COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lacey v. Weyerhaeuser Company Limited,* 2013 BCCA 252

Date: 20130528
Docket: CA039826

Between:

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

Respondents
(Plaintiffs)

And

Weyerhaeuser Company Limited

Appellant
(Defendant)

Before: The Honourable Mr. Justice Low
The Honourable Madam Justice A. MacKenzie
The Honourable Mr. Justice Harris

On appeal from: Supreme Court of British Columbia, 9, March 2012,
(*Lacey v. Weyerhaeuser Company Limited*, 2012 BCSC 353,
Vancouver No. S101925)

Counsel for the Appellant:	R.A. Skolrood, L.L. Bevan
Counsel for the Respondent:	J.D. Rogers, Q.C., A.D. Merritt, L.D. Sworn
Place and Date of Hearing:	Vancouver, British Columbia October 29 and 30, 2012
Place and Date of Judgment:	Vancouver, British Columbia May 28, 2013

Written Reasons by:
The Honourable Mr. Justice Low

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Harris

Reasons for Judgment of the Honourable Mr. Justice Low:

[1] The central issue in this case is whether an employer acted lawfully by unilaterally reducing its contribution to the cost of medical benefits provided to its retired, salaried employees; or whether it was contractually bound to maintain its contribution to the cost of the benefits from the date of retirement for the lifetime of the survivor of each retiree and his or her spouse.

[2] The employer, Weyerhaeuser Company Limited, appeals an order of Mr. Justice Saunders awarding damages to the five plaintiffs/respondents for breach of contract, and providing additional remedies. The operative part of the order reads:

> THIS COURT ORDERS that:
>
> 1. The Plaintiffs are entitled to continuing payment, by the defendant, of B.C. Medical Services Plan premiums for themselves and their spouses;
> 2. 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;
> 3. 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;
> 4. The Plaintiffs are further entitled to a refund of all premium assessments paid in respect of their extended health coverage; and
> 5. The plaintiffs are entitled to their costs at Scale B.

[3] Weyerhaeuser says the trial judge erred:

> (a) in finding that payment of the cost of the medical benefits was deferred compensation promised under the contract of employment;
>
> (b) in finding that the employer was contractually obligated to pay the full cost of the medical benefits for the retirees and their spouses for life;
>
> (c) in finding that the benefits vested in each employee on the date of retirement so that the employer was prohibited from changing the benefits or its contribution to the cost of them;
>
> (d) in granting declaratory and injunctive relief not sought by the plaintiffs in their pleadings.

[4] The respondents say the trial judge made findings of fact as to the nature of the contract of employment and its specific terms to which this court must give deference. They say the judge made no factual errors, drew inferences of fact supported by the evidence and made no error in stating the applicable law or in applying the law to the facts.

[5] Each of the five respondents was an employee of Weyerhaeuser's predecessor, MacMillan Bloedel Ltd. ("MB"). They commenced employment in various years from 1951 to 1973. Two of them retired in 1991, one in 1998 and two in 2000. At retirement, they were 57 to 65 years old.

[6] Weyerhaeuser acquired the shares of MB in 1999. Only two of the respondents were subsequently employed by Weyerhaeuser, and they both retired soon after the share acquisition. There is no dispute that Weyerhaeuser assumed all contractual obligations at issue in this action.

[7] None of the respondents testified. There is no written employment contract in evidence for any of the respondents.

[8] The trial judgment is indexed at 2012 BCSC 353. The trial judge provided a thorough review of the history of the provision by MB of medical benefits to both employees and retirees. I do not understand Weyerhaeuser to contend that the judge misapprehended the evidence, ignored significant evidence or misunderstood the evidence. This appeal is about the factual inferences to be drawn from the undisputed facts and the legal conclusions to be reached from the facts proven.

[9] The trial judge summarized what the case was about:

> [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.

[10] The releases referred to in the penultimate paragraph above did not factor into the final analysis by the trial judge and are not related to any of the issues on appeal.

[11] The judge then identified the necessary examination of the evidence:

> [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.

[12] There is no dispute that the task of the judge was to view the evidence objectively to determine whether retirement medical benefits were part of the contract of employment for each respondent. Nor is there any dispute that, because the communications by MB with its salaried employees were general, if there was an enforceable contractual obligation for MB to provide retirement medical benefits to any plaintiff, there was an identical contractual obligation to all of them.

