entitled to receive the payments for the balance of a guaranteed five-year period.

[7] The appellant is married and his wife is two and one-half years younger than he is. The commuted value of the Normal Form of pension specified in Appendix B(b) would therefore be greater than the commuted value of an LG5 form of pension.

[8] Western referred to a number of cases said to support its approach to the interpretation of the Normal Form provision in Appendix B(b), including ***Prism Hospital Software Inc. v. Hospital Medical Records Institute*** (1994), 97 B.C.L.R. (2d) 201 at 271-218 (S.C.); ***MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority***, [1993] 2 W.W.R. 127 at 137 (C.A.); ***Ahluwalia v. Richmond Cabs Ltd.*** (1995), 13 B.C.L.R. (2d) 93 at 97-98 (C.A.); ***Canada Deposit Insurance Corp. v. Commonwealth Trust Co.*** (1997), 39 B.C.L.R. (3d) 1 at 9 (C.A.); and ***Maple Leaf Foods Inc. v. Schneider Corp.*** (1998), 42 O.R. (3d) 177 at 209 (C.A.).

[9] Appellant's counsel does not take issue with Western's submission that Appendix B(b) has to be read in the context of the provisions in the Western Plans. What the appellant takes issue with is the position taken by Western, supported by the opinion of an actuary with the firm responsible for the administration of the Western Plans, that the "Normal Form" provision found in Appendix B(b) should be interpreted as an LG5 form rather than the form stipulated. In the appellant's submission, Western's position, which was accepted by the trial judge, is simply not supported by the language of Appendix B(b) and nothing found elsewhere in the Western Plans compels the interpretation Western asserts was intended.

[10] The appeal raises, among others, the issue of whether the opinion of an actuary responsible for the administration of the Western Plans with respect to the construction of the provision in issue is relevant to that determination.

II. Background

[11] The appellant became an employee of B.C. Forest Products, the predecessor to Fletcher Challenge Canada Limited ("Fletcher"), in 1972. He worked for those companies for 16 years.

[12] In 1988 it was agreed between Fletcher and Western that the appellant would join Western. Fletcher is an affiliate of Western. The appellant was employed by Western for close to eight years.

[13] Fletcher and Western had different pension plans. While he worked for Fletcher, the appellant was a member of the Fletcher Registered Pension Plan (the "Fletcher Plan"). When he became an employee of Western, the appellant became a member of the Western Registered Plan.

[14] When the appellant became an employee of Western, Fletcher and Western considered how to deal with the appellant's pension, taking into account his service with each company. A letter dated 13 October 1988 from Fletcher to Western sets out the agreement that was reached between the two companies:

Upon his termination of employment from Fletcher Challenge Canada Limited, we will obtain a quote for the cost of a deferred annuity in an amount equal to his accrued pension from our company. Funds equal to the amount of the quote will be transferred, as soon as reasonably possible, from the FCCL pension plan to the WPLP pension plan.

Upon his retirement or other termination from WPLP, you will determine his pension under the terms of the WPLP plan and under the terms of the FCCL plan, on the assumption that he was employed by each company for the full length of his service with both and using his final earnings with WPLP as the earnings base. If the calculation under the FCCL formula exceeds the calculation under the WPLP formula then FCCL will be responsible for the difference, with the method of funding to be established at the time of retirement or termination.

[15] For reasons that are not clear, Fletcher failed to obtain a quote for the cost of a deferred annuity and funds were never transferred from the Fletcher Plan to the Western Registered Plan.

[16] In January 1989, the appellant became a member of Western's Supplementary Plan, which is intended to augment the Registered Plan for Western's senior employees.

[17] The appellant turned 65 in September 1994. Under both Western Plans, the appellant was entitled to receive a pension when he became 65. Rather than retiring, however, the appellant agreed to work for another two years, until October 1996. In May 1996, five months before the agreed retirement date, Western terminated the appellant's employment.

[18] When his employment was terminated, the appellant was eligible for pension benefits under both the Registered Plan and the Supplementary Plan but the parties were unable to agree on his pension entitlement.

[19] Between Fletcher and Western, the appellant had worked almost 25 years. Had he worked all of that time for Western, he would have been entitled to a Supplementary Pension for all his years of service to age 65. A question arose over his entitlement to a Supplementary Pension based on his full term at both Fletcher and Western. If the appellant were to receive a Supplementary Pension for 25 years, a second question arose as to whether Western or Fletcher should pay that portion of the Supplementary Pension for the first 18 years. Fletcher took the position that it had not made the appellant a member of any supplementary plan and had no obligation to fund or pay.

