A COMMA-DY OF ERRORS: ONTARIO SUPERIOR COURT DISMISSES PENSIONERS' CLASS ACTION

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Justice Mason once remarked that "the comma has earned its notoriety as a troublemaker."[1] True to that observation, in *Austin v. Bell Canada*,[2] a class proceeding alleging damages of over $130 million was brought, certified, and dismissed on summary judgment, all in connection with a single comma found in an annual indexing provision of a pension plan.

Background

The Plaintiff was a pensioner who had worked for one of the Bell corporate defendants. His pension was funded by his former employer, and administered by Bell Canada. He alleged that Bell Canada erroneously calculated the cost of living increase for all pensioners in 2017, and that this error, in turn, negatively impacted the calculation of pension payments for all years thereafter. He brought a proposed class action on behalf of all similarly situated Bell retirees[3] alleging breach of contract, breach of trust, and breach of fiduciary duty.

The Plaintiff brought two motions to be heard at the same time: one to certify the action as a class action under the *Class Proceedings Act*,[4]and the other for summary judgment. While Justice Morgan certified the class action against Bell Canada, His Honour dismissed the case against Bell Canada.

The Applicable Provisions

The relevant pension plan (the "**Plan**") provided the following methodology in s. 1.29 for indexing pension payments for inflation:

> *'Pension Index' means the annual percentage increase of the Consumer Price Index, as determined by Statistics Canada, during the period of November 1 to October 31 immediately preceding the date of the pension increase.*

Section 8.7 of the Plan then provided a series of formulas (including rounding directives) to determine how the annual indexation was to be calculated once the Pension Index was arrived at under s. 1.29.

The troublemaking comma was the comma between "Consumer Price Index" and "as determined by Statistics

Canada" in s. 1.29, quoted above. What was to be determined by Statistics Canada? The Consumer Price Index ("**CPI**") alone, or both the CPI *and* the annual percentage increase of the CPI?

Certification

Before wading into the merits of the contractual interpretation issue identified above, Justice Morgan considered whether the action should be certified, and concluded that "this is an easy claim to certify".[5]

His Honour found that all of the causes of action raised were feasible, properly pleaded, and were well known bases for challenging a pension plan. There was clearly an identifiable class of two or more persons, as all Bell Canada pensioners were subject to the same Plan. The common questions posed were capable of common resolution, and the determination of answers to those questions would apply on an equal basis to all class members.

Under the preferable procedure analysis, His Honour concluded judicial economy would be enhanced by answering the common issues once and for all members of the Plan. Bell argued that the claim was not the preferable procedure because i) a the Plaintiff ought to be required to bring the identical case as a one-off "test case" rather than on behalf of the entire class, and ii) that it would be preferable for the matter to be brought before the Office of the Superintendent of Financial Institutions Canada ("**OSFI**") (the regulator of pension plans) for determination.

His Honour rejected both of these submissions, finding that there was no guarantee that a test case would result in Bell applying the result to other analogous cases and binding the class, and that the same commonality that made this case an appropriate test case also made it an appropriate class action. Further, it was Bell's evidentiary burden to establish that an alternative procedure would be preferable to a class action. In the absence of evidence from Bell about the length of time, difficulty, ease of enforcement, or procedures to be completed under an OSFI proceeding, Justice Morgan did not accept that a regulatory procedure was preferable to a class action.

Finally, the representative Plaintiff put forward a workable litigation plan, and was fully engaged in the litigation. Accordingly, all five elements of the certification test were satisfied.

Summary Judgment and the Legally Induced "Comma"

Having certified the action as a class proceeding, Justice Morgan turned to analyzing the merits of the case on the Plaintiff's motion for summary judgment.

This case was not the first time that a comma had left lawyers and litigants scratching their heads: "[d]espite their physically small stature, commas have created controversy in important places." His Honour noted that

"the comma, it would seem, can mean everything or nothing in a sentences statutory provision, or contractual clause," and reviewed other cases in which a single comma took centre stage: "[e]ven for lawyers the dispute was a painfully technical one."[6]

His Honour embarked on a contractual interpretation exercise which pitted the "series qualifying rule" (in which a modifier that comes at the end of a series of nouns or verbs, with a comma separating the modifier from the rest of the series, applies to the entire series) against modern rules of interpretation (including the principle that a particular clause should be considered in conjunction with other relevant clauses).

Turning back to s. 1.29 in the Plan, Bell took the position that the modifier "as determined by Statistics Canada" applied only to the CPI rate. It argued that it was required to independently determine the annual percentage increase using the specific directions set out in the Plan, including the rounding rules in s. 8.7 which directed that "[a]ll percentage increases shall be rounded to the nearest 2 decimal points" and then rounded to a whole number. The parties were in agreement that the percentage increase over the previous year was 1.49371%. Bell's interpretation resulted 1.49371% being rounded to 1.49% (two decimal points), and then to the nearest whole number of 1%.

The Plaintiff's theory was that the modifier "as determined by Statistics Canada" applied to both the CPI rate and the percentage increase. Statistics Canada had rounded 1.49371% one decimal point to 1.5%. When Statistics Canada's increase of 1.5% was rounded to a whole number, the result was a 2% increase.

However, Bell Canada called evidence showing that the Plaintiff's methodology could never yield a figure with more than two decimal points. Bell Canada argued that such an interpretation would render the provision requiring percentages to be rounded to two decimal points meaningless.

Despite the general policies favouring employees and pensioners, and doctrines of contractual interpretation that favour the non-drafting party (the *contra proferentem* rule), Justice Morgan found "there is no rule of interpretation that would implement a version of the Plan that renders it partly meaningless." His Honour, relying on the Supreme Court of Canada's decision in *Tercon*, determined that the Plan could not be interrupted so as to "effectively gut" a key aspect of the calculation process.[7] Instead, His Honour applied the appellate level guidance directing courts to give meaning to the entire agreement, and to reject interpretations that would render one of the terms in the agreement ineffective.[8]

Accordingly, the calculation of the 2017 annual percentage increase as required by s. 1.29 of the Plan was done correctly by Bell, justifying the 1% increase applied by Bell. Having given the pensioners the benefit of the 1% increase, there was no breach of any of the duties owed to the Plaintiff and to all class members.

And as for the rogue comma, His Honour concluded "it was likely punctuated that way unconsciously; I do not

believe it was a legally induced comma."[9]

His Honour's decision is a good reminder to litigants that an overly technical analysis of punctuation, or narrow focus on a single provision, may be trumped by a holistic interpretation of the contract that gives effect to all of its constituent provisions.

Observations on Summary Judgment

The decision also highlights the risks – and rewards – of bringing a certification motion and a summary judgment motion together.

In *Austin*, both parties agreed that summary judgment was appropriate in the circumstances. The dispute was one of the few cases that neatly fit into a summary judgment box: it centred on the interpretation of a contract and the performance of a mathematical calculation where the parties agreed there was no need to hear *viva voce* evidence or to conduct a full trial. However, it is rare that the issues at stake in a class proceeding (and the evidence necessary for each party to prove the merits of its case) will be quite so tidy.

Once Justice Morgan certified the action in *Austin*, His Honour's findings on the summary judgment motion determined the merits of the claim for the entire class.[10] In similar cases where the overall merits are strong, a confident defendant may be able to achieve similar efficiencies through a "one and done" certification and summary judgment hearing that is dispositive of the class proceeding. If defeating certification is a long shot, a defendant could take those efficiencies a step further by consenting to certification (likely on narrower issues than those proposed by the plaintiff). By doing so, the defendant dispenses with the effort, expense, and adverse cost risks of a doomed contested certification motion, and can proceed straight into a summary judgment motion that may determine the fate of the entire action in its favour.

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[1] *Hamilton v. Nerbas* 2008 ABQB 674 at para. 1.[ps2id id='1' target='/]
[2] 2019 ONSC 4757 ("*Austin*").[ps2id id='2' target='/]
[3] The proposed class was defined as "All persons, wherever resident, who were entitled to receive a Defined Benefit indexation payment increase from the Bell Canada Pension Plan as of January 1, 2017, pursuant to section 8.7 of the Plan (whether a Retired Member, an ex-Spouse