[13] As early as 1968, MB introduced medical insurance for salaried employees. A series of internal memoranda, dating from early 1973 and generated by MB management, discussed the cost of extending coverage under the existing medical plans to both current retirees and employees who would become retirees in the

future. These memoranda showed that management discussed this benefit for both salaried and hourly employees upon retirement on both a cost-sharing basis and on the basis of MB paying the full cost.

[14] During this period, MB learned that some of its competitors were providing full medical coverage at company cost to retired salaried employees. Other competitors were providing the same benefit on a 50/50 cost-sharing basis. The trial judge referred to memoranda indicating that MB management was "determined to match the practices of its competitors" (para. 16).

[15] A memorandum to retired employees dated 20 July 1973 announced an extended health benefit plan, with MB paying the cost of premiums in full, whether the retiree lived in British Columbia or in another province. The trial judge found this offer to be "clearly gratuitous" (para. 18). The judge again identified the central issue:

> [18] ... 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.

[16] At para. 24, the trial judge noted that MB from 1973 until 1998 treated "both the salaried retiree MSP and extended health premiums as a non-taxable benefit consistent with [a 1975 tax ruling]". However, in 1998 the company apparently questioned the tax-free status of the benefits and began to issue T4A forms with respect to them. No reason for this change can be found in the evidence.

[17] From internal documents concerning the 1975 tax ruling, the trial judge was of the view that MB then considered its payment of the medical insurance premiums to be gratuitous, not contractual. However, the tax ruling and the internal documents connected to it were not a form of communication with employees. The judge was of the view that the evidence showing how the benefits were described to salaried employees was considerably more important.

[18] At para. 25, the judge said this:

> ... 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.

[19] This observation was followed by an extensive evidentiary review of handbooks provided by MB to its salaried employees. It is not clear when this practice commenced, but it was prior to 1985 because one such pamphlet was reissued in that year – it was entitled "You and McMillan Bloedel" and was referred to in evidence as the "Red Book". Also in 1985, the company printed and issued a folder describing its benefits program. This document was entitled "Your Employee Benefits Summary".

[20] The trial judge described the Red Book and the Employee Benefits Summary (my emphasis in bold; trial judge's underlined):

> [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.

[21] The judgment continues (trial judge's emphasis):

> [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.

[22] In 1994, the above-described documents were replaced by a binder entitled "Partnerships for Success". The judge described the 1996 reissued version of this document as follows (trial judge's emphasis):

> [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.

[23] The judge then contrasted the wording of this document with the wording of a pension plan document (trial judge's emphasis):

> [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.

[24] The trial judge also noted at para. 39 the following description in the Partnerships Binder, (trial judge's emphasis):

> 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.

[25] After discussing the group insurance contracts that MB maintained with Medical Services Association and Pacific Blue Cross, the trial judge described evidence given by past senior managers:

> [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.

[26] The trial judgment continues with a description of communications by MB with the individual respondents themselves in anticipation of the retirement of each. Mr. Morris received a retirement letter in 1991 that contained the following statement (my emphasis):

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

[27] Mr. Leskewitch testified that this letter was consistent with those received by other retiring employees at the time of the down-sizing in the early 1990s. He also testified that he assisted employees in interpreting the letters.

[28] Mr. Miller retired in 1998 and he merely received letters which indicated that his medical coverage would continue and that he would receive a brochure describing the extended health plan. He was advised to read it carefully because of differences between retirement benefits and those he had received as an active employee.

[29] Mr. Lacey and Ms. Walker retired in late 1999 and the latter received a letter that read, in part, as follows (emphasis in trial judgment):

> 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.

[30] The judge reviewed other internal MB documents relating to accounting and actuarial matters which contained some discussion of the nature of the post-retirement medical benefits, including suggestions that these benefits were "not gratuities but instead are part of an employee's compensation for services rendered" (para. 65). Later he described other relevant documents (my emphasis):

> [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.

[31] The trial judge described the events leading to the unilateral decision to require retirees to partially pay for their health coverage:

> [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.

[32] After weighing the evidence described above, the trial judge discussed whether the statements of MB to its employees from time to time, including representations indisputably made during various seminars, established that the retirement health benefits were offered by MB as compensation for labour, or were merely gratuitous promises. At para. 95, he said that the communications generated by MB created "a common understanding amongst the employees that benefits would be provided for life". At para. 96, he noted that MB described the benefits to the salaried employees as a form of compensation for their services. At para. 97, he

observed that the 1985 and 1994 booklets given to the employees "describe[d] the retiree coverage not as a gratuitous benefit but as an entitlement".

[33] At para. 99, the judge repeated that when MB management instituted the retirement health benefits they did so gratuitously. However, he said that later communications to employees "can only reasonably be interpreted as demonstrating that this initial subjective intention changed over time". He added: "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".

[34] At para. 105, the judge restated his final conclusion - the retirement benefits were deferred compensation and their provision by the employer was an enforceable contractual term.

[35] As to the specific term of the retirement medical benefits provision in the employment contract, the trial judge said this:

> [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.

[36] As to the right Weyerhaeuser claimed to make changes to the benefits post-retirement, the judge concluded:

> [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.

[37] The trial judge discussed the issue of vesting at length. In argument, counsel had focussed a lot of their attention on this issue. Weyerhaeuser argued that there had to be an intention to vest in each retired employee a right to lifetime payment by the employer of the benefits in question.

[38] At para. 132, the trial judge repeated his conclusion that "... retirement health benefits were intended in the employment contracts for MB's salaried employees as a form of compensation". He added: "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." In reaching this conclusion, he relied by analogy upon the judgment of Wilson J. (as he then was) in *Sloan v. Union Oil Company of Canada Ltd.*, [1955] 4 D.L.R. 664, a case often referred to and which, in my opinion, is still good law. He went on to find inapplicable various cases dealing with vesting in the employment benefit context.

Contract formation

[39] The scope of appellate review in civil cases is governed by *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235. The starting point is to decide whether the error alleged by the appellant is one of fact, law, or mixed fact and law. If it is a question of fact, the appellant must demonstrate that there has been a palpable and overriding error by the trial judge in assessing the evidence. If the issue is purely a matter of law, the standard of review is correctness. If the issue is one of mixed fact and law, the standard of correctness applies only to the extent that the discrete issue raised on appeal is an extricable point of law.

[40] What the terms of a contract are is a question of fact. Determining the meaning and legal effect of the terms of a contract may be a question of law. In

269893 Alberta Ltd. v. Otter Bay Developments Ltd., 2009 BCCA 37, 266 B.C.A.C. 98 Mr. Justice Chiasson explained the distinction thus:

> [12] In *Hayes*, this Court referred to and quoted from a number of authorities. Several propositions emerged. They included the following: a trial judge must apply the proper principles of contract interpretation; failure to do so would be an error attracting review on a standard of correctness; determining the factual matrix of a contract is a question of fact; construction of a contractual provision becomes a question of law as soon as the true meaning of the words and the surrounding circumstances have been ascertained. This Court summarized the analysis in para. 44, stating:
>
> > [44] In my view, taken broadly, the construction of a contract often is a question of mixed fact and law. Insofar as the task narrowly is to determine the meaning of the words in the contract the matter may be a question of law as was stated in *Domtar*, but where the factual matrix of the contract is questioned, determining that matrix and its significance is a question of fact. Interpreting the language of the contract in the context of the factual matrix is a question of mixed fact and law.
>
> [13] The analysis in *Hayes* was undertaken to examine the proposition that the construction of a contractual provision is always a question of law because under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, an appeal to the court is limited to questions of law. This Court concluded that often the construction of a contractual provision is not solely a question of law, but it can be. The determination of the factual matrix is a question of fact. This means that interpreting the meaning of a contractual provision in the context of the factual matrix is a question of mixed fact and law, but at the end of the day the court determines the legal relationship between the parties as expressed by the language of their contract.

[41] In the present appeal, Weyerhaeuser puts forward arguments described as points of law but they are really either questions of fact or questions of mixed fact and law with no extricable point of law. In any event, Weyerhaeuser has failed to identify any legal error in the analysis by the trial judge of the entirety of the evidence, or in his application of the common law of contract to the facts.

[42] Each of the respondents had an unwritten employment contract with MB. The employee's contractual obligation was to provide labour; MB's contractual obligation was to compensate the employee for his or her labour. The trial judge found as fact that it became a term of each respondent's contract that part of the compensation would be the medical retirement benefits at issue. It was compensation that was

fully earned as of the date of retirement and was payable until the date of death of the survivor of the retiree and his or her spouse.

[43] A contract of this nature was described by Smith J.A. in *Bennett v. British Columbia*, 2012 BCCA 115, 318 B.C.A.C. 153, (my emphasis):

> [27] The appellant's first proposition asserts what is known as a "unilateral contract", for which there is ample authority: see, for example, *Carlill v. Carbolic Smoke Ball Co.*, [1892] EWCA Civ. 1, [1893] 1 Q.B. 256; *Sloan v. Union Oil Company of Canada Ltd.*, [1955] 4 D.L.R. 664 (B.C.S.C.); and *Mosier v. Linden-Alimak Inc.* (1985), 65 B.C.L.R. 111 (B.C.S.C.). A unilateral contract arises when an offer "is such as to make it clear that it is the performance of some act by the offeree which concludes the contract and amounts to acceptance, making the contract binding without any requirement of communication of acceptance in advance of the performance of the act": G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Canada Limited, 2006) at 71. Under this principle, if the respondent's communications constituted a promise or an offer to current employees that it would provide premium-free insurance on retirement if they should continue their employment until their retirement and should elect such coverage, then their continuing in the respondent's employ until retirement and so electing would constitute an acceptance of the offer and would supply the necessary consideration to bring a contract into being.

[44] In *Sloan*, the issue was whether the plaintiff was entitled to a "termination allowance" of about $1,400 after he was dismissed by his employer without cause. The employer, Union Oil, sold its assets to British-American Oil Co. Ltd. The employees of Union Oil were given termination letters and the plaintiff was hired by British-American. A few years later he sued Union Oil for the allowance based on various circulars that had been given by Union Oil to its employees during the years prior to the sale. The allowance, as amended from time to time in the circulars, was calculable according to a formula and was payable only for termination without cause, not for voluntary resignation, retirement or for any other reason.

[45] It appears there was no dispute that the plaintiff's employment had been terminated as contemplated by the circulars. Wilson J. wrote that he had to "decide whether or not there was a contract by [Union Oil] to pay the plaintiff a termination allowance if he was discharged without cause." He said the contract was to be found in the circulars. The judge had "no doubt that [the statements in the circulars]

constitute an offer by [Union Oil]; a promise that it would, if [the plaintiff] continued in its employment until such time, short of retirement age, as it should without cause, dismiss him from its service, pay him certain stated sums. The offer is clear." He went on to say that there was no "verbal or written acceptance of the offer; no consideration by way of a promise that he would so continue to serve. Therefore, if a consideration moved from the plaintiff to the defendant, that consideration was not a promise but a performance, the doing of an act. For undoubtedly he did fulfil the terms of the defendant's offer, he did serve them until dismissed, and it is this, and only this, that must be relied on as consideration."

[46] Wilson J. discussed *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256, and found in it support for the proposition that communication of acceptance of an offer is not required in all cases to make a binding contract. He continued (my emphasis):

> This is authority for the idea that an offer may be accepted by conduct, as well as by words. I think that the offer in the case before me was thus accepted. The judgment in the *Carlill* case goes on to deal with consideration and finds that the same acts of the plaintiff which constituted acceptance also constituted consideration.

[47] After discussing a number of English and American authorities, Wilson J. arrived at his conclusion (my emphasis):

> It seems to me there are here the essentials of a contract, offer and acceptance, promise and consideration. In the part of ex. 3 (section 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 it existed, in the absence of any notice cancelling it, up to the time when the employee was discharged. Once he was discharged the rights 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 of 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.*

[48] As I have said, I consider this decision to still be good law. Although the learned judge did not use the term, he described a unilateral contract as defined by Smith J. A. in *Bennett*. The analysis by Wilson J. in *Sloan* is to be applied in the case at bar. The trial judge here used this analysis and, in my opinion, he reached a conclusion reasonably available on the entirety of the evidence.

[49] The issue in this case is whether the promise to provide retirement medical benefits at company cost became contractual. I see that as primarily a question of fact to which this court must give deference in the absence of palpable and overriding error.

[50] The evidence supported the conclusion of the trial judge that the retirement benefits were deferred compensation and that the employer became contractually obligated to provide the agreed benefits. Over a considerable period of time, there was a pattern of MB telling its salaried employees that they would have these benefits for life upon retirement. The company frequently used phrases such as "part of your compensation", "benefits will be provided for the lifetime of you and your spouse and the company will pay the premium". I consider it particularly significant that MB referred to the retirement benefits as an "entitlement".

[51] These promises were reinforced during seminars and meetings with employees. The obligation was created unilaterally by MB in order to be competitive. It became clear over time that MB made this promise as part of an incentive to its salaried employees to stay with the company. I agree with the trial judge that MB's successor must be held to MB's bargain.

[52] It should be put this way – by remaining with MB to retirement, each respondent accepted MB's offer and was entitled to the promised compensation. It has to be presumed that compensation for labour performed prior to retirement would have been greater if the promise had not been made. MB clearly intended the

promise, once accepted by conduct by each respondent, to be a contractual term of employment and, therefore, to be binding and enforceable.

[53] It was open to MB to change the terms of employment during the course of employment. However, in the circumstances, it could not change those terms after the fact, when the retired employee no longer had the option to seek more attractive employment within the salaried-labour market. Once the employee retired, a unilateral change in retirement benefits by MB or its successor clearly was a breach of contract. As reviewed by the trial judge and described above, the evidence was strong in support of this conclusion. The respondents fulfilled their obligations under the contract by working to retirement and thereafter it remained for MB to fulfill its obligations under the contract.

[54] Each respondent was entitled to the remuneration he or she earned during employment. That remuneration included the retirement medical benefits at company cost. In the particular circumstances of this case, payment by the company of the medical insurance premiums during retirement was no less a contractual obligation than would have been the case if the employment contract had provided for payment of part of the employee's salary after retirement.

[55] There has been no attempt by Weyerhaeuser to show that there was any palpable and overriding error on the part of the judge in weighing the evidence. Weyerhaeuser instead attacks the ultimate conclusion of the trial judge as to the terms of the contract on the basis that he failed to "consider whether the elements necessary to form a contract exist". Weyerhaeuser says there was no determination by the trial judge of an intention to contract, of certainty of the terms of the contract and of whether there was valid consideration for MB's promise.

[56] In my opinion, these arguments are without merit. They are an attempt to have this court do its own analysis of the evidence and reach the opposite conclusion to that reached by the trial judge.

[57] Weyerhaeuser points to language in the manuals that it says evinces a lack of intent on the part of MB to create a contractual obligation. The former human resources manager, Mr. Leskewitch, testified that the manuals were "a snapshot ... of the benefits and compensation and practices and policies as they existed at that point in time". There was no evidence that any of the respondents relied on the manuals which came into being after each respondent was hired. Failure of the trial judge to address these points, says Weyerhaeuser, shows that he failed to distinguish between representations and contractual promises. Weyerhaeuser relies on the decision of this court in *Bennett* upholding the conclusion of Dorgan J. that documents similar in kind to those in the case at bar and distributed to employees by the employer were "merely descriptions of the retirement benefits available from time to time". (The judgment of Dorgan J. is indexed at 2009 BCSC 1358.)

[58] This argument ignores the bulk of the evidence and its import as described by the trial judge and referenced above. Contractual intention is determined by viewing the evidence cumulatively and objectively. The evidence relied upon by the trial judge was unchallenged by Weyerhaeuser and, viewed objectively and in its entirety, supported the conclusion that the benefits promised were intended to be contractual. Weyerhaeuser called none of the former senior executives of MB to refute the respondents' case that MB intended to be contractually bound by the retirement medical benefits program it announced and implemented.

[59] Reliance by Weyerhaeuser on the *Bennett* case is misplaced. That case does not stand for a general proposition with respect to the benefits at issue. On much weaker evidence, the contractual provision asserted in *Bennett* was unproven. In addition, the employer there was a public body (the provincial government) and, unlike the present case, a statutory regime was involved. The case was not just about the common law of contract applied in an employment situation. At trial, *Bennett* was a case in which different considerations had to be applied, on different evidence and with a different result.

[60] It is worth noting that in *Bennett*, this court stated the applicable standard of review with respect to the factual question of contract formation:

> [41] Findings as to the circumstances surrounding the use of the words in the communications and the meaning to be attributed to them in their context are questions of fact with which an appellate court may not interfere in the absence of a palpable and overriding error: *Keefer Laundry Ltd. v. Pellerin Milnor Corporation*, 2009 BCCA 273 at paras. 55-60, 94 B.C.L.R. (4th) 205.

[61] Part of the passage I have quoted from *Bennett* in my para. 43 above bears repeating, in paraphrased form: "... if the [employer's] communications constituted a promise or an offer to current employees that [the employer] would provide premium-free insurance on retirement if they should continue their employment until ... retirement ... [that] would constitute an acceptance of [the employer's] offer and would supply the necessary consideration to bring a contract into being".

[62] The evidence in the case at bar established what the evidence in *Bennett* fell short of establishing.

[63] Weyerhaeuser says the trial judge failed to consider the legal requirement of certainty as to the contract the respondents sought to prove at trial. It adds that the trial judgment does not identify a date at which a policy of providing retirement medical benefits became a binding contractual term.

[64] These arguments were made at trial and are clearly met in the trial judgment. At para. 91, the judge correctly instructed himself that the requirement of certainty in contract law is relaxed to some extent with respect to employment contracts. Reference was made to 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 ...

[65] There was no need to identify a date on which the benefits changed from policy to contractual obligation. As noted above, the judge concluded at para. 99 that after 1985 the retirement medical benefits became deferred compensation. Nothing more was needed.

[66] Contractual certainty is to be found in the wording used in the communications between MB and its employees. The words were explicit and purposeful. The whole of the evidence supports the conclusion that MB repeatedly and effectively told its employees this: "If you continue to work for this company until retirement, part of your compensation will be lifetime medical benefits coverage at company cost". It follows that after retirement MB could not impose the cost of the benefits, in whole or in part, on the respondents. Upon retirement, each respondent had earned those benefits and was entitled to receive them in accordance with MB's contractual commitment.

[67] Weyerhaeuser argues that the trial judge failed to properly determine whether there was any consideration flowing from the respondents to MB for the retirement benefits. I think this has already been addressed above, particularly in the passage twice referenced from this court's decision in *Bennett*. If, as already found, by staying in the employ of MB to retirement each respondent accepted the offer of retirement benefits made by MB, surely the labour provided by each respondent to his or her date of retirement amounted to consideration. The whole of the evidence supported the conclusion that the retirement benefits were merely deferred partial consideration for the labour provided. Conversely, the labour provided by each respondent was, in part, consideration for the benefits to be received during retirement.

Vesting

[68] The trial judge mentioned at para. 8 that the respondents claimed a vested right. They did not do so in their amended statement of claim but the topic of vesting seems to have received a lot of attention at trial.

[69] I do not consider vesting to be a stand-alone issue in this case. Once the court determined the contractual obligation of MB, it seems to me it was unnecessary to separately determine whether the right to retirement medical benefits vested in each respondent. MB became contractually bound to provide the benefits for life to each respondent. Each respondent became entitled by contract to receive the benefits for life. This might be called a vested right but vesting is not a separate matter to consider. The respondents did not have to prove a vested right in addition to proving a contractual entitlement. If they are not one and the same thing, the one is superfluous to the other. By asserting that the respondents did not prove a vested right, Weyerhaeuser is merely re-arguing with different terminology the factual question of contractual obligation and contractual entitlement.

[70] I am not sure it is necessary to say anything further on this topic, but I will address one argument made by Weyerhaeuser.

[71] Weyerhaeuser contends that *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230, stands for the proposition that vesting of retirement benefits can be established only on proof of mutual intention set out in clear and express language. I do not agree.

[72] In *Dayco*, the issue was whether retirement medical benefits survived a collective agreement between the employer and a union after the agreement came to an end by means of a shutdown agreement reached as part of a plant closure. What attracted judicial review and eventually the attention of the Supreme Court of Canada was a preliminary ruling by an arbitrator with respect to whether the issue was arbitrable after termination of the collective agreement. The Court upheld an

appellate order that the issue was arbitrable and dismissed the appeal. In the result, the contract issue was sent back to the arbitrator for determination.

[73] Because it was concerned with a collective agreement, *Dayco* is of limited value to the discussion in the case at bar. In any event, there was no determination in *Dayco* of the question of ongoing entitlement of retired workers to medical benefits. Writing for five members of the Court (the other two concurring in the result), La Forest J. expressed his final conclusion as follows, at 305 (my emphasis):

> To summarize, I am of the view that retirement rights can, if contemplated by the terms of a collective agreement, survive the expiration of that agreement. Moreover, although it is not strictly necessary to decide the point in this appeal, I would also find that these surviving rights vest at the time of retirement, and would survive subsequent collective bargaining that purported to divest such rights. As such, I have concluded that the arbitrator's general propositions in this respect were correctly stated, and the arbitrator had jurisdiction to hear the union's grievance. Of course, I make no comment on whether the terms of the agreement between the company and the union do in fact create such a vested right. That is a question for the arbitrator to decide when the arbitration hearing proceeds on the merits.

[74] I do not see in *Dayco* any assertion of a canon of contract construction, much less one that, as a matter of law, would govern the contractual analysis in this case. In particular, I do not see in the judgment any statement of the proposition asserted by Weyerhaeuser.

Remedy

[75] Weyerhaeuser's final ground of appeal is that the trial judge erred in granting declaratory and injunctive relief not sought in the amended statement of claim. The order gives declaratory relief but, on my reading, it does not give injunctive relief.

[76] I am not sure the trial judge explicitly found that Weyerhaeuser as of 1 January 2010 breached the contract with each respondent by reducing its contribution to the cost of health care insurance from 100% to 50%. However, he made that finding implicitly.

[77] Weyerhaeuser also announced that it would not contribute anything to future increases in the cost of insurance. However, it seems to me that is only an anticipatory breach of contract in the absence of evidence of insurance premium increase prior to trial. It is to be assumed that the company would govern itself in the future in accord with the outcome of this litigation.

[78] The amended statement of claim explicitly removed from the prayer for relief these remedies previously pleaded:

> (a) a declaration requiring the Defendants to uphold the Contract by continuing to pay the entire amount of the Benefits on behalf of the Plaintiffs;
>
> (b) an order requiring the Defendant to continue to pay the entire amount of the Benefits on behalf of the Plaintiffs, as according to the Contract;

[79] The substantive relief remaining in the pleading was for general damages for breach of contract, general and aggravated damages for mental distress for breach of contract (not pursued) and special damages.

[80] The final conclusions of the trial judge were:

> [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.

[81] The first two of these paragraphs contain legal conclusion, not expressions of the relief to which the respondents, on the pleadings as amended, were entitled. They were findings made to support an order for damages for breach of contract, but I agree with Weyerhaeuser that the case at trial was only about whether Weyerhaeuser could reduce the amount it would continue to contribute to the cost of health insurance. The only remedy at issue was damages.

[82] The damages proven at trial were those portions of the insurance costs each respondent had to pay from 1 January 2010 to 9 March 2012, the date of the order under appeal. We were not told if the specific amount due to each respondent is in the evidentiary record. I presume that it is understood that these damages can be readily calculated. It seems to me that each respondent should obtain a final order for the amount so calculated and that the order at trial should have been for damages to be assessed, perhaps with a reference to the registrar of the court for that purpose. Alternatively, if the parties agree to the amount due to each respondent as of the date of the order under appeal, the final order could simply read something like this - "the plaintiff Lorne K. Lacey will recover from the defendant the sum of $X for damages for breach of contract" - with a similar provision in the order for each of the other respondents. I am assuming that the dollar amount of damages might be different for each respondent. If the amount happens to be identical for each respondent, one clause would suffice. This will have to be sorted out.

[83] I agree with Weyerhaeuser that no declaratory relief should have been granted on the state of the pleadings at trial. The respondents are only five of a much larger number of MB retirees affected by the 2009 announcement made by Weyerhaeuser. We are told that certification of a class action is pending. This is an additional reason for confining the relief to that pleaded in the amended statement of claim.

[84] I would allow the appeal to the extent of striking the first two paragraphs of the order under appeal. I would also strike the third and fourth paragraphs and replace them with one or more paragraphs providing for the recovery of damages by each respondent.

[85] It is necessary for the parties to make submissions as to the wording of the order. The respondents have been successful with respect to the essential issues in this appeal but I would give the parties liberty to make submissions with respect to costs of the appeal.

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Mr. Justice Harris"