[20] In February 1997, the appellant started an action against Western and Fletcher claiming, among other things, to be entitled to pension benefits from each of them.

[21] Although the agreement between Fletcher and Western, to which I have already referred, provided that funds would be transferred from the Fletcher Plan to the Western Registered Plan to fund the appellant's pension, Fletcher determined that it could not make such a payment. Instead, in September 1997, Fletcher started to make monthly payments to the appellant under the Fletcher Plan using what is referred to as a "Joint and Survival 60" form ("J&S 60"), as the appellant requested.

[22] Under a J&S 60 form of pension, a retiree receives a pension until his or her death and, after the retiree's death, his or her spouse receives a pension equal to 60% of the pension payable to the retiree.

[23] Fletcher also made a lump sum payment to the appellant of \$63,994.10, which was made up of the monthly pension payments based on the J&S 60 form from 1 October 1994 to 31 October 1997, together with interest.

[24] In June 1998, in a mediation session with Mr. Martin Taylor, Q.C., the parties settled most of the issues in the lawsuit. As a result of the mediation, the parties agreed that the appellant's entitlement to a pension under the Supplemental Plan would be calculated based on twenty years service.

[25] The Minutes of Settlement resulting from the mediation provided, in part:

1. WESTERN PULP LIMITED PARTNERSHIP ("Western") will pay to WALDIE MANION, in addition to his basic pension, a supplemental pension under its Supplementary Retirement Benefit Plan, based on 20 years service.

2. The supplemental pension payments will commence as soon as is possible and will be enhanced so as to provide Mr. Manion with the "arrears" of supplementary pension benefits due on the above basis effective from his retirement date. Should such enhancement for any reason not be possible, Western will pay the arrears by way of lump sum together with such additional payment as is necessary to indemnify Mr. Manion for the additional tax liability imposed on him by reason of the arrears having been paid in this manner rather than as increased periodic benefits paid since the time when his pension first became payable.

* * *

7. The parties will execute releases with respect to all claims which either or both of Western and Fletcher may have against Mr. Manion and which Mr. Manion may have against either or both of them arising out of any matter to this date, except only the continuing obligations of Western and Fletcher Challenge in respect of basic and supplementary pension benefits, as heretofore payable and as provided for by this settlement, and benefits payable under Fletcher Challenge's retirement medical and dental benefit plan.

* * *

9. While all obligations assumed towards Mr. Manion by this settlement are obligations of Western (except Fletcher Challenge's basic pension payments and Fletcher Challenge's Retirement Medical and Dental Benefit plan), Mr. Manion recognizes that Fletcher Challenge is a participant in the settlement, whose participation as to amount is not disclosed.

[Underlining in original.]

[26] It was also agreed that the parties were at liberty to apply for a declaration as to the amount of the pension payable by Western to the appellant pursuant to the Minutes of Settlement reached by the parties.

[27] The appellant and Western were unable to agree on the amount and the appellant then sought a determination of the issue in his court action.

[28] The trial proceeded on the basis of the material the parties agreed to put before the court, without oral testimony. The material included the Registered Plan and the Supplementary Plan, an affidavit and some expert opinion reports from the actuary in the firm of actuaries responsible for the administration of the two Western plans, an affidavit and some expert opinion reports from an actuary retained by the appellant, transcripts of cross-examination on the affidavits of the two actuaries and two letters from Fletcher's actuaries.

[29] Although Fletcher was a defendant in the action, the appellant and Western agreed that there was no need for Fletcher to appear.

[30] At the end of a two-day trial, the trial judge gave brief oral reasons stating his conclusions on the issues that had been put before him. The order from which the appeal is brought is dated 12 July 1999 and provides:

THIS COURT ORDERS that the plaintiff's pension under the Western Registered Retirement Plan be an LG5 normal form.

THIS COURT FURTHER ORDERS that the defendant Western PLP be entitled to take into account the arrears paid by defendant Fletcher Challenge Canada Ltd. in determining the plaintiff's pension under the Western Registered Retirement Plan.

III. Grounds Of Appeal

[31] There are two grounds of appeal:

[1] The learned trial judge erred in holding that the Normal Form of Mr. Manion's pension under the Western Registered Plan was a LG5 form.

[2] The learned trial judge erred in holding that Western was entitled to deduct the arrears paid by Fletcher to Mr. Manion from October 1994 from the monthly pension payments it makes to Mr. Manion.

[32] If the appeal is allowed, the appellant seeks a declaration that the appellant's pension under the Registered Plan be the "Appendix B Normal Form" and an order declaring that Western is not entitled to deduct the arrears paid by Fletcher in determining the amount of the appellant's pension under the Registered Plan.

IV. Relevant Provisions In The Registered Plan And The Supplementary Plan

[33] The Registered Plan is a non-contributory, defined benefits plan employing final average earnings in the formula to calculate the benefit.

[34] Section 7 of the Registered Plan sets out the formula for calculation of members' pensions:

(a) The annual amount of pension payable to a Member in the Normal Form under the Plan upon retirement on or after Normal Retirement Date shall be equal to:

- (i) 1.3% of Final Average Earnings up to the Final Average YMPE, plus
 - (ii) 1.9% of Final Average Earnings in excess of the Final Average YMPE,
- multiplied by years of Credited Service.

[35] Under Section 1, "YMPE" and "Final Average YMPE" are defined:

"YMPE" means in respect of any year, the Year's Maximum Pensionable Earnings as defined under the Canada Pension Plan.

"Final Average YMPE" means the annual average of the lower of the YMPE and a Member's Earnings during the same period used to calculate the Member's Final Average Earnings....

[36] Section 7(f) of the Registered Plan incorporates the Cap required under the ***Income Tax Act***:

(f) Notwithstanding the foregoing, the amount of annual pension payable to a Member at retirement, Termination of Service or termination of the Plan, excluding the bridge benefit payable under paragraph (c) above, shall not exceed the lessor of:

- (i) \$1,722.22, or such higher amount as may be allowed under the *Income Tax Act*, multiplied by the Member's years of Credited Service; and
- (ii) 2% of the amount determined by multiplying the Member's years of Credited Service by the average of the best three consecutive years of remuneration paid to the Member by the Company.

...

[37] While many salaried employees may not reach the maximum benefit allowed under Section 7(f), that is not so in the appellant's case.

[38] The Supplementary Plan is also non-contributory. Article 1 of the Supplementary Plan sets out its purpose:

Purpose of the Plan

This Supplementary Plan provides a pension supplement to Participants to provide the same retirement income ratio to Final Average Earnings as a Participant would receive from the Pension Plan if there was no maximum pension limitation. Benefits provided by the Supplementary Plan are in addition to and integrated with the benefits provided under the Western Forest Products Limited Retirement Plan for Salaried Employees.

[39] Article 6 provides, in part:

6.1 Supplementary Pension

The Supplementary Pension, of a Participant, payable commencing on his retirement date, shall be the result of (a) minus (b), where:

(a) is the pension that would be payable pursuant to the Pension Plan if the maximum pension restriction was not applied; and

(b) is his Pension Plan Offset.

6.2 Pension Plan Offset

The Pension Plan Offset shall be the pension that would be payable to the Participant from the Pension Plan on the retirement date, if a life pension, with a sixty (60) month minimum guaranteed period was chosen.

[40] The Supplementary Plan, in Article 2.1(c), defines "Pension Plan" as the Registered Plan.

[41] The "Normal Form" provisions in the Registered Plan are central to the arguments on the first ground of appeal.

[42] The Registered Plan contains two definitions of "Normal Form": one is found in Section 2, which in turn refers to Section 8(a), and the other, which applies only to those members who are participants in the Supplementary Plan, is found in Appendix B(b).

[43] Under Section 2, the term "Normal Form" is defined as follows:

"Normal Form" has the meaning assigned thereto by paragraph (a) of Section 8 herein;

[44] Section 8(a) provides:

[1] The Normal Form of pension will be a pension payable monthly to a Member commencing on the day on which the Member retires and terminating with the payment payable in the month in which the death of the Member occurs except that should the Member die before receiving 60 monthly payments the remainder of the 60 payments will be paid monthly to the Member's Spouse, designated beneficiary or estate.

[45] It is common ground that the Normal Form of pension set out in Section 8(a) is the "LG5" form.

[46] Under Section 8(b), a member who has a spouse must elect one of the optional forms set out therein in lieu of the Normal Form in Section 8(a), unless the spouse provides a signed waiver before the pension is to commence.

[47] If a member elects one of the optional forms, the amount of the monthly pension is reduced. It is obvious from the provisions in section 8(b)(i) and (ii), set out below, that the reduction is designed to take into account the longer period over which the pension benefits are likely to be payable to a member's spouse. Section 8(b) provides:

(b) In lieu of the Normal Form of pension, a Member who has a Spouse must elect one of the following optional forms, unless the Spouse provides the Company with a signed waiver in the Approved Form within 90 days before the date the pension is to commence, waiving the Spouse's entitlement:

(i) a reduced pension payable during the life of the Member equal to 90% of the pension otherwise payable with the provision that after the Member's death a pension equal to 60% of the pension payable to the Member prior to optional modification shall be paid during the life of, and to, the Member's surviving Spouse. For each completed year up to 20 years by which the Spouse's age exceeds the Member's age by more than 5 years the reduced pension payable to the Member shall be increased by 1/2 of 1% of the pension payable prior to optional modification. For each completed year by which the Spouse's age is more than 5 years less than the Member's age, the reduced pension shall be decreased by 1/2 of 1% of the pension payable prior to optional modification; or

(ii) a reduced pension payable during the life of the Member equal to a percentage of the pension otherwise payable with such percentage being equal to 84% plus 1% for each completed year, up to 16 years, by which the Spouse's age exceeds the Member's age by more than 5 years, or minus 1% for each completed year by which the Spouse's age is more than 5 years less than the Member's age. After the death of the Member, the pension payable during the life of, and to, the Member's surviving Spouse, shall be equal to the reduced pension payable to the Member; or

(iii) any other optional form of pension acceptable to the Company, which shall be the Actuarial Equivalent of the Normal Form of pension determined in accordance with the Plan Factors.

[48] While the amount of the monthly pension payments may be reduced as a result of the member selecting one of the options, Section 8(b) goes on to provide that an option selected will be not less than the actuarial equivalent of the Normal Form of pension:

If the pensions payable in accordance with subparagraph (i) or (ii) above have an Actuarial Equivalent value less than the Normal Form they shall be increased so that they are of Actuarial Equivalent value to the Normal Form of pension.

The optional form of pension must be in a form then acceptable under the Income Tax Act and subject to the requirements of Applicable Legislation and shall not provide for a guarantee period which exceeds fifteen years or the period from the date of retirement of the Member to the date on which the Member's 85th birthday would occur. An optional form of pension must be elected in writing in the Approved Form, before retirement.

[49] The term "Applicable Legislation" (which appears in Section 8(b) set out above) is defined in Section 2 of the Registered Plan:

"Applicable Legislation" means the *Pension Benefits Standards Act* S.B.C. C.15 [sic] together with Regulations as amended and/or replaced from time to time.

[50] The ***Pension Benefits Standards Act***, S.B.C. 1991, c. 15 came into force on 1 January 1993.

[51] The provisions of Section 8(b) of the Registered Plan reflect the requirements of the ***Pension Benefits Standards Act*** in respect of survivor benefits and, in particular, sections 34 and 35. Section 34 applies if a member dies before payment of a pension commences. Section 35 provides:

35 (1) Despite anything in this Part and except as provided in this section and section 40 (1), the pension payable to a former member who had a spouse at the date the pension commenced is to be a joint pension payable during the joint lives of the former member and the spouse and which, after the death of either, continues to be payable to the survivor for life.

(2) A pension plan may provide for the joint pension to the survivor to be decreased by not more than 40% or, subject to subsection (3), to be actuarially adjusted.

(3) The joint pension may be adjusted only if the pension's actuarial present value following the adjustment is not less than the actuarial present value of the normal form of pension under the plan that would be payable to the former member from his or her pensionable age were it not for this section and the provision in the plan corresponding to this section.

(4) If the pension plan provides for alternative forms of payment, the former member may receive a pension in a form acceptable under the plan but that does not comply with this section if the administrator receives, before pension commencement, a statement by the spouse in the prescribed form that

(a) the spouse has reviewed the information referred to in section 10 (1) (d) and is aware of the spousal entitlements under this section,

(b) waives the spousal entitlements, and

(c) is signed by the spouse in the presence of a witness and outside the presence of the member or former member.

(5) The statement under subsection (4) is not valid if that statement is made more than 90 days before pension commencement.

(6)

(7) This section does not apply if payment of the pension began before January 1, 1993.

[52] Appendix B of the Registered Plan, which applies only to those members who are eligible to receive benefits under the Supplementary Plan, contains its own provision for the "Normal Form" of pension. Appendix B reads:

(a) The provisions of this Appendix B apply to Members designated by the Company as eligible to receive benefits under the Western Forest Products Limited Supplementary Retirement Plan, defined as "Participant" in that Plan. Where the provisions of this Appendix B are in conflict with the remaining terms of the Plan, these provisions shall control.

(b) The Normal Form of pension for Participant Members will be a pension payable monthly for the life of a Participant Member commencing on the day on which the Participant Member retires, and payable after the Participant Member's death to the Participant Member's Spouse for life in monthly instalments equal to 60% of the amount of each monthly instalment paid during the life of the Participant Member. The monthly pension payable shall cease with the last monthly payment paid for the month in which the Participant Member dies, or if later, the month in which the Participant Member's Spouse dies.

(c) The benefits payable to a Participant Member under this Appendix B will be limited if necessary so that the Commuted Value of the Participant Member's pension at retirement does not exceed the Commuted Value of the pension payable under the terms of the Plan without regard to paragraph (f) of Section 7 and paragraph (b) of this Appendix B.

[53] The "Normal Form" of pension referred to in Appendix B(b) is not an LG5 form because it does not provide for a five-year guarantee of pension payments.

[54] The Normal Form in Appendix B(b) may be described as J&S 60, but it is important to note the difference between the J&S 60 options in Section 8(b) and the J&S 60 Normal Form in Appendix B(b). The J&S 60 options available under Section 8(b) provide for a reduction in the monthly amount of the pension, depending on the age of the member's spouse, whereas Appendix B contains no options, and Appendix B(b) does not provide for a reduction if the Participant has a spouse.

V. GROUND ONE: Did the trial judge err in concluding that the Normal Form under paragraph (b) in Appendix B ought to be interpreted as providing an LG5 form of pension?

[55] Under the first ground of appeal, the contentious question is whether the "Normal Form" set out in Appendix B(b) ought to be interpreted as providing pension benefits in an "LG5" form, as the trial judge held, or whether the pension benefits ought to be paid as stipulated in Appendix B(b).

[56] Western's position is that the Registered Plan in conjunction with the Supplementary Plan was intended to provide eligible employees with a pension equivalent in value to an LG5 form of pension, unlimited by the Cap. Western argues that the two plans must be read together and when they are, "the plans are so closely integrated and interdependent that they might be considered as incorporating one another so as to give rise to a single pension, payable from different sources." In Western's submission, "the result is a total pension (Registered and Supplementary) equivalent in value to an LG5 pension, unlimited by the Cap".

[57] There is no dispute that the two Plans were intended to work together to provide an enhanced pension for selected senior employees but there are a number of differences between the Registered Plan and the Supplementary Plan which would not produce a seamless "single pension".

[58] One of the notable differences is where an employee continues to work after age 65. Under s. 5(a) of the Registered Plan, the employee does not receive a pension at age 65 but continues to accrue benefits until the date of retirement. Under the Supplementary Plan, the employee becomes a "retired Participant" at age 65 and retirement income is determined based on Credited Service up to age 65. The result is that while the participant may not be credited for years of service after age 65, he or she is entitled to start receiving the Supplementary Pension as of that age.

[59] Another difference is that members of the Registered Plan may choose one of the options in Section 8(b) but Participants in the Supplementary Plan are not given any options.

[60] As previously mentioned, the appellant does not take issue with Western's submission that Appendix B has to be read in the context of the provisions in the Registered Plan and the provisions of the Supplementary Plan. What the appellant takes issue with is the proposition put forward by Western that the "Normal Form" provision found in Appendix B must be interpreted as requiring the LG5 form rather than the form stipulated. In the appellant's submission, neither the language of Appendix B(b) nor the context in which it is found supports such a construction.

[61] Western's argument that the LG5 form applies to Appendix B(b) rests largely on the views expressed by an actuary with William M. Mercer Limited, the company responsible for the administration of the two Western Plans as to how the "Normal Form" provision in Appendix B(b) ought to be interpreted. In an affidavit sworn 22 June 1999, Mr. Michael Mills deposed:

10. A J&S 60 pension with monthly payments equal to those paid under an LG5 pension would have a greater value than the LG5 pension due to the survivor's benefit. In other words, the monthly payments made under the J&S 60 plan are expected to be paid for a longer period of time according to the actuarial tables. For this reason the monthly payments are lower under the plan for a J&S 60

pension than would be received for an LG5 pension of the same value. Notwithstanding the J&S 60's greater expected value (based on the monthly payments being the same) Revenue Canada imposes the same \$1,722.22 per year of service limit on both forms of pension.

* * *

12. Mercer, and specifically myself during my tenure as the responsible principal for the plans, have been advised by Western Forest Products Limited and Western Pulp Inc. that it is the intent of the WFP RPP and SPP to maintain an LG5 normal form, while channeling as much of the value of the pension as possible through the WFP RPP, which is backed by a registered pension fund, and as little as possible through the SPP which obligations are paid through the company's general revenues.

* * *

14. I have reviewed Mr. Karp's report [the report of the actuary retained by the appellant] dated October 5, 1998 which is attached as Exhibit "E" to the Hamilton Affidavit and make the following comments with respect to the areas of disagreement noted in that report with respect to Mercer's calculations of June 11, 1998 and my letter of August 24, 1998 (also attached as Exhibit "E" to the Hamilton Affidavit) as follows:

* * *

(b) Is the effective normal form of pension under the WFP RPP "joint and 60% survivor benefit" or rather life with a five year guarantee (LG5)?

* * *

(iii) The purpose of paragraph (c), in my view, and consistent with the manner in which the plan has been administered over the years by Mercer under the direction of Western Forest Products Limited and Western Pulp Inc., is to ensure that a member never receives a pension with a commuted value greater than an LG5 even if they chose a J&S60 and to channel as much of the payment back through the registered plan as possible. In my view the words "Committed Value of the pension payable under the terms of the Plan without regard to paragraph (f) of Section 7 and paragraph (b) of this Appendix B" means the normal form under the WFP RPP and the normal form under that plan is an LG5.

[62] Paragraph 16 of Mr. Mills' affidavit illustrates the nature of the actuary's complaint about adhering to the Normal Form set out in Appendix B(b):

16. Based on my review of Mr. Karp's report [the report of the actuary retained by the appellant], if Mr. Manion were to receive the payment he is requesting and that Mr. Karp appears to indicate that he is entitled to, Mr. Manion would receive a J&S60 pension with monthly payments roughly equivalent to those he would

receive under an LG5, notwithstanding he had chosen an option pursuant to which he or his spouse is expected to receive the monthly payments for a much longer period of time.

[63] The appellant submits that the answer to this complaint is self-explanatory. Under the wording of Appendix B(b) to the Registered Plan, the appellant is entitled to a J&S 60 form without the 10% reduction that applies if the first option under Section 8(b) were chosen. The appellant has not "chosen an option" because under Appendix B he is not entitled to any option.

[64] The appellant contends that the error of Western's actuary, and of the learned trial judge, was in treating the "Normal Form" provision in Section 8(a) and the "Normal Form" provision in Appendix B(b) as if they were or had to be actuarially identical.

[65] In the appellant's submission, Western's actuary is only correct if paragraph (c) of Appendix B has the effect of imposing actuarial equivalency between the LG5 form contained in the Section 8(a) Normal Form, and the Normal Form set out in Appendix B(b).

[66] For ease of reference, I will repeat Appendix B(c):

(c) The benefits payable to a Participant Member under this Appendix B will be limited if necessary so that the Commuted Value of the Participant Member's pension at retirement does not exceed the Commuted Value of the pension payable under the terms of the Plan without regard to paragraph (f) of Section 7 and paragraph (b) of this Appendix B.

[67] The reference in Appendix B(c) to Section 7(f) is to the maximum benefit that may be received under the Revenue Canada Cap. Paragraph (b) of Appendix B sets out the "Normal Form" for those eligible to be participants in the Supplementary Plan. Under Section 2 of the Registered Plan, the term "Commuted Value" is defined thus:

"Commuted Value" means the lump sum value that is the Actuarial Equivalent of a Member's pension entitlement under the Plan.

[68] The terms "Actuarial Equivalent" and "Applicable Legislation" are defined in Section 2:

"Actuarial Equivalent" means an amount of equal value determined on the basis of mortality tables, rates of interest and rules adopted by the Company on the recommendation of the Actuary in accordance with the Applicable Legislation;

"Applicable Legislation" means the *Pension Benefits Standards Act* S.B.C. C.15 [sic] together with Regulations as amended and/or replaced from time to time.

[69] Under the ***Pension Benefits Standards Act***, *supra*, the term "commuted value" is defined as follows:

"commuted value" means, in relation to benefits that a person has a present or future entitlement to receive, the actuarial present value of those benefits determined, as of the time in question,

- (a) on the basis of actuarial assumptions and methods that are adequate and appropriate and in accordance with generally accepted actuarial principles,
- (b) in accordance with any prescribed conditions, and
- (c) in a manner acceptable to the superintendent;

[70] The appellant submits that in order to determine how Appendix B(c) works, it is necessary to calculate two commuted values. The first is the commuted value of the Participant Member's pension at retirement. This means the pension payable under the Supplementary Plan. The second is the commuted value of the pension payable under the Registered Plan without regard to paragraph (f) of Section 7 and paragraph (b) of Appendix B. In the present case, the first commuted value is significantly less than the second. As appears in the transcript of his cross-examination, Mr. Mills acknowledged that the second value would be approximately 160% of the first.

[71] In my respectful view, the construction that Western seeks to put upon the provisions in Appendix B cannot be sustained. The wording of paragraph (b) of Appendix B plainly requires that the Normal Form of pension for those eligible for the Supplementary Pension is a pension payable for the life of the member and after the death of the member, a 60% annuity for the life of the surviving spouse, if any.

[72] Western's argument, that the provisions of Article 6 of the Supplementary Pension (set out in paragraph 39 of these reasons) are only compatible with Appendix B(b) being interpreted as requiring an LG5 form, might have more force if the provisions of the two Plans were otherwise entirely consistent, but they are not.

[73] The argument of Western that the provisions of the Registered Plan and the Supplementary Plan are intended to work together in such a way as to exclude Appendix B requiring anything more than benefits paid in an LG5 form is not borne out when specific provisions in the two Plans are considered. Under the Registered Plan, a member may continue to be employed past his Normal Retirement age and benefits under that Plan continue to accrue. Under the Registered Plan, however, benefits are limited by the Cap under the **Income Tax Act**, as reflected in Section 7(f) of the Registered Plan. Under the Supplementary Plan, a participant who postpones his retirement past his Normal Retirement Date has his pension benefit income determined, based on his Credited Service up to his Normal Retirement Date. That is clear from the provisions in Article 5 of the Supplementary Plan, set out above.

[74] For the purposes of calculating the monthly amount payable under the Supplementary Plan, taken as at a participant's Normal Retirement Date, it is necessary to have reference to Article 6 in that Plan. As I read Article 6.1 and 6.2, the Supplementary Pension is to be calculated as if the Cap did not limit the benefits under the Registered Plan, but after deduction of the actuarial equivalent of a pension payable to the Participant from the Pension Plan on the normal retirement date, as if a life pension, with a five year minimum guaranteed period were chosen.

[75] In my view, the opinion of an actuary as to actuarial equivalents would clearly be admissible but, in my respectful view, the opinion expressed by the actuary as to "the intent of the WFP RPP and SPP to maintain an LG5 normal form" ought to have been disregarded when the trial

judge was determining the form of benefit to which the appellant was entitled to receive under Appendix B of the Registered Plan.

[76] In summary, I agree with the appellant that while under s. 7(f) of the Registered Plan he would reach the Cap imposed under the **Income Tax Act**, he is entitled, as a result of the Normal Form stipulated in Appendix B(b), to receive a J&S 60 form of pension, without reduction for the fact that he is married. Put another way, as a result of Appendix B(b) and the provisions of the Supplementary Plan, the appellant is entitled to receive a pension in a J&S 60 form without regard to the Cap.

[77] I would therefore allow the appeal on the first ground of appeal and grant the declaration sought by the appellant.

VI. GROUND TWO: Did the trial judge err in ordering that Western could deduct the amount of the arrears Fletcher paid to the appellant?

[78] As background to the second ground of appeal, it is necessary to set out the provisions concerning retirement and payment of benefits under the Registered Plan and the Supplemental Plan.

[79] Under the Registered Plan, the term "Normal Retirement Date" is stated to be "the first day of the month coincident with or next following the Member's 65th birthday". That made 1 October 1994 the appellant's "Normal Retirement Date".

[80] Under the Registered Plan, a participant in the plan may continue to work past his "Normal Retirement Date" and accrue benefits. Section 5(c) provides:

(c) If a Member remains employed after reaching Normal Retirement Date, the Member shall continue to accrue benefits under the Plan until the earlier of the actual date of retirement or December 31 in the year that the Member attains age 71 when the pension benefits will commence.

[81] The provisions in the Supplementary Plan are not identical to the provisions in the Registered Plan in regard to retirement and payment of the pension. Articles 5.1 and 5.3 of the Supplementary Plan provide:

5.1 Normal Retirement

A Participant, who ceases to be employed by the Company upon attaining his Normal Retirement Date, shall become a retired Participant and shall be entitled to receive a Supplementary Pension.

5.2 Early Retirement

* * *

5.3 Postponed Retirement

A Participant may, upon the request of the Company, remain in active service with the Company after his Normal Retirement Date for a period to be agreed upon jointly by the Participant and the

Company. If a Participant continues to work for the Company after his retirement in accordance with this Article 5.3, he shall become a retired Participant on his Normal Retirement Date and his retirement income shall be determined and shall commence as provided in Article 5.1 or 5.2, based on his Credited Service up to his Normal Retirement Date.

[82] The second ground of appeal concerns the deduction made by Western of arrears paid by Fletcher to the appellant in relation to Fletcher's plan.

[83] A letter from Fletcher addressed to the appellant dated 30 September 1997 sets out the pension amount and the lump sum payment Fletcher, in fact, has made and is making to the appellant:

... your pension has been commenced effective October 1, 1994. The monthly pension amount is \$1773.61 based on a life annuity guaranteed 5 years. As you elected the Joint and Survivor 60%, the monthly pension has been reduced to \$1,575.86, to provide for the survivor pension.

We have instructed Canada Trust to commence your monthly pension effective immediately. The first pension cheque will be deposited to your account by November 1, 1997. Canada Trust will pay a retroactive amount of \$63,994.10 representing the missed pension payments from October 1, 1994 to October 31, 1997 inclusive.... The interest rates are the minimum interest rates for accumulating contributions for pension plans registered in the province of British Columbia....

[84] The trial judge found that Western was justified in deducting the arrears but gave no reasons for his decision.

[85] In seeking to uphold the trial judge's order that permitted Western to deduct the amount of the arrears paid by Fletcher to the appellant, Western has referred to a letter dated 29 August 1996, from Towers Perrin, the actuaries for Fletcher, to Fletcher. The letter stated that there were two options in regard to payment of the appellant's pension: Fletcher could either commence payment of the appellant's pension effective 1 October 1994, in which case the missed payment would have to be made up, or, alternatively, instead of paying the missed payments, Fletcher could pay an actuarially increased pension effective from the deferred retirement date. According to the calculations in the letter, if the appellant chose the actuarially increased pension from the deferred retirement date, the actuarial increase would be \$425.24 per month.

[86] Regardless of whether the appellant could have chosen the actuarially increased amount, he did not do so and I see nothing in the material to suggest that he was under any obligation to do so. The letter from Fletcher to the appellant dated 30 September 1997 set out above clearly states the monthly amount Fletcher would be paying under the option the appellant had chosen as well as the amount it would pay as arrears for the period stipulated. It would seem to be obvious from the letter that the arrears were calculated for the period specified using the same option.

[87] While the Fletcher Pension Plan is not before us, there is no dispute, based on a reference in the Towers Perrin letter of 29 October 1996, that the Normal Form for the Fletcher Plan is LG5 and that he was entitled to receive pension benefits under that Plan after age 65.

[88] The 1988 agreement between Fletcher and Western did not deal with the question of what would happen if the appellant had a different entitlement under each Registered Plan due to the fact that he continued to work for Western past age 65.

[89] What is clear is that under the Fletcher Plan, the appellant became entitled to a pension at age 65 and that Fletcher ultimately decided to pay the appellant's benefits under that Plan, effective October 1994.

[90] Western started to make monthly pension payments to the appellant effective October 1996. The appellant's position is that Western is entitled to deduct the payments Fletcher made, commencing as of October 1996. What the appellant objects to is Western appropriating for itself the pension benefits which Fletcher saw fit to pay to him for the two year period prior to that time. In the appellant's submission, Western has no right to appropriate those benefits for itself.

[91] The appellant points out that Western has not paid the Supplementary pension which it was required to pay commencing October 1994. Had Western done so, the appellant would agree that the deduction of the Fletcher pension would make sense.

[92] In short, the appellant's position is that having made no pension payments under either Plan for the period October 1994 to October 1996, Western is not entitled to set off the monies paid by Fletcher for there is nothing against which to set it off.

[93] I agree with the appellant's submissions on this point as well. In the result, I would set aside the order made by the trial judge and substitute a declaratory order that Western is not entitled to deduct the arrears paid to the appellant for the period between 1 October 1994 and 1 October 1996.

VII. Conclusion

[94] I would allow the appeal, set aside the orders made by the trial judge, and grant the declarations sought by the appellant.

"THE HONOURABLE MADAM JUSTICE ROWLES"

I AGREE:

"THE HONOURABLE MR. JUSTICE CUMMING"

I AGREE:

"THE HONOURABLE MADAM JUSTICE HUDDART"