IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lacey v. Weyerhaeuser Company Limited,* 2012 BCSC 353

Date: 20120309
Docket: S101925
Registry: Vancouver

Between:

Lorne K. Lacey, Kenneth James Miller, Raymond Morris, George E. Plant, and Mary Jane Walker

Plaintiffs

And

Weyerhaeuser Company Limited

Defendant

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiffs:	John Rogers, Q.C. Amanda Merritt, Articled Student
Counsel for the Defendant:	Ron A. Skolrood Laura L. Bevan
Place and Date of Trial:	Vancouver, B.C. February 14-16 and 18, 2011
Further Written Submissions Received:	March 7 and 11, 2011
Place and Date of Judgment:	Vancouver, B.C. March 9, 2012

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Introduction

[1] The plaintiffs are retired salaried employees of the defendant or its predecessor company, MacMillan Bloedel Limited ("MB"). Each of them retired at different times between 1991 and 2000. At those times, the employer's benefits package for retiring employees included specific retirement health benefits: continuing payment, by the employer, of B.C. Medical Services Plan premiums; and coverage of extended health insurance benefits at the sole expense of the employer.

[2] As of January 1, 2010, the defendant unilaterally reduced its contribution to the cost of this coverage by 50%, and announced that the retirees would be responsible for bearing any future cost increases. The plaintiffs seek damages for breach of contract.

[3] The original statement of claim sought, in addition to the claim for damages, forms of declaratory and injunctive relief. Those latter claims were abandoned in order to bring the action within the former Rule 68 (the Expedited Litigation Project Rule, now captured and modified by Rules 15-1, 7-1, 5-2, and 12-2 to varying degrees in the *Supreme Court Civil Rules*). The amended statement of claim sets out a claim for general and aggravated damages for mental distress; at trial, the plaintiffs limited their damages claims to general damages for breach of contract only.

Synopsis

[4] The plaintiffs – none of whom testified at trial – were employed at various times. Raymond Morris was employed with MB from 1951 until his early retirement at age 57, in 1991. George Plant was employed with MB from 1971 until his retirement at age 65, also in 1991. Kenneth Miller was employed with MB from 1973 until his retirement at age 60, in 1998. Lorne Lacey was employed with MB and its successor, Weyerhaeuser, from 1962 until his retirement at age 60, in 2000. Mary Jane Walker was employed by MB, and then Weyerhaeuser, from 1961 until her retirement at age 58, in 2000.

[5] During the periods of the plaintiffs' employment, MB introduced the subject fully-funded retirement health benefits as part of its benefits package. These insurance benefits were not bargained for, but were introduced voluntarily by MB management. The benefits were described in various publications provided to MB's employees over the years, and were discussed with employees in seminars held by the company's human resources staff. The substance of these communications will be detailed below. Over the years, MB, and then Weyerhaeuser, secured group extended health insurance policies which covered its retirees. Changes were made to the scope of coverage from time to time.

[6] In 1999, MB was acquired by Weyerhaeuser.

[7] In October 2009, Weyerhaeuser advised the retired MB Canadian salaried employees that "in order to sustain the viability and affordability of our retiree plans", the company's contribution to extended health insurance and MSP coverage would be frozen at 50% of the costs as of January 1, 2010; and, that any future premium increases would be borne solely by the retirees.

[8] In the present action, the plaintiffs claim that their entitlement to fully-funded retirement health benefits vested during the course of and as a term of their employment. Some of the plaintiffs further plead and rely upon terms of releases entered into between them and the defendant when they were involuntarily retired upon the amalgamation of MB and Weyerhaeuser.

[9] The defendant says that the provision of any and all forms of retirement health benefits is and has been entirely at the discretion of the employer, is not a contractual right, and is not a right which vested.

Evidence of Terms of Contract of Employment

[10] The plaintiffs did not have written employment contracts. The terms of the employment contracts, and in particular the question of whether lifetime fully-funded retirement health benefits were provided as part of the salaried employees' compensation packages, must therefore be determined from an objective view of the

parties' conduct, including communications which passed between MB and its salaried employees.

Plan Development Internal Memoranda

[11] The parties filed in evidence a copy of a memorandum marked as having been originally issued January 3, 1968, and reissued February 3, 1989, entitled, "Medical Plans for Retirees" affecting "All Employees - Canadian Operations". The memorandum states as follows:

> POLICY
>
> The Company will pay premiums as required under Medical–Surgical–Hospital Plans, and coverage under Extended Health Insurance Plans will be continued, for employees who retire under the terms of a Company sponsored retirement plan. For those employees not in a Company sponsored retirement plan, including those in an industry sponsored plan, coverage will be continued at retirement only if the employee qualifies in accordance with the following schedule: . . .

The memorandum then sets out a table specifying the number of required years of company service in order to qualify, for employees retiring between the ages of 55 and 65.

[12] This memorandum is on a form entitled "Management Policy". The above quotation, as noted, appears under the heading "Policy". These facts may suggest that this decision had been made by management as a matter of policy, and this in turn may imply that management reserved the right to revise or terminate the plan as a matter of policy, at its discretion, as well. However, there is no evidence as to whether this memorandum was circulated to employees generally. There is no evidence as to the circumstances under which the memorandum was reissued in 1989. And there is no evidence as to how such "Policies" were understood.

[13] Also filed in evidence is a series of memoranda dating from early 1973, in which members of MB management discussed the cost of extending coverage under its medical care plans to present and future retired employees. I infer from these documents that the "policy" referred to in the aforementioned memorandum was not

in fact implemented in 1968. The 1970's memoranda indicate that management reviewed the projected cost, both of covering salaried pensioners and hourly pensioners on a 50/50 cost-sharing basis, and on the basis of MB paying 100% of the cost.

[14] Subsequent to the first of these 1970's memoranda being written, management discovered that MB's competitors Crown Zellerbach and Columbia Cellulose were covering their retired salaried employees, with the company paying 100% of their costs. It was understood that another competitor, B.C. Forest Products, was considering a similar course. Crown Zellerbach was covering its retired hourly employees on a 50/50 cost-sharing basis. Later that spring, it was also discovered that the competitor Weldwood was paying 100% of the cost of coverage of Medical Services and extended health for its retired salaried employees.

[15] MB management sought an advanced tax ruling from the Department of National Revenue (reviewed further below), and in the expectation of a favourable ruling pushed ahead with planning.

[16] Subsequent memoranda indicate that management was determined to match the practices of its competitors.

[17] By way of a memorandum dated July 20, 1973, addressed to its retired salary employees, MB announced that it had been able to arrange an extended health benefit plan to assist its retired MB employees with their medical expenses. MB stated that it would pay the cost of the premiums of this plan in full, and that for retirees residing in Provinces where direct premium payments were required for hospital or medicare coverage, the company would pay the whole premium of the provincial plan.

[18] To the extent that this plan represented a change for employees who had already retired without medical coverage – those to whom the memorandum was addressed – the announced benefits were clearly gratuitous. With respect to persons such as the plaintiffs, who were current salaried employees of MB, the

question is how their future entitlement to fully-funded retirement health benefits is to be characterized – whether it was objectively ascertainable as a gratuitous benefit, or as an aspect of their compensation. The evidence on this issue is discussed below.

Tax Ruling

[19] As noted above, MB sought an advance ruling in 1973 from the Department of National Revenue as to whether its contributions to retired employee health insurance premiums would be taxable benefits to the retired employees, and whether MB would be precluded from claiming the payments as deductions in computing the taxable income of the company. The relevant provisions of the *Income Tax Act*, S.C. 1970-71-72 c. 63, were as follows:

> **Inclusions**
>
> **6. (1) Amounts to be included as income from office or employment** - There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable:
>
> > (a) **Value of benefits** - the value of board, lodging and other benefits of any kind whatever (except for the benefit he derives from his employer's contributions to or under a registered pension fund or plan, group sickness or accident insurance plan, private health services plan, supplementary unemployment benefit plan, deferred profit sharing plan or group term life insurance policy) received or enjoyed by him in the year in respect of, in the course of, or by virtue of an office or employment ;
>
> . . .
>
> **(3) Payments by employer to employee** - An amount received by one person from another
>
> > (a) during a period while the payee was an officer of, or in the employment of, the payer, or
> >
> > (b) on account or in lieu of payment of, or in satisfaction of, an obligation arising out of an agreement made by the payer with the payee immediately prior to, during or immediately after a period that the payee was an officer of, or in the employment of, the payer,
>
> shall be deemed, for the purposes of section 5, to be remuneration for the payee's services rendered as an officer or during the period of employment, unless it is established that, irrespective of when the agreement, if any, under

> which the amount was received was made or the form or legal effect thereof, it cannot reasonably be regarded as having been received
>
> > (c) as consideration or partial consideration for accepting the office or entering into the contract of employment,
> >
> > (d) as remuneration or partial remuneration for services as an officer or under the contract of employment, or
> >
> > (e) in consideration or partial consideration for a covenant with reference to what the officer or employee is, or is not, to do before or after the termination of the employment.
>
> . . .
>
> **Deductions**
>
> **18. (1) General limitations** - In computing the income of a taxpayer from a business or property no deduction shall be made in respect of
>
> > (a) **General limitation** - an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property . . . .

[20] The letter seeking the ruling is not in evidence, but the basis for the request can be inferred from the aforementioned internal memoranda, from the Department's reply, and from subsequent correspondence in 1975 concerning a supplementary ruling (referred to in greater detail below). It appears that MB represented to the government that the company's decision to provide these benefits to retirees was purely voluntary on its part, not a contractual commitment, and hence would not be taxable in the hands of the retirees. Nevertheless, MB contended that its expenses in doing so were related to the employees' services during the course of their employment and were of the character of a normal business expenditure; and that, in incurring the expenses, MB would be advancing the company's interests by improving its relations with its staff and the community. MB therefore argued that it ought to be entitled to deduct the expenditures from income.

[21] By way of a ruling issued in June 1973, the Department accepted MB's arguments, and ruled in its favour.

[22] In August 1975, the Department issued Interpretation Bulletin IT-247, "Employer's Contribution to Pensioners' Premiums under Provincial Medical and Hospital Services Plans":

> 1. A former employer may pay contributions or premiums on behalf of a pensioner to a provincial hospital and medical care insurance plan. For the purpose of this bulletin “pensioner” includes early retirees and disabled pensioners who have severed all employer-employee relationships with the person making the contributions.
>
> 2. Where these amounts are paid on account of an obligation arising out of an agreement made by the former employer with the former employee (or with a union on his behalf) immediately prior to, during or immediately after the former period of employment, they are taxable under paragraph 6(3)(b).
>
> 3. Where paragraph 6(3)(b) does not apply, the amounts are considered to be "superannuation or pension benefits" whether they are paid out of the former employer's pension funds or from his general funds (i.e., sources other than a superannuation or pension fund or plan), and as such are subject to tax in the hands of the pensioner pursuant to paragraph 56(1)(a). However, this treatment in respect of payments from general funds will only be applied to payments that are made in respect of former employees who became pensioners on or after the date of this bulletin.
>
> 4. A pensioner who is no longer required to contribute to a provincial hospital and medical insurance plan may receive amounts from his former employer equivalent to the premium or portion thereof that was being paid on his behalf. These are generally subject to tax in the manner described in paragraphs 2 and 3 above.
>
> 5. Where these contributions or premiums are taxable in the hands of a pensioner, they will be deductible to the employer as an allowable outlay or expense for the purpose of gaining or producing income pursuant to paragraph 18(1)(a).

[23] I infer that it was the issuance of this bulletin which prompted a subsequent request by MB for clarification and confirmation of the 1973 ruling. In a letter to the Department dated September 1975, MB reiterated the gratuitous character of both the payment of MSP premiums and the provision of extended health insurance coverage. [All underlining in quotations that follow is added for emphasis]:

> Our program exists by virtue of Management Policy and <u>could be changed or withdrawn at anytime without legal recourse</u> by a former employee.
>
> <u>Since our program is not legally enforceable by the employee</u>, we submit that the benefits cannot be taxed under 6(3)(b).

The problem confronting MB, as the letter states, is that if the payment of MSP premiums on behalf of retirees was not taxable as a benefit under s. 6(3)(b), the Interpretation Bulletin implied that the employer’s expense could not be claimed as a deduction. MB pointed out that this interpretation would contradict the advance

ruling. By way of a letter dated November 1975, the Department confirmed that the advance ruling would continue to be binding.

[24] Ms. Mylee Powell, who has been Weyerhaeuser's Pension and Benefits Manager since 2007, testified as to the records of MB's and Weyerhaeuser's reporting of retirement benefits. From 1973 up until 1998, MB continued to treat both the salaried retiree MSP and extended health premiums as a non-taxable benefit, consistent with the 1975 ruling. In or around 1998, MB changed its practice and began issuing T4A forms in respect of MSP premiums paid on behalf of former salaried employees who retired in or after 1998. No evidence was tendered as to the reason for this change in practice. MSP premium payments for pre-1998 salaried retirees, and extended health premium payments for all salaried retirees, continued to be treated by MB as non-taxable. As discussed below, however, documentation related to the 1999 acquisition of MB by Weyerhaeuser does disclose that by this point in time, MB's management had come to question the tax-free status of the retirement health benefits.

"Red Book" Handbook, and Folder

[25] If, as it appears from the tax ruling evidence, MB's management at least initially considered their payment of insurance premiums to have been gratuitous, that still leaves the question of how the fully funded retirement medical benefits were described to employees during the course of their employment. Only through an examination of this evidence can it be determined whether such benefits are to be construed as having been a form of compensation for their employment services, or in the nature of a gratuitous, unenforceable promise.

[26] The evidence on this point comes first in a handbook distributed to its salaried employees entitled "You and MacMillan Bloedel"; it was also referred to in the evidence as the "Red Book". There is no evidence as to when this handbook was first issued; it was reissued in 1985. Also in 1985, MB for the first time issued to its salaried employees a printed folder describing its benefits program, entitled "Your Employee Benefits Summary".

[27] The Red Book was provided to each MB salaried employee. Its introduction begins as follows:

> **You and MB**
>
> This is your personal portfolio. It tells you about the company and the many benefits available to you and your dependants.
>
> The company is justifiably proud of its benefits package. It has been improved over the years to the point where it is now one of the finest in the country. Today the company pays 100% of any premium costs for medical benefits, extended health insurance, dental care, long term disability, group life and travel accident insurance. You become eligible for all these plans on the first of the month coincident with, or following, your date of employment with MB. You should join as soon as you are eligible because you may not be able to do so at a later date. In addition, the company's pension plan is non-contributory and you are automatically enrolled when you join the company.
> . . .

[28] The Red Book is then divided into a number of chapters, including salary, vacations, job counselling and training, and, under Chapter 6, a long list of what are referred to as "Benefits for You and Your Family". These listed benefits – which I refer to as the "Family Benefits" – include both the "Retirement Plan" and the "Medical Plan for Retired Employees". This "Family Benefits" chapter of the handbook begins with the following comment:

> **Benefits for You and Your Family**
>
> You should examine this section carefully as it explains the many benefit programs which are available for the protection of you and your family. These plans, which represent a significant form of compensation to you, compare favourably with the best in Canada, and include:
>
> - Medical Benefits
> - Extended Health Insurance . . .
> - Retirement Plan
> - Medical Plan for Retired Employees . . .

[29] On the following page, the handbook states:

> **Cost of Benefits**
>
> The Company pays the full cost of the following benefits:
>
> - Provincial Hospital/Medical Plan
> - Extended Health Benefits

- Dental Care Plan
- Sick Leave
- Long-Term Disability Plan
- Group Life Insurance
- Travel Accident Insurance
- Pension Plan

There is no explicit mention in this "Cost of Benefits" paragraph of medical benefits for retirees. However, as it is found in the "Family Benefits" chapter, it is possible that this "Cost of Benefits" paragraph was intended to relate back to and encompass all of the "Benefits for You and Your Family" listed on the previous page, including all medical and extended health benefits for current employees and retirees alike.

[30] Further on in the Red Book, under Chapter 16, the pension benefits –"MB Retirement Plan" – are spelled out. That chapter of the handbook includes a provision under which MB explicitly reserved its right to modify or terminate the pension benefits:

> While MB intends and expects to continue the plan indefinitely it necessarily reserves the right to modify, amend or terminate the plan at any time. However the plan shall not be modified, amended or terminated in any manner which would cause or permit a release to the company of any part of the trust fund before satisfaction of the plan's liabilities.

[31] The next chapter of the Red Book, Chapter 17, briefly describes the medical plan for retired employees:

> **Medical Plan for Retired Employees**
>
> When you retire from active service in Provinces where the basic medical/surgical plan requires a premium, the company will pay the cost of your premium.
>
> The company will also provide an extended health plan for salaried employees and while this is not identical to the active salaried plan, it provides good coverage for most essential extended health services.
>
> In the event of your death, coverage for your spouse will be continued.

There is no reservation of rights wording in Chapter 17 of the Red Book regarding the retirees' medical benefits, comparable to that found in Chapter 16.

[32] The Red Book was reprinted in 1985, and in that year MB also created, and circulated to employees, a folder entitled “Your Employee Benefits Summary”, summarizing the benefits on a chart. The folder begins with the following introductory comments:

> Your Benefits Program at MacMillan Bloedel is among the most comprehensive and progressive programs in Canada. It represents a significant and valuable part of your compensation, and it is in your interests to know what you are entitled to and to take advantage of the available benefits.
>
> The purpose of this folder is to provide you with a summary of the plans available to you from the Company, and it also shows the additional benefits offered by government plans. The folder has been designed so that it will fit into the front section of your Employee Handbook which describes your employee benefits in detail.
>
> This folder will answer some of the more basic questions which you may have about MacMillan Bloedel’s benefit program but it is intended only as a guide to assist you in understanding your benefits. The employee handbook describes the plans in more detail, but if you have further questions, please feel free to discuss them with your supervisor or the Employee Benefits Section.

[33] The folder summarizes what the employee or family members are to do, or what they are entitled to, in the event of having medical or dental expenses, or becoming ill or disabled; in the event of the employee’s death; or upon retirement. It states that upon retirement – “WHEN YOU RETIRE” –

> An extended health insurance plan will be provided for the lifetime of you and your spouse and the company will pay the premium.

With respect to Provincial hospital/medical coverage, the folder states that upon retirement:

> The Company continues to pay the premium for your coverage.

[34] As noted, the plaintiffs Morris and Plant retired in 1991, at which time the Red Book and folder were in circulation.

"Partnerships for Success" Documents

[35] In 1994, the Red Book and the "Your Employee Benefits Summary" folder were replaced with a comprehensive employee binder entitled "Partnerships for Success".

[36] Initially, this binder described both vacation, medical, insurance and related benefits, and pensions, as part of the "Benefits Partnership". Pensions were of the 'defined benefit' variety. As of July 1996, current salaried employees were allowed to opt-in to a defined contribution pension plan, and new hires became eligible for defined contribution pensions only; this came to be described in the "Partnerships for Success" binder as the "Pension Benefits" program, as distinct from the "Benefits Partnership" program.

[37] The Benefits Partnership section of both the pre- and post-July 1996 binder inserts contained the following general reservation of rights wording:

> This section of your binder has been designed to help you get the most value from MB's *Benefits* [post-1996: *Benefits and Pension*] *Partnership* programs by giving you the details you need to make the appropriate choices for you and your family.
>
> . . .
>
> While this section covers a lot of information, it is not possible to include every detail contained in the insurance policies, group contracts and plan documents. Every effort has been made to summarize the information correctly. However, in the event of any question, the legal documents will govern.
>
> On-going, MB reviews the benefit and pension programs and reserves the right to make changes from time to time. If changes are made, you will receive updates for this section.

Under cross-examination by defence counsel, MB's former Director of Human Resources Mr. Leskewitch, who was involved in drafting of the Partnerships documents, acknowledged that this wording was inserted because the company would need flexibility to deal with changes in circumstances.

[38] That language may be contrasted with wording used in the Pension Plan section of the pre-July 1996 binder, and the post-July 1996 “Pension Partnership” section, both of which contain the following:

> While MB intends and expects to continue the plan indefinitely, it necessarily reserves the right to modify, amend or terminate the plan at any time. . . .

This language is not found in the “Benefits Plan” or “Benefits Partnership” sections of the binder dealing with extended health benefits, or retiree health benefits.

[39] With respect to the Medical Plan for Retired Employees, the “Partnerships” binder sets out the following description:

> When you retire from active service, MB will continue to pay the cost, if any, of your provincial health care plan. You are also entitled to extended health plan coverage. The extended health plan for retired employees is similar to the benefits provided under extended health Option 2 for active employees, except there is no vision care and the maximum lifetime benefit is $50,000.

The referenced “Option 2” is described elsewhere in the binder as having features including an annual deductible of $25; reimbursement of 80% of in-province expenses, and 100% of out-of-province; and, an annual limit on ‘paramedical’ claims of $500 per individual, per practitioner.

[40] At the time of the retirement of the plaintiffs Miller, Lacey, and Walker, this aspect of the “Partnerships” benefit program was in effect.

Insurance Policies

[41] The particulars of the extended health insurance coverage available to salaried employees and retirees were set out in group insurance contracts that MB, up until the merger, maintained with Medical Services Association (“MSA”), which later became Pacific Blue Cross (“PBC”). The contract terms were outlined in booklets or brochures circulated to MB employees. Copies of typical brochures are in evidence; they state that the descriptions are summaries only and that the booklets themselves are not contracts.

[42] Under the terms of the insurance contracts, the insurer would be liable to pay the actual costs of each benefit provided, subject to deductible or "co-insurance" provisions. MB was assessed a monthly premium based on a contribution rate per insured employee. MSA had the right to adjust the contribution rates, on notice to MB, to reflect the claims experience.

[43] The contracts provided for an annual deductible of $25 for each plan member and dependent. After payment of the deductible, the insurer was liable for payment of 80% of all covered claims (except for hospital rooms, and hospital co-insurance charges, which were 100% recoverable), up to an annual threshold, and 100% of covered claims exceeding that threshold figure. Coverage was subject to a lifetime coverage limit.

[44] Over the years, terms of coverage were modified from time to time by agreement between MB and MSA/PBC. These changes were initiated by MB without prior consultation with the insured plan members. Most if not all of the modifications were an expansion of coverage.

[45] Copies of the 1977 and 1981 MSA insurance contracts are in evidence. They included the following "condition of coverage":

> The Employer agrees to charge the employee not more than 50% of the monthly premiums in effect on the inception date of this Contract and to obtain from each employee member employed by him a signed statement in the form approved by MSA, authorizing the Employer to deduct from his earnings and to pay to MSA a portion of the contributions referred to, provided however that this shall not apply were the Employer pays all of the contributions.

Those insurance contracts were silent as to the circumstances in which the employer would pay all of the contributions.

[46] The PBC contract in evidence, dating from 1997, contained no similar condition and did not address in any manner whether the premiums were to be paid by MB, or by the retirees.

[47] The MSA and PBC insurance contracts contained provisions giving the insurer a right to terminate the contract on notice.

General Communications with Salaried Employees

[48] The plaintiffs called evidence from two former MB human resources managers.

[49] Mr. Dwayne Leskewitch, who was referred to above, began employment with MB in 1972 as a Finance Department auditor. In 1979 he moved into a supervisory human resources position with a division of MB, working his way up to becoming the company's Director of Human Resources in 1997. He remained as senior human resources manager with Weyerhaeuser upon the merger in 1999, until 2005.

[50] Mr. Leskewitch regularly met with employees to discuss their compensation. Occasionally he would field complaints that the compensation was falling behind what was being paid by MB's competitors. Mr. Leskewitch would typically respond by encouraging the employees to look at their entire compensation package, including the benefits; with the benefits taken into account, he would explain that the compensation levels compared favourably.

[51] In 1993, Mr. Leskewitch was seconded to the team that developed the new compensation scheme reflected in the "Partnerships for Success" documents. He testified that in the new design, they wanted to reinforce that the compensation was the totality of base salaries, incentives and benefit plans, including medical benefits for retirees.

[52] After the "Partnerships" documents were released, he testified that there was a major effort made to communicate the new program to employees. He had conversations with individuals and groups of employees in which he described the new scheme. During those conversations, he explicitly stated that their future extended health and MSP premiums would be paid in retirement.

[53] Mr. Leskewitch was referred, in his direct examination, to MB's September 1975 request to the Department of National Revenue for clarification of the 1973 tax ruling. He had never seen that letter prior to his review of documents in connection with this action. He had never heard or read a statement from management to the effect that retirees' entitlement to health benefits was considered not legally enforceable, nor that the benefits could be terminated without legal recourse. He is unaware of any written or oral communications to that effect having been made to MB employees during his employment with MB.

[54] Mr. Glen Nymark was an employee benefits supervisor with MB from 1977 to 1985, and manager of employee benefits from 1985 until he left the company in 1998. He testified that one of his functions was to hold seminars for salaried employees, including in particular new employees, to review the benefits described in the Red Book. He would discuss the fact that the cost of retirement medical and extended health benefits would be paid by the company. He testified that he did not describe this benefit to employees as one which was subject to change. On average, he held twelve to fifteen such seminars every year.

[55] Mr. Nymark also held retirement seminars for employees. Initially these were up to three days long, and covered lifestyle issues, health, financial planning and benefits. Eventually the length of the seminars was reduced to one day, and financial planning and benefits issues would still be covered. At least ten to fifteen seminars a year would be held; they were more frequent as the company moved into an era of closures and downsizing in the 1990's. Employees were told that medical and extended health benefits would be continued for the lifetime of the employee and their spouse, at company expense.

[56] None of the individual plaintiffs testified. However, there is in evidence a letter to Weyerhaeuser from the plaintiff Lorne Lacey dated November 2, 2009 setting out Mr. Lacey's objections to the changes to the retirement medical benefits which are the subject of this action. Mr. Lacey's letter reads, in part:

> Weyerhaeuser is further obliged to pay the full premiums for these benefits during the lifetimes of myself and my wife as both were continuously communicated to me by policy from 1968 to the date I retired and through the Annual statements I received from the Company. They were also included in the Employee Benefit Plans Handbook that we received from the Company including updates. As a former Senior Human Resources Manager with MacMillan Bloedel, I was and remain fully aware of the commitments made to all employees.

[57] This letter forms part of the Joint Book of Documents filed under a Document Agreement signed by counsel. The Document Agreement stipulates that the parties reserved the right to challenge the accuracy of any fact or statement recorded in any document, and that the documents were not admitted for the purpose of proving any opinion. Obviously, this letter is not admissible as evidence of any conclusion as to the legal effect of MB's policies. Neither do I view it as adding any substantive evidence as to the content of MB's communications with its employees regarding the scope of retiree benefits. However, in the absence of evidence to the contrary, I do infer from this letter that Mr. Lacey's evidence is consistent with that of Mr. Leskewitch: that he was unaware of any communications from MB to employees to the effect that retirees' entitlement to health benefits was considered not legally enforceable, or that the benefits could be terminated without legal recourse.

Communications with the Plaintiffs

[58] Mr. Morris took early retirement when the Alberni Plywood Division closed. The terms of his retirement were stated in an August 1991 letter to him from MB, which included the statement:

> Coverage under the retiree medical and extended health plans will continue for life for both you and your wife, at Company expense.

Mr. Dwayne Leskewitch, who was at that time Manager of Human Resources at MB's New Westminster operations, testified that this letter to Mr. Morris was consistent with what was offered by MB to other employees whose employment was terminated due to downsizing. Mr. Leskewitch testified that plant closures and downsizing occurred virtually annually; he prepared similar letters himself, and assisted employees in interpreting them.

[59] In 1998, the plaintiff Mr. Miller took early retirement from the company due to restructuring. Copies of two letters sent by MB to Mr. Miller at the time of his retirement in February 1998 are in evidence. The letters do not describe the retirement medical insurance benefits to any extent, except to note that MB had submitted applications for continued coverage to both MSP and MSA. It was noted that Mr. Miller would receive from MSA a brochure describing the extended health plan, and he was asked to read it carefully as there were some differences between the benefits for active and retired employees. In consideration for receiving his severance pay, Mr. Miller executed a release of all claims in MB's favour. The release explicitly excepted his rights under the retirement plan for salaried employees.

[60] Following the merger, Mr. Lacey and Ms. Walker also accepted offers of early retirement, due to restructuring. A December 1999 letter from Weyerhaeuser to Mr. Lacey in evidence does not describe the retirement medical insurance benefits, except to say that retiree benefits would replace his active status benefits as of the date of his retirement. A May 2000 letter in evidence from Weyerhaeuser to Ms. Walker is more descriptive:

> You will have lifetime coverage in the B.C. Medical Services Plan and the extended health plan for retired employees. The only differences from the coverage under the extended health plan for active employees is that there is no eyeglass coverage and the lifetime maximum is $50,000.

[61] Both Mr. Lacey and Ms. Walker also signed releases, in consideration of the payments and terms set forth in the letters provided.

Other Internal MB Documents

[62] Other documents internal to MB management are also possibly of relevance to the proper characterization of the retirement health benefits. These include documents relating to how retirement health benefits were accounted for in MB's financial statements, and relating to what factors MB's management considered in its periodic review of employee benefits.

Accounting Evidence

[63] Up until the 1990's, MB accounted for retiree benefits as incurred, on a pay-as-you-go, or cash, basis. The evidence discloses some effort on the part of MB when the benefits were initiated in the 1970's to estimate projected annual costs over the next ten years. There is no other evidence as to how the benefits were costed or projected at that time.

[64] In the early 1990's, the U.S. Financial Accounting Standards Board issued *Financial Accounting Standard 106: Employers' Accounting for Postretirement Benefits Other Than Pensions*. This new standard required employers to change the accounting of such benefits from a pay-as-you-go or cash basis, to an accrual basis: requiring accrual, during the years that an employee renders the services entitling the employee to the benefits, of the expected cost of providing those benefits in the future. As a listed company on the New York Stock Exchange, MB was obliged to comply with FASB statements. A similar rule was instituted subsequently in Canada. The parties did not put FAS 106 in evidence, but it was agreed that the Court could refer to the document. I have found it necessary to do so to understand the context of the defendant's evidence. The following quotations from FAS 106 explain the approach to be taken to accounting of retiree benefits, and the Board's rationale:

> **FAS 106 Summary**
>
> . . .
>
> The Board's conclusions in this Statement result from the view that a defined postretirement benefit plan sets forth the terms of an exchange between the employer and the employee. In exchange for the current services provided by the employee, the employer promises to provide, in addition to current wages and other benefits, health and other welfare benefits after the employee retires. It follows from that view that postretirement benefits are not gratuities but are part of an employee's compensation for services rendered. Since payment is deferred, the benefits are a type of deferred compensation. The employer's obligation for that compensation is incurred as employees render the services necessary to earn their postretirement benefits.
>
> The ability to measure the obligation for postretirement health care benefits and the recognition of that obligation have been the subject of controversy. The Board believes that measurement of the obligation and accrual of the cost based on best estimates are superior to implying, by a failure to accrue, that no obligation exists prior to the payment of benefits. The Board believes

that failure to recognize an obligation prior to its payment impairs the usefulness and integrity of the employer's financial statements.

. . .

Introduction

. . .

3. The Board views a postretirement benefit plan as a deferred compensation arrangement whereby an employer promises to exchange future benefits for employees' current services. Because the obligation to provide benefits arises as employees render the services necessary to earn the benefits pursuant to the terms of the plan, the Board believes that the cost of providing the benefits should be recognized over those employee service periods.

. . .

5. The Board's objectives in issuing this Statement are to improve employers' financial reporting for postretirement benefits in the following manner:

> . . .
>
> b. To enhance the relevance and representational faithfulness of the employer's statement of financial position by including a measure of the obligation to provide postretirement benefits based on a mutual understanding between the employer and its employees of the terms of the underlying plan;
>
> c. To enhance the ability of users of the employer's financial statements to understand the extent and effects of the employer's undertaking to provide postretirement benefits to its employees by disclosing relevant information about the obligation and cost of the postretirement benefit plan and how those amounts are measured . . .

Standards of Financial Accounting and Reporting

Scope

. . .

7. For the purposes of this Statement, a postretirement benefit plan is an arrangement that is mutually understood by an employer and its employees, whereby an employer undertakes to provide its current and former employees with benefits after they retire in exchange for the employees' services over a specified period of time, upon attaining a specified age while in service, or both. Benefits may commence immediately upon termination of service or may be deferred until retired employees attain a specified age.

8. An employer's practice of providing postretirement benefits may take a variety of forms and the obligation may or may not be funded. This Statement applies to any arrangement that is in substance a postretirement benefit plan,

> regardless of its form or the means or timing of its funding. This Statement applies both to written plans and to unwritten plans whose existence is discernible either from a practice of paying postretirement benefits or from oral representations made to current or former employees. Absent evidence to the contrary, it shall be presumed that an employer that has provided postretirement benefits in the past or is currently promising those benefits to employees will continue to provide those future benefits.

[65] Appendix "A" to FAS 106 sets out a summary of the considerations that were deemed significant by members of the Board in reaching their conclusions. It elaborates further on the Board's view of the nature of retirement health benefits:

> 146. The Board's conclusions in this Statement derive from the view that a defined postretirement benefit is part of an exchange between the employer and the employee. In exchange for services provided by the employee, the employer promises to provide, in addition to current wages and other current and deferred benefits (such as a pension), health care and other welfare benefits during the employee's retirement period. Postretirement benefits are not gratuities but instead are part of an employee's compensation for services rendered. Since payment is deferred, the benefit is a type of deferred compensation. The employer's obligation for that compensation is incurred when the services exchanged for that benefit are rendered, not when an employee terminates or when a retiree receives benefits.
>
> 147. Postretirement benefits are a form of pension benefits in kind. Unlike traditional cash pension benefits, the employer promises to provide defined benefits or services as the need for those benefits or services arises or on the occurrence of a specified event. Typically, those postretirement benefits supplement cash benefits paid after retirement. Regardless of the form of the benefit—in cash or in kind—the underlying promise is the same. In exchange for service over a specified period, the employer will provide the employee and any covered dependents or beneficiaries with the defined postretirement benefits.

[66] The glossary to FAS 106 includes a definition of "plan":

> **Plan:** An arrangement that is mutually understood by an employer and its employees, whereby an employer undertakes to provide its employees with benefits after they retire in exchange for their services over a specified period of time, upon attaining a specified age while in service, or a combination of both. A plan may be written or it may be implied by a well-defined, although perhaps unwritten, practice of paying postretirement benefits, or from oral representations made to current or former employees. . . .

[67] MB's FAS 106 accounting costs were evaluated annually by William Mercer Limited, on the basis of assumptions provided by management. Mercer's reports to MB from November 1994 to and including December 1998 are in evidence. In the

early 1990's, and up to and including its November 1995 evaluations, Mercer used a consistent set of assumptions: that MSP and extended health premiums would increase by 10% in 1993, with annual increases in subsequent years trending downwards, to 4.5% in 2002 and later; and that there was some possibility of future implementation of an MSP payroll tax in place of premium payments, which was accounted for by assuming a 100% likelihood of a premium in the first forecast year, declining by 10 percentage points each year, to a 0% chance in year 11 and later.

[68] In its November 1995 evaluation, Mercer cautioned that premium increases were in fact running higher than in the assumptions, and that rolling the ten-year phase-in of a payroll tax forward each year was having negative impact; management was invited to reconsider its assumptions.

[69] The November 1995 Mercer evaluation also noted that MB's financial statements would have to include disclosure of:

- plan description, funding policy, employee groups covered.

The financial statements are not in evidence; hence, there is no evidence before the Court as to whether the retiree health plan was described as being purely voluntary on the part of MB, nor as to whether MB considered that it had reserved the right to terminate the plan.

[70] Representatives of MB and Mercer met to discuss the assumptions in early December 1995, and in January 1996 Mercer provided a further evaluation based on an alternative set of assumptions: that the assumed increase in future MSP premiums was 0%, i.e. that future premium increases would be the responsibility of employees; and that MB would increase payments towards extended health premiums warranted by increases in the Consumer Price Index, but that cost increases beyond this would have to be addressed through instituting employee contributions, or modifying the benefits. (These same alternative assumptions continued to be used by Mercer in subsequent years up until the 1999 merger with

Weyerhaeuser, with the addition that in December 1998 Mercer based its estimate of future extended health cost increases on the actual claims experience.)

[71] Mercer enclosed with its January 1996 evaluation a selection of newsletters and articles on the subject of FAS 106 accounting, and options available to employers to control escalating retiree health care costs. One such newsletter, produced by Mercer, noted that employers who altered their retiree benefit plans typically made changes that would affect only future retirees, not employees who had already retired.

[72] Also in evidence is a December 1998 letter from Mercer to Mr. Leskewitch, then MB's Director of Human Resource Services, which begins:

> In the past, MacMillan Bloedel has asked whether it is possible to discontinue or reduce the non-pension benefits you provide to your current retirees. We have cautioned you that changing or eliminating the benefits provided to current retirees, if you have not reserved the right to do so, could result in a lawsuit being brought by the retirees against the company.

[73] In cross-examination by defence counsel, Mr. Leskewitch acknowledged having been aware that management was considering the possibility of future changes to retiree benefits; he had been copied on the December 1997 Mercer evaluation, which set out the aforementioned alternative assumptions. Nevertheless, in 1997 and 1998 he continued to advise employees that MB would pay retiree premiums. He testified that in doing so, he was relying on the statements that had been made in the Red Book and the Partnerships manual. It was put to Mr. Leskewitch on cross-examination that by that point in time he was in no position to guarantee that benefits would be provided in the future; he replied that he believed the guarantee employees had been given would be honoured by the company.

MB Human Resources Committee Documents

[74] MB's Board of Directors had a Human Resources Committee. Copies of relevant documents from their meetings during the time period 1994 - 1999 are in evidence. I regard these documents as having particular significance with respect to

two issues. First, they confirm that benefits were regarded as a form of compensation. Second, they are evidence of management's awareness of the need to provide a benefits program which was competitive. Some examples are as follows.

[75] In 1995 the Committee reviewed and approved a "Compensation Plan for Salaried Employees in North America". This Compensation Plan begins with a statement of the company's compensation philosophy:

> ***Our Philosophy***
>
> Our philosophy is to provide a competitive total compensation package in a manner and amount that encourages the maximum individual and team contribution from productive, innovative and committed employees.
>
> Our company will succeed in a rapidly changing, uncertain and highly competitive world if our employees are confident of their abilities, independent, self-motivated and managed. These employees will be committed to personal and company success.

[76] The Compensation Plan then identifies nine "key elements", the first of which is:

> 1. To maintain competitive base salaries and employee benefits through regular market surveys and internal equity programs.

[77] A document identified as information provided for discussion of "Retiree Benefits – Costs and Issues" as an agenda item at a 1998 Committee meeting states:

> **1. Background**
>
> Eligibility:
>
> In Canada, all salaried employees who retire from the company are eligible for lifetime payment of basic medical and a modified extended health plan. . .
>
> The program costs MB about $6 million per year. Although employment has declined from 13,000 last year to about 8,300 today, costs will not decline for many years to come unless B.C. eliminates premiums. Conversely, there is risk of significant increase.
>
> . . .
>
> **2. Legal Requirements**
>
> . . .

> Canadian case law is reasonably developed on the point. Current retirees are probably entitled to continuance of the benefit or a reasonable alternative. Long service active employees are likely in the same position. Short service employees may not be entitled if provided notice of discontinuance of the benefit, and those yet to be hired have no entitlement. . . .

[78] That document is accompanied by a number of charts and tables, including a table comparing MB's retiree benefits for Canadian salaried employees with those of 17 competitors.

[79] The agenda materials for a Human Resources Committee meeting held in June 1999 contain the following note with respect to Canadian benefit plans:

> The majority of salaried employees in Canada are covered by a flex plan that is *in aggregate* competitive and to a large extent matches union negotiated plans.

The agenda materials also state, under the heading "Issues",

> Law in both jurisdictions suggests we have limited ability to reduce or eliminate plans currently available to retirees but may have some flexibility with respect to new employees and employees with relatively short service.

Implementation of Benefit Changes by Weyerhaeuser

[80] Weyerhaeuser acquired MB in 1999 through a share purchase transaction. There were extensive discussions as to MB's current and past employees, and as a term of the acquisition Weyerhaeuser agreed to maintain employee benefits for a period of two years**.** In the disclosure process which preceded the acquisition, MB advised Weyerhaeuser of the existence of its retirement health benefits, but did not advise Weyerhaeuser of there being any binding commitment on its part to provide its retirees with lifetime benefits.

[81] The merger agreement itself provided for a formal disclosure letter, both of those documents being dated June 20, 1999. The disclosure letter discussed retirement health benefits in the following terms:

> MB maintains medical and extended health plans for retirees in Canada and the U.S. as disclosed in the Data Room. In Canada these plans have enjoyed an exemption from taxable benefit status which MB believes is no longer

> applicable. It is MB's intention to advise retirees of this and commence to treat the plans as taxable benefits for 1999.

I infer from the proximity in time that this statement in the disclosure letter was either meant as a reference to MB's decision to change the tax reporting in connection with the MSP benefits, as described above, or was a reference to the process of re-evaluation of the tax status of benefits that had led to that change. In any event, no evidence was put before this Court as to the circumstances which had led MB to conclude that retirement health benefits were no longer tax-exempt.

[82] Following the merger, much effort was put into integrating and harmonizing MB's employee and retiree benefits with Weyerhaeuser's existing plans, which were styled the "Advantages" program. The Advantages program's retirement health benefits included cost sharing between Weyerhaeuser and its retirees. MB employees who were age 50 or older as of December 31, 2000 were permitted to continue with benefits under the MB plan, or switch to the Advantages program. Younger employees would automatically be covered under Advantages. All current retirees – including the plaintiffs – were grandfathered-in, and were to continue receiving those benefits that had been in place at the time of their retirement.

[83] Effective January 2002, the PBC insurance contract was terminated, and Weyerhaeuser entered into an administrative services contract with Maritime Life. From that point on, Weyerhaeuser self-insured all employee and retiree extended health coverage; benefits were funded out of the current year's revenues. Simultaneously, Weyerhaeuser increased the lifetime maximum coverage for retirees from $50,000 to $100,000.

[84] Weyerhaeuser then prepared brochures for those employees covered under the former MB plans, describing their benefits. In evidence are a brochure entitled "Group Insurance Plan" for employees covered under the former MB salaried retiree plan, dated effective January 2002; and a brochure entitled "Group Benefit Plan" for employees covered under the former MB hourly retiree plan, dated effective January 2003. These brochures do not contain any explicit statement that Weyerhaeuser

would pay or would continue to pay the cost of retiree healthcare, nor that benefits were "lifetime". The salaried retiree brochure contained a disclaimer:

> The benefits described under this Plan may be revised from time to time or discontinued. Detailed information about benefits or other provisions of the contract(s) or copies of those provisions may be obtained from Weyerhaeuser.

An even broader disclaimer was made in the hourly retiree brochure:

> The Company reserves the right to change, modify or discontinue the plans and programs described in this Booklet (the Benefit Programs), including employer/employee cost sharing, at any time at the complete and absolute discretion of the Company.

[85] In December 2007, Weyerhaeuser sent a letter to MB salaried retirees, advising of the institution of a scale of premiums to be paid by retirees for continuing extended health coverage, depending on their length of service upon retirement. It appears that the letter was mistakenly sent to all retired salaried employees, not just those who had opted-into the Advantages plan. That letter asserted a right to make unilateral alterations to retiree benefits, including their termination:

> Weyerhaeuser is proud to be able to continue offering a competitive retiree benefit plan to our non-union retiree population. While the Company plans to provide benefits to retirees on an indefinite basis, the Company reserves the right to change or terminate the policies and plans that make up the Retiree Benefit Plan for current or future retirees, spouses, or dependents if competitive or financial conditions make it necessary to do so.

Within a matter of weeks, Weyerhaeuser sent to retirees who had remained in the MB benefits program a retraction, advising that the December letter had been sent in error. However, the retraction letter repeated the above-quoted reservation of the company's right to terminate retirement benefits.

[86] Ms. Anne Giardini, President of Weyerhaeuser, testified as to the implementation of the current retiree health plan. By 2009 the company was in a serious cash loss position, and losses were projected to continue for a number of years, reflecting industry-wide difficulties. To ensure the continuing viability of operations, Weyerhaeuser undertook an extensive review of what cost-cutting

measures were available to it. A salary freeze was instituted, and a program of matching contribution to employee savings was discontinued. Other employee benefits were suspended as well. With respect to retirement health benefits, two alternatives were identified: a reduction in the scope of benefits provided; and, institution of a co-payment regime. It was Ms. Giardini's personal view that the retirees as a whole would be best served by preserving the existing scope of group coverage to the greatest extent possible, while requiring some degree of cost sharing, and ultimately the company decided to go down that path.

[87] Ultimately, Weyerhaeuser decided that its contribution to the cost of Medical Services Plan and extended health coverage would be frozen at 50% of current levels. Effective January 1, 2010, salaried retirees wishing continued coverage would have to pay 50% of the premium costs, and would bear the full cost of any future premium increases.

[88] The decision was communicated to the salaried retirees in a letter sent in October 2009. In a follow-up letter sent the following month, Ms. Giardini elaborated on Weyerhaeuser's reasons for implementing cost-sharing:

> Weyerhaeuser's plans and arrangements are made from time to time at the discretion of the company, taking into account a range of factors. In order to accomplish its goals of providing pensions and other benefits, as well as running the businesses that ultimately pay for benefits, cost and benefits, [sic] changes needed to be made. Current retiree benefits are not affordable. If they were continued on a premium-free status, employees retiring later would not enjoy similar benefits. Their contributions to the company would go, in part, toward maintaining the premium free benefits of current retirees without any hope of receiving such benefits themselves. I do not believe we can attract or retain employees on that basis. Our goal, instead, is to strive to provide some measure of retirement security for everyone - retirees and current employees.
>
> . . .
>
> We are making and will continue to make tough decisions. We are mindful that we need to do so while being respectful of all, including retirees. We know that some retirees are in a position of vulnerability. We have referred lower-income retirees to the government subsidy program for Medical Services Plans premiums, which may be of assistance in reducing the cost of medical coverage. Retirees may also wish to look into other government programs specific to their province of residence. For example, B.C. residents

> should enroll in the Fair Pharmacare program as lower income seniors may have 75% of their prescriptions covered, with no deductible.

Discussion and Analysis

[89] The plaintiffs' employment contracts were not in written form, and the terms were not negotiated. As in every such case, determining the terms of the contract requires consideration of the written and verbal communications which passed between the defendant and its salaried employees.

[90] It should be noted at the outset that although there inevitably would have been differences in the contracts of individual employees – particularly as to salary – the subject retiree health benefits were offered to the salaried employees *en masse*; therefore, communications with any one employee, or group of employees, regarding those benefits may be relevant to determining the nature or character of those benefits within the context of the employment contracts of the salaried employees as a whole, including the plaintiffs.

[91] It should also be noted that although the common law requires a contract to have a measure of certainty to be legally enforceable, the degree of certainty is relaxed in the field of employment law. In *Johnson v. James Western Star Ltd.,* 2001 BCSC 1008, Lamperson J. adopted the following passages from Geoff England, Innis Christie & Merran Christie, *Employment Law in Canada,* 3d ed., looseleaf (Toronto: Butterworths, 1998):

> 7.61 . . . Modern courts are sensitive to the fact that parties to relational contracts in the commercial sphere require a relatively high degree of incompleteness, ambiguity and flexibility for their agreements to operate successfully. Accordingly, the courts do the utmost to flesh out the contractual skeleton, especially by liberal use of implied terms, in order to maintain the contract rather than see it avoided. In the employment context, too, courts will strive to uphold vague and incomplete contracts of employment by making reasonable inferences from the parties' verbal statements, written documentation, past practices and the generally accepted standards of industrial behavior.
>
> 7.62 When construing written and verbal representations, the courts must decide whether a reasonable person in the position of the parties would have intended that the representation have contractual force, and the answer is likely to be in the affirmative the more detailed and clear the representation ...

Effect of the Early Retirement Releases

[92] The plaintiffs Miller, Lacey and Walker all executed releases in favour of the company. It is argued by the plaintiffs that in respect of the right to retirement health benefits the releases constitute a collateral contract.

[93] I do not read the releases as having expanded in any way those plaintiffs' entitlement to retirement benefits. At most, the terms of the releases served to confirm the relationship and obligations which were already in existence. Those plaintiffs' entitlement to benefits continued on the terms they had previously been offered, and determination of the extent of that entitlement rests entirely on the interpretation of the employment contract.

Nature of the Retirement Health Benefits - Gratuity, or Compensation?

[94] In determining the terms of the contract, I regard the following three aspects of the communications between MB and its employees as particularly significant.

[95] First, the 1985 Benefits Summary folder explicitly stated that extended health insurance would be provided for the "lifetime" of the retiree and his or her spouse. This wording was not carried over in the Partnerships binder. However, Mr. Morris was told by MB, in writing, in 1991 that his coverage would continue "for life", at the company's expense. In 2000, Ms. Walker was told by Weyerhaeuser, in writing, that she would have "lifetime coverage". This is how the benefits were described to employees in seminars. Based on these communications from the employer, I have no doubt that there was a common understanding amongst the employees that benefits would be provided for life.

[96] Second, the Red Book and the 1985 Benefits Summary folder explicitly stated that the benefits provided to employees were a form of compensation. This is consistent with how the benefits were described to employees by Mr. Leskewitch, in particular his having encouraged employees to look at the entirety of their benefits and compensation when comparing their compensation packages to those offered by MB's competitors. This means that employees would reasonably have considered

their retirement health benefits as being part of what was paid to compensate them for services rendered.

[97] Third, both the 1985 Benefits Summary folder – "it is in your interests to know what you are entitled to" – and the 1994 Partnerships binder – "[y]ou are also entitled to extended health plan coverage" – describe the retiree coverage not as a gratuitous benefit, but as an entitlement.

[98] The fact that the retirement health benefits were initially contemplated by MB as being purely gratuitous and discretionary in nature, as evidenced by the 1973 and 1975 correspondence with the Department of National Revenue, does not assist the defendant. There is no evidence of this subjective intention having been communicated to the plaintiffs, nor to any other salaried employee, nor, in particular, to senior human resources managers such as Mr. Leskewitch and Mr. Nymark.

[99] The evidence of the substance of the employee communications is all to the contrary. Though it appears to have been the intention of management when the retirement health benefits were instituted that they be provided gratuitously, the manifestations of its intention – through the company's actions in distributing the handbooks, worded as they were, through the oral representations of human resources managers, through written communications with retirees confirming the terms of their retirement, and through MB's "Compensation Plan" – can only reasonably be interpreted as demonstrating that this initial subjective intention changed over time. The evidence of the communications from 1985 onwards is only consistent with the retirement health benefits having been intended as a form of deferred compensation, and not as a gratuitous, discretionary perk.

[100] I have noted the evidence that MB seems to have been determined to provide a benefits package which compared favourably to that offered by its competitors. There is no evidence that its competitors provided retirement health benefits only gratuitously, nor that such a practice, if it existed, ought to have been known by MB employees to be widespread in the forest product industry.

[101] MB moved to accrual accounting of the benefits in the early 1990's, in accordance with FAS 106. The FAS documents clearly demonstrate that this accounting change was predicated upon the status of health care benefits as a contractual obligation. There is no evidence that accrual accounting under FAS 106 was regarded by the accounting profession or by industry as being necessary for benefits that were purely gratuitous and discretionary. That is not to say that an employer would not be obliged to account for benefits that were being provided but that could be terminated under the terms of the contract. However, I am not persuaded that MB decided to account for these benefits under FAS 106 on the understanding that it had been providing retirement health benefits as anything other than a form of compensation.

[102] It is the case that the retired employees did not have tax deducted at source on the extended health premiums paid on their behalf when insurance was placed through MSA and PBC. This fact appears consistent with MB's initial intent to provide the retirement benefits gratuitously. I have no evidence as to what factors may have led MB to reconsider the tax-free status of the benefits, as referred to in the disclosure letter to Weyerhaeuser. I have no basis in the evidence for reaching any conclusions as whether this tax treatment was or was not consistent with characterizing the retirement benefits as gratuities or as deferred compensation, under the *Income Tax Act* or under any other applicable Revenue Canada Interpretation Bulletins in effect from the 1970's to the late 1990's.

[103] MB did, however, change its tax treatment of MSP premium payments, in or about 1998. No explanation for this change has been provided. There is no evidence of any change in terms of employment of MB's salaried employees at that date that would account for this change. One possibility is that the change was made because MB reached the conclusion that by this point in time the payment of MSP premiums had become a form of compensation. On the limited evidence I have, MB's decision to begin to issue T4A's only to employees who retired in or after 1998 may simply have been a matter of administrative convenience. I do not regard the fact that T4A's have not been issued to the pre-1998 retirees, including the plaintiffs Plant and

Morris, as being determinative of, or material to the status or characterization of their health benefits.

[104] Finally, the fact that the retirement medical benefits were initially offered unilaterally, and were not bargained for, does not assist the defendant. A unilateral offer by an employer of increased wages becomes enforceable as a "unilateral contract" when the employee accepts the offer through continuing to work: *Hannigan v. Hannigan*, 2007 BCCA 365 at para. 48. In the case of a unilateral offer of benefits intended to take effect upon termination, the employee's consideration is not simply continuing to work, but continuing to work until termination: *Sloan v. Union Oil Company of Canada Ltd*., [1955] 4 D.L.R. 664, 16 W.W.R. 225 (B.C.S.C.); *Ciric v Raytheon Canada Limited*, 2008 BCCA 241. The unilateral contract then takes effect, and the employer's offer becomes legally enforceable.

[105] The objective evidence leads me to conclude that the retirement health benefits were intended as a form of deferred compensation, that the offer to continue to provide those benefits was a term of a contract between MB and its employees, and that as such it is enforceable.

What Benefits Did MB Contract to Provide?

[106] It is necessary to state with some further precision exactly what benefits the plaintiffs were entitled to.

[107] MB undertook to pay its retirees' future MSP premiums. This promise was made unconditionally.

[108] There was no evidence put before me of the history of MSP premium increases, if any, over the period of the plaintiffs' employment. There is no evidence that some possibility of future premium increases could not have been within the reasonable contemplation of the parties, when the plaintiffs retired. To the contrary, the correspondence between MB and Mercer in the 1990's as to the handling of the benefits in the financial statements discussed the issue of future cost increases, and the Human Resources Committee was specifically warned of the risk of a significant

increase of health care costs, no later than 1998. MB took no steps to advise retirees that its obligation to fund MSP premiums would be limited or restricted in any way.

[109] I find that MB contracted to pay the present and future Medical Services Plan premiums of its retirees and their spouses in full, for life, without any co-payment.

[110] With respect to extended health care, I find that MB contracted with its employees to provide extended health care benefits to retirees and their spouses at its sole cost, for life.

[111] For the reasons I explain below in the discussion of vesting, I find that the defendant's obligation is to continue to provide to the plaintiffs those extended health care benefits that were available at the point of their retirement.

Did MB Effectively Reserve a Right to Terminate the Retirement Health Benefits?

[112] There is some inconsistency in the written documents in the verb tenses used to describe the various employee benefits. The Red Book stated explicitly, in the introduction to its Chapter 6, what Family Benefits were being paid "today". The use of that word is capable of being read not as a guarantee that benefits would continue on the same terms in the future, but as implying a reservation by the company of a right to change the benefit structure in the future. With respect to benefits generally, the Red Book also stated that the company "pays" – present tense – the full cost of benefits, again possibly implying that the cost structure could change.

[113] However, the health plan for retirees was described in the Red Book not in the present tense (e.g. "the company pays"), but in the future tense: "When you retire . . . the company will pay . . .", and "[t]he company will also provide . . ." The 1985 folder also used the future tense in describing the retirement health benefits: an extended health insurance plan "will be provided", and "the company will pay the premium". The future tense was also used in the Partnerships binder: "When you retire . . . MB will continue to pay the cost of your provincial health care plan".

[114] These do not read as simple statements of fact regarding the retiree benefits currently available. Nor is it reasonable to read them simply as statements of what an employee would obtain only at the commencement of their retirement, in the future, without any implication as to whether the benefits would continue throughout retirement. These uses of the future tense are far more consistent with the written statements having been intended as promises that retirees would receive a specific suite of benefits upon retirement that would continue through the duration of retirement – "for life" – as future compensation for services rendered, and not subject to cancellation.

[115] The Red Book contained no explicit reservation of rights with respect to retirement health benefits. Explicit reservation language was used with respect to pension benefits: "MB . . . reserves the right to modify, amend or terminate". The fact that such language was used in connection with one, and not the other, implies that no such reservation was intended in the Red Book with respect to the health benefits.

[116] Reservations of rights language is found in the Partnerships binder but, as noted above, the only wording relevant to the retirement medical benefits is the general disclaimer, that MB reserved the right "to make changes from time to time" with respect to benefits and pension. The particular provision respecting pensions – "reserves the right to modify, amend or terminate" – is more comprehensive.

[117] Nowhere in any of the MB communications made up until the dates on which the plaintiffs retired is there found the sweeping right to terminate or discontinue benefits which Weyerhaeuser asserted in its post-acquisition communications.

[118] The representation of the duration of the benefits as "lifetime" was not qualified. MB did not say that the coverage was "for life, until we decide otherwise". The assertion by Weyerhaeuser of a right to terminate the benefits at its discretion is completely inconsistent with the way the benefits were described by MB.

The Effect of the "Right to Make Changes"

[119] The Partnerships binder, which went into force in 1994, purported to reserve to MB a limited right to "make changes from time to time" to the benefit program. The phrase is found in the introductory paragraphs on the first page of the Benefits section of the binder. This phrase gives rise to three questions.

[120] The first question is whether this term was enforceable against the retirees. No such reservation of right was found in the Red Book, nor in the 1985 Benefits folder. As I have discussed, the 1985 Benefits folder promised that lifetime extended health insurance would be provided, and that the company would pay the premium. To the extent that the right to make changes could operate to restrict the benefits provided to those employees who had been covered by the 1985 documents – including the plaintiffs – I would hold that the right to make changes asserted in 1994 was of no effect.

[121] The second question is whether the right, as expressed, could in any event have included a right to cap Weyerhaeuser's financial exposure to health costs and institute co-payment provisions.

[122] I do not interpret this right, as expressed, as having been intended to encompass what Weyerhaeuser has done in the present case. Weyerhaeuser has not simply made a change to the retirement health coverage provided. Under the current plan, Weyerhaeuser is not providing coverage, as that phrase would reasonably be understood by an employee. Instead, it is offering to subsidize coverage to those pensioners who can afford to pay for it at the current rate, and who will be able to afford future cost increases. The retirement benefits of fully-funded Medical Services Plans premiums and fully-funded extended health insurance coverage have not simply changed, they have been terminated.

[123] It might be said in Weyerhaeuser's favour that what was being reserved by MB was not a right to make changes to the health coverage, but a right to make changes to the employee benefit package as a whole. As fully-funded retirement

health coverage was simply an element of the employee benefit plan, terminating the fully-funded health coverage was simply a change to the plan. I would not accept this interpretation. In contrast to the rights reserved to MB with respect to the pension plan – rights to "modify, amend or terminate" – the right to "make changes" seems mild. The security offered to an employee through an employer's undertaking to bear the cost of future retirement health coverage would have been appreciated by both MB and its employees to be of considerable value. In my view, much stronger language, located in the subsections of the Partnership binder specific to health and retirement health benefits, would have been required to give the employer a right to make the fundamental changes which are in issue.

[124] The third question is whether the right to make changes includes a right to change the terms of a retiree's coverage after the date of retirement. Is this phrase properly construed as expressing a right to change the terms of all retirement health coverage at any time, including the right to change a retiree's coverage after the date of retirement? Or does it only permit the employer to impose changes to retirement health benefits on those currently employed when the change is made, changes that will affect only them in their future retirement?

[125] No right to make changes in health benefit coverage specifically after the retirement date was asserted in the Partnerships binder. No such reservation of rights appears in any of the letters that are in evidence addressed to employees that outline their retirement benefits. Furthermore, the Partnerships binder said that if changes are made, the changes would be communicated through updates to the Benefits section of the binder; there is no mention made of any mechanism for advising retirees. These factors all give weight to the proposition that "changes" would only affect current employees, not those who had already retired.

[126] Furthermore, as I stated above, it would reasonably have been within the contemplation of both MB and its employees that retirees had a particular need for security; that persons on a fixed income would have a particular desire for certainty and predictability. Therefore, a more restricted interpretation of the reservation of a

right to make changes, as affecting only current employees, would be at least as reasonable as the broader interpretation. Given these two reasonable alternative interpretations of the language in the Partnerships binder, I find the reservation of the right to make changes to be ambiguous. I therefore interpret the language *contra proferentem,* against the interests of the party who drafted it and who relies upon it.

[127] I find that the right to make changes as expressed did not extend to changing the terms of an employee's retirement health coverage after the date of retirement. The language may, at the most, have entitled MB, and Weyerhaeuser, to make changes unilaterally, prior to an employee's retirement, in the retirement benefits which that employee would become entitled to – just as Weyerhaeuser did when it unilaterally moved younger MB employees over to its Advantages program.

[128] My decision on this point is reinforced by my findings on the issue of vesting, as described below.

[129] In the present case the plaintiffs, having continued in the employ of MB until retirement, have met the terms of the unilateral contract, and are entitled to the retirement benefits in effect on their retirement date.

Did the Retirement Health Benefits 'Vest'?

[130] This last point raises the issue of vesting. Counsel for both parties in the present case – the defendant in particular – framed substantial portions of their arguments in terms of the concept of vested rights, in particular as a question of whether the subject benefits were intended by the parties to vest. Their arguments rely in part on diverging lines of U.S. case authority on the vesting of welfare plan benefits covered by the *Employee Retirement Income Security Act*, 29 U.S.C. §1001 *et seq.* [*ERISA*].

[131] As noted by La Forest J. in the majority judgment in *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230 at 270, 102 D.L.R. (4th) 609, the term "vested" can carry many different meanings. More recently, the Supreme Court of

Canada provided some guidance as to how to determine whether a right granted by statute has vested, in *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73. I will return to *Dikranian* below. At this point in the analysis, it is sufficient to note that in a private law setting, vesting, in the sense of becoming inalienable or interminable, may be an incident of certain classes of rights or interests. However, arguments over whether a particular right was intended to be vested, or merely contingent, can obscure the more fundamental question of the character of the right in issue.

[132] Aside from one essential point – that if a retirement right is inalienable, it is at the time of retirement that the right vests (see *Dayco*, at p. 293) – I have not found it helpful to analyze the facts of this case through focusing on the concept of vesting in the abstract, without consideration of the nature of the retirement benefits in issue. As discussed above, I have found that during the currency of both the Red Book and the Partnerships binders, retirement health benefits were intended in the employment contracts for MB's salaried employees as a form of deferred compensation. It is clear in Canadian law that a right under a common law contract of employment to deferred compensation upon retirement is one which vests.

[133] The rationale for this was discussed by Wilson J. in *Sloan v. Union Oil, supra.* The case arose out of the defendant's sale of its assets to British American Oil, in 1945. The plaintiff had been the defendant's credit manager. As early as 1941, the plaintiff had been advised by Union Oil that he would be granted a termination allowance, if his employment were terminated for any reason other than discharge for cause, voluntary resignation, retirement, or death. Upon the sale of the defendant's assets, the plaintiff's employment ceased. B.A. Oil was under no obligation to retain any of the employees. The plaintiff was persuaded to accept employment with B.A. Oil in his former position, though on different terms. He did not appreciate until some time later that B.A. Oil did not offer termination allowances. He obtained legal advice that he was entitled to his termination allowance from the defendant, but made no claim against the defendant until 1950 – just before expiry of the limitation period – when he voluntarily left B.A. Oil.

[134] In finding for the plaintiff, Wilson J. considered a number of U.S. cases dealing with employers' promises to pay various types of benefits on completion or termination of a contract, such as completion bonuses (considered in *Scott v. J. F. Duthie & Co.,* 216 Pac. 853 (Wa. Sup. Ct. 1923), and in *Zwolankek v. Baker Mfg. Co.*, 150 Wis. 517, 137 N.W. 769 (1912)), and life insurance (*Mabley & Carew Co. v. Borden,* 129 Ohio St. 375, 195 N.E. 697 (1935). He then said:

> In *Wilson v. Rudolph Wurlitzer Co.* (1934), 194 N.E. 441, the defendant had set up a pension scheme for its employees and advised its employees of its terms in a booklet . . . . The Court of Appeals of Ohio, per Ross J. at p. 443 said this:
>
> > "It is plain that the pension plan was an integral part of the program for his employment. To say that it constituted merely a nebulous inducement, unsupported by an intent to be bound by the provisions mentioned, is to charge the employer with the grossest fraud. This provision constituted a continuing part consideration for the services rendered by the employee. It was a daily inducement to continuation of service and to exertion to satisfy, which was successful for more than twenty-four years."
>
> I find these authorities, foreign of course, but not foreign to the common law, most convincing.
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> . . .
>
> It seems to me there are here the essentials of a contract, offer and acceptance, promise and consideration. In the part of Ex. 3 (sec. 1) where provision is made for termination allowance, certain paid holidays are listed and certain rights to vacations with pay are granted. Could it be argued that an employee who had taken the vacation granted would have no right of action against the company for wages for the period covered by the vacation? Surely not. The concession by an employer to an employee of the right to holiday pay or a termination allowance is as much a part of the consideration for his services as is his right to wages. It is part of the contract of employment.
>
> It is also asserted here that the defendant had a right to "terminate" its termination allowance after, or coincidentally with, its discharge of the plaintiff from its employment. This argument stands or falls with the argument as to whether there was or was not a contract in respect of termination allowance. If there was such an offer [contract] it existed, in the absence of any notice cancelling it, up to the time when the employee was discharged. Once he was discharged the right to a termination allowance crystallized and could not thereafter be extinguished by any notice purporting to "terminate" or "modify" it. The offer could be cancelled before the plaintiff was discharged but not after. I revert to my illustration of vacation pay. Could the employer, after the employee had taken the vacation offered to him on p. 9 f Ex. 3, "terminate" the "policy" of vacation pay so as to deprive the employee of the right to

> collect it? Again I say, surely not. And again I refer to *Mabley & Carew Co. v. Borden*, *supra.*

The analogy to the present case is strong.

[135] I would not by any means say that Weyerhaeuser, in implementing cost sharing, has been guilty of "the grossest fraud" discussed in *Wilson v. Rudolph Wurlitzer Co.* It is apparent that Weyerhaeuser struggled with the decision, and I believe it reflected a genuine attempt to balance a number of what management perceived to be competing and conflicting considerations of equal importance. But the decision, fundamentally, was not one Weyerhaeuser was free to make. The business it acquired came impressed with a contractual obligation in favour of MB's retirees. Weyerhaeuser was not entitled to sacrifice the contractual rights of MB's retirees, in order to further the interests of its own current employees and shareholders.

[136] The defendant relies in part upon a substantial body of U.S. case law decided under *ERISA*, to the effect that there is a presumption against vesting of retirement welfare benefits, or that an inference of vesting should only be made on clear and compelling evidence (e.g., *Anderson v. Alpha Portland Industries, Inc.,* 836 F.2d 1512 (8th Cir. 1988); *Gable v. Sweetheart Cup Company Inc.,* 35 F.3d 851 (4th Cir. 1994); *Sprague v. General Motors*, 133 F.3d 388 (6th Cir. 1998).

[137] *ERISA* sets out minimal standards for various aspects of employee benefit plans - both pension plans, and welfare plans (the latter including plans, funds or programs maintained for the purpose of providing medical, surgical or hospital care benefits, and also including plans for supplemental pension payments intended to offset increases in the cost of living). Welfare plans are not mandatory, but if provided must be established and maintained pursuant to a written instrument (§1102 (a)(1)), and must be described in summary plan descriptions "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan" (§1022 (a)). The plan descriptions are to be provided to all employee participants (§1021 (a)); it has been

widely held, consequently, that conflicts between the terms stated in the formal plan documents and those made through informal communications, will be resolved in favour of the former (e.g., *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2nd Cir. 1988) at 493; *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990) at 665-666); and further, "statements in a summary plan are binding and if such statements conflict with those in the plan itself, the summary shall govern": *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988) at 136.

[138] *ERISA* provides that pension plan benefits are non-forfeitable upon an employee attaining retirement age (§1053(a)). Welfare plans are specifically exempt from this vesting requirement.

[139] The Supreme Court of Canada in *Dayco* – which concerned a union's right to grieve termination of retirement benefits after expiry of a collective agreement – reviewed the conflicting lines of *ERISA* jurisprudence: those cases that have held against a presumption of vesting, as described above, and the minority that reach a contrary result, principally *U.A.W. v. Yard-Man, Inc.,* 716 F.2d 1476 (6th Cir. 1983), a collective agreement case. In his majority judgment, La Forest J. expressed a preference for the "compromise" approach taken in *United Paperworkers v. Champion International Corp.,* 908 F.2d 1252 (5th Cir. 1990): that, at least with respect to collective bargaining cases, it could be open to arbitrators or courts on a case-by-case basis to infer an intent to vest benefits from the circumstances in which a collective agreement was negotiated (*Dayco* at paras. 73 and 84).

[140] In passing, La Forest J. noted that the American position on retirement benefits must be understood in the context of their laws (*Dayco*, para. 63). He did observe that there are many points of similarity between Canadian and U.S. labour law, in particular the point that vesting of retirement benefits may be bargained for by a union (paras. 80 - 82).

[141] In my view the U.S. case law on the presumption against vesting of retirement benefits has to be treated cautiously, particularly in the context of common law

employment contracts, and cannot simply be grafted onto Canadian law. I say so for several reasons.

[142] First, the relationships at issue in the present case are governed by common law. The character of compensation benefits as a form of contractual consideration is a distinguishing feature. In contrast, it has been noted that in the U.S., the statutory framework of *ERISA* has replaced the deferred compensation theory of retirement benefits; see Jennifer L. Pratt, "Reversion of Surplus Pension Assets Upon Plan Termination: Is It Consistent with the Purpose of *ERISA*?" (1987) 62 Indiana Law Journal 805 at 806-807. (That author's comments were directed toward pension benefits in particular, but the same reasoning applies to retirement welfare benefits.)

[143] Second, the *ERISA* case law emphasizes the determinative nature of the formal plan documents. In those cases in which collective bargaining has taken place, the terms of the collective agreement must also be scrutinized. In contrast, in the present case there is no one document that has been put forth as a definitive and exclusive statement of MB's obligation to pay for lifetime benefits. All communications between MB and its employees on the subject, both written and oral, may have equal weight as evidence of the employment contract's terms. I cannot discount the evidence of what was said to employees by Mr. Leskewitch and Mr. Nymark, the same way that similar evidence would be treated in a U.S. *ERISA* case.

[144] Third, many courts have found significance in the fact that *ERISA* provides for vesting of pension benefits, but not welfare benefits, as observed in Richard L. Kaplan, Nicholas J. Powers, and Jordan Zucker, "Retirees at Risk: The Precarious Promise of Post-Employment Health Benefits" 9 Yale Health Policy Law & Ethics 287 at 303:

> ERISA's silence regarding the vesting of health care benefits has spawned extensive litigation and nuanced jurisprudential hopscotch over whether vesting of welfare benefits can occur in the absence of explicit and unambiguous contractual language in a company's benefits plan agreement.

[145] This absence of a vesting requirement in *ERISA* needs to be understood in the context of specific legislative choices made by Congress. The legislative intent was described by the 3rd Circuit Court of Appeals in *Hozier v. Midwest Fasteners, Inc.,* 908 F.2d 1155 (1990) at 1160:

> Congress plainly did not impose as stringent vesting requirements as it might have. We can hardly attribute that decision to oversight, however. Having made a fundamental decision not to require employers to provide any benefit plans, Congress was forced to balance its desire to regulate extant plans more extensively against the danger that increased regulation would deter employers from creating such plans in the first place. In other words, although ERISA was clearly "designed to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw v. Delta Air Lines, Inc*., 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983), the statute was also designed to "minimize[ ]" the "adverse impact" of "cost increases" imposed on employers by the tougher regulation, H.Rep. No. 533, 93rd Cong., 1st Sess. 1, reprinted in 1974 U.S.Code Cong. & Admin. News 4639, 4639. Thus, Congress analyzed "all of the provisions in [*ERISA*] ... on the basis of their projected costs in relation to the anticipated benefit to the employee participant." Id., 1974 U.S.Code Cong. & Admin.News at 4639-40.

It would therefore seem irrational to apply *ERISA* case law that turns on the absence of vesting provisions, to situations to which the *ERISA* regulatory framework does not apply.

[146] It is possible to read La Forest J.'s judgment in *Dayco* as implying that there are parallels between the U.S. legal environment, in which the same legislation regulates pension and welfare benefits without vesting of the latter being required, and the Canadian environment, in which only pension benefit legislation requires vesting (see *Dayco*, para. 80). I do not, however, read his judgment as endorsing the consideration of U.S. case law in the abstract without regard to legislative context. As I read it, his judgment does not lead to the conclusion that the absence of vesting legislation in Canada has any particular implications for the interpretation of employment contracts. Nor does his judgment imply that Canadian courts and arbitrators ought to follow U.S. law by imposing on employees or unions contending for vested rights a particularly heavy burden of proof.

[147] Fourth, there are obvious differences in Canada and the U.S. as to the extent to which health care forms part of the social contract. Canadian and U.S. employees

may have very different expectations, and may understand their employment contracts through a significantly different set of presumptions, when it comes to the subject of their rights to health care coverage. We cannot blithely assume that assumptions found by U.S. courts to be implicit in a particular employment relationship would necessarily hold true north of the 49th parallel.

[148] In arguing that vesting should not be found in an ambiguously worded contract, the defendant cites a portion of the following passage from *Moore v. Metropolitan Life Insurance Co*., 856 F.2d 488 (2nd Cir. 1988) at 492:

> With regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans. Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increase in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs.

The Second Circuit Court of Appeals offers these considerations as reasons why *ERISA* does not require vesting. These considerations are not provided as being germane to interpretation of a particular employment contract; they provide no justification in the present case for taking MB's promise of lifetime coverage at less than face value. The economic considerations discussed in *Moore* may militate against an employer making an open-ended commitment to its employees. They do not militate against enforcing a commitment which has been made.

[149] The defendant points to the termination provisions of the MSA and PBC insurance contracts that were in force when the plaintiffs retired, and, citing *Gable v. Sweetheart Cup Co.*, *supra*, and the decision of Romilly J. in *B.C. Nurses Union v. Municipal Pension Board of Trustees*, 2006 BCSC 132, [*BCNU*] argues that the plaintiffs' rights were not vested, but only contingent, being dependant on those policies remaining in force. (This argument, of course, has no bearing on MB's promise to pay MSP premiums.)

[150] In *Gable*, the employer had instituted a medical and life insurance plan which initially consisted only of an insurance policy; the policy provided that it could be amended or discontinued without notice to beneficiaries, and insurance certificates provided to employees contained this provision. This insurance policy was still in effect when the plaintiffs retired. The plaintiffs had been told upon their retirement that coverage would be continued ". . . during the remainder of your lifetime at company expense". When a successor company later modified their coverage and instituted co-payment requirements, the plaintiffs sued.

[151] The employer succeeded at trial, and the Fourth Circuit Court of Appeal affirmed. Their reasons are very much based on the statutory purpose and requirements of *ERISA*. The Court observed that as *ERISA* does not mandate vesting of welfare benefits, employers are free under the statute to modify, amend or terminate benefits. The modifications in the formal written plan documents override all other communications:

> . . . ERISA prohibits informal written or oral amendments of employee benefit plans . . . and references to lifetime benefits contained in non-plan documents cannot override an explicit reservation of the right to modify contained in the plan documents themselves . . . .
>
> . . .
>
> As a matter of statutory policy, ERISA places great weight on the written terms of the formal plan documents. Congress expressed this "emphatic preference for written agreements" in ERISA in order to establish predictability as to an employer's future obligations. Here, the official plan document -- the John Hancock master policy -- unambiguously set out the company's right to terminate or modify the plan at any time. Were we to hold that other communications could nullify this express written term, plan documents would no longer serve to ensure predictability as to employers' future liabilities, and "consequently, substantial disincentives for even offering such plans would be created."
>
> . . . Benefit descriptions cannot be translated into guarantees that benefits will never be altered, especially where, as here, the descriptions fall well short of the "precise language denying the right to withdraw benefits" that courts require to find the creation of a vested right. Therefore, we hold that the plaintiff retirees' benefits did not vest, and that the company retained its statutory right to modify or terminate the plan at any time.
>
> [*Gable* at p. 857, citations omitted].

[152] It is upon such interpretations of *ERISA* that U.S. courts have founded decisions that a promise of "lifetime benefits" made outside formal plan documents will have no contractual effect. Such a promise, it has been held, merely describes the period of time during which the retired employees will be eligible to receive a particular benefit, so long as the benefit is still available under the plan: see *Unisys Corp. Retiree Med. Ben. Erisa Litigation*, 58 F.3d 896 (3rd Cir. 1995); *Sprague v. General Motors Corporation, supra*. For the reasons stated above, I find this analysis to have no application outside the framework of *ERISA.*

[153] In *BCNU*, the plaintiff sought a declaration that its retired members were entitled to a vested interest in benefits which had been available under the Municipal Pension Plan at the time of their retirement. The governing legislation referred to specific group insurance contracts under which retirement benefits were to be provided. Those group insurance contracts specifically provided that their terms were subject to amendment. In considering whether the plaintiff could claim a vested interest on behalf of its members, Romilly J. reviewed the Supreme Court of Canada's decision in *Dikranian*:

> [178] *Dikranian* introduced a new analytical framework with respect to determining whether an entitlement has vested. As I will shortly discuss, the Court articulated two criteria: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement. This framework is rather imprecise, and, in my view, its application to the facts of the present case first required consideration of the issues raised by the parties in their initial submissions and addressed above.
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> . . .
>
> [184] Commencing at para. 29, Bastarache J. discussed the concept of vested rights, describing them as resulting from "the crystallization of a party's rights and obligations and the possibility of enforcing them in the future": para. 30. He then articulated an analytical framework for recognizing when rights have vested:
>
> > Few authors have tried to define the concept of "vested rights". The appellant cites Professor Cote in support of his arguments. Cote maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (Cote, at pp. 160-61). This analytical approach was

> used by, *inter alia*, the Saskatchewan Court of Appeal in *Scott v. College of Physicians and Surgeons of Saskatchewan* (1992), 95 D.L.R. (4th) 706, at p. 727.
>
> I am satisfied from a review of the case law of this Court and the courts of the other provinces that the analytical framework proposed by the appellant is the correct one.

[185] With respect to the first criterion, he continued:

> A court cannot therefore find that a vested right exists if the juridical situation under consideration is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists: Cote, at p. 161. As Dickson J. (as he then was) clearly stated in *Gustavson Drilling*, at p. 283, the mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued (see also *Abbott v. Minister for Lands*, [1895] A.C. 425, at p. 431; *Attorney General of Quebec*, at p. 743; *Massey-Ferguson Finance Co. of Canada v. Kluz*, [1974] S.C.R. 474; *Scott*, at pp. 727-28. In other words, the right must be vested in a specific individual.

[186] As for when an individual's legal situation is sufficiently constituted or concrete to have vested, Bastarache J. explained:

> … The situation must also have materialized (Cote, at p. 163). When does a right become sufficiently concrete? This will vary depending on the juridical situation in question. I will come back to this point later. Suffice it to say for now that, just as the hopes or expectations of a person's heirs become rights the instant the person dies (see, for example, *Marchand v. Duval*,[1973] C.A. 635, at p. 637, and art. 625 C.C.Q.), and just as a tort or delict instantaneously gives rise to the right to compensation (see, for example, *Holomis v. Dubuc* (1974), 56 D.L.R. (3d) 351 (B.C.S.C.); *Ishida v. Itterman*, [1975] 2 W.W.R. 142 (B.C.S.C.); and arts. 1372 and 1457 C.C.Q.), rights and obligations resulting from a contract are usually created at the same time as the contract itself (see Cote, at p. 163).

[154] On the facts before him, Romilly J. held that the plaintiff had satisfied the first criterion set out in *Dikranian*, but not the second:

> [196] I am not satisfied, however, that the second prong of the analysis has been met, that is, that the legal situation was sufficiently constituted at the time of the amendment. Bastarache J. was vague in articulating what this means, beyond noting that it "will vary depending on the juridical situation in question". Nevertheless, the examples he cites cast some light in this regard. He notes that rights from a will or intestacy arise upon death, rights in tort arise upon the injury, and contractual rights generally arise at the time of contract formation.
>
> [197] A key aspect of the analysis in this regard is the fact that the plaintiffs have no contractual entitlement to the post-retirement group benefits. This

> distinguishes their circumstances from that in *Dikranian* where the incorporation of the statutory terms into the contract was critical to the Court's conclusion. In *Dikranian*, the specific obligations of the parties, including the student's repayment obligations, were expressly set out in the private contract. Upon execution of that contract, there was certainty for both parties with respect to the amount of principal, the interest to be repaid, and the required repayment dates. At that point, the rights and obligations of the parties crystallized and became concrete.
>
> [198] The same cannot be said of the requirement in the collective agreement between the BCNU and the Health Employers Association that employees participate in the Municipal Pension Plan. That agreement applies to active employees, while post-retirement group benefits by definition are only available to Plan members after they cease employment. The plaintiffs themselves submit that the benefits do not vest until retirement and can be changed or revoked prior to that time. Thus, the fact that active members are required by their collective agreement to be covered by the provisions of the Plan cannot be said to crystallize their rights in a manner comparable to *Dikranian*.
>
> [199] Further, the contingency on funding in the legislative scheme of the post-retirement group benefits has no analogue in *Dikranian*. While the plaintiffs are entitled, as retired members of the Plan, to participate in the post-retirement group benefits plans made available under the Plan, for the reasons discussed above, it was not intended that those entitlements be guaranteed. There is nothing in the Plan itself or the governing legislation that purports to guarantee specific benefit or premium subsidy levels. Indeed, the content of the benefits is set out in separate group insurance contracts which may be amended from time to time. Similarly, the extent to which the plaintiffs were required to make contributions toward the cost of the benefits was determined by regulations made under the *Public Service Benefit Plan Act*, which were also subject to periodic amendment. Consequently, the right to post-retirement group benefits is not sufficiently concrete to satisfy the second part of the test under *Dikranian*.

[155] It is not by any means clear to me that the *Dikranian* framework applies to vesting of rights other than statutory rights. But assuming that it does, the position of the retiring MB employees in the present case suffers from no comparable impediments. Those employees were continuously covered by one overarching contractual agreement under which MB had undertaken to provide health benefits during their employment, and to do so unconditionally during their retirement. Their legal situation was sufficiently certain at the moment of their retirement for their rights to crystallize. The employment contract did not limit MB's obligation to providing a particular insurance policy, one which may have been subject to unilateral termination; the retirees' rights were not expressly limited to benefits under

a policy, only so long as the policy remained in force. The principle in *Unisys* does not apply. Rather, MB, having received the value of its employees' labour, was obliged to continue to compensate them in retirement by providing benefits on the terms that had been in force for retirees throughout their employment. If private insurance on those terms became unavailable, MB was obliged to self-insure, just as Weyerhaeuser has done.

[156] The plaintiffs, in other words, are not seeking a vested interest in any particular policy of insurance – unlike the retired nurses in *BCNU*, who were limited under the statutory scheme to benefits available under a particular set of policies. The plaintiffs, rather, are simply seeking the health coverage that MB promised to provide them with.

[157] The defendant argues that management's adoption of the alternative assumptions, in its preparation of the financial statements in 1996-1999, and in particular the assumption that co-payment would be instituted in the event of cost increases, is inconsistent with management having intended that the retirement health benefits vest. This assertion is belied by the fact that MB was at the same time receiving advice from Mercer alerting it to the difficulty of changing the benefits of those who had already retired. Also relevant is the evidence of the Board of Directors' Human Resources Committee having been advised that "[c]urrent retirees are probably entitled to continuance of the benefit or a reasonable alternative" and that management had "limited ability to reduce or eliminate plans currently available to retirees". In light of all this advice, it would not be unfair to ask if the alternative assumptions were more a reflection of wishful thinking than the product of a frank analysis of MB's legal obligations. I do not give the alternative assumptions any weight as regards vesting.

[158] Lastly, the defendant argues that vesting of the plaintiff's rights offends the principle of inter-generational equity. This is, in essence, the argument put forward by Ms. Giardini in the portion of her November 2009 letter quoted above, when she said,

> Current retiree benefits are not affordable. If they were continued on a premium-free status, employees retiring later would not enjoy similar benefits. Their contributions to the company would go, in part, toward maintaining the premium free benefits of current retirees without any hope of receiving such benefits themselves.

[159] The wording of this letter echoes passages from the judgment of Romilly J. in *BCNU* :

> [206] The Province submits that the notion of inter-generational equity is a further factor that militates against a conclusion that the post-retirement group benefits vested. It says that the practical result of the plaintiffs' interpretation that the benefits vested is that active members would be required to pay substantially increased premiums without any hope of receiving benefits themselves. This, the Province contends, is inconsistent with the clear statutory purpose of providing retirement security for all participating members. I agree.
>
> [207] Trustees are obliged to interpret trust agreements in a way that is even-handed as between beneficiaries. Interpretive results that favour a beneficiary group over others are to be avoided unless the trust documents mandate that result. Where the suggested interpretation of a pension document creates extra benefits for some beneficiaries, it must be kept in mind that this extra benefit creates a corresponding burden on others, including other beneficiaries: *Electrical Industry of Ottawa Pension Plan v. Cybulski*(2001), 30 C.C.P.B. 95 at 99 (Ont. Sup. Ct. of J); *Rivett v. Hospitals of Ontario Pension Plan* (1995), 9 C.C.P.B. 284 at 298 – 299 (Ont. Gen. Div.). Courts must be careful in interpreting pension plans in such a way as to confer additional benefits on some members at the expense of others.

[160] I note these passages were quoted approvingly by Dorgan J. in *Bennett v. British Columbia*, 2009 BCSC 1358, in finding that intergenerational equity was required in order for the Crown to fulfill its fiduciary duties to civil servants under a statutory pension plan.

[161] I find this principle to have no application to common law contracts of employment. The plaintiffs are not claiming an inequitable distribution of any trust or fund. Employers are not obliged at common law to treat current employees in the same manner as those of an earlier generation.

Conclusion

[162] I find that the plaintiffs are entitled to continuing payment, by the defendant, of B.C. Medical Services Plan premiums for themselves and their spouses.

[163] I find that the plaintiffs are entitled to the extended health benefits available to retirees and their dependants as of the date of their retirement, without alteration of the scope of coverage, coverage limits or deductibles, all at the defendant's continuing expense.

[164] The plaintiffs are entitled to damages in the amount of all premiums they have paid to M.S.P. since their benefits were reduced by the defendants. The plaintiffs are further entitled to a refund of all premium assessments paid in respect of their extended health coverage.

[165] The plaintiffs are entitled to their costs at Scale B.

"A. Saunders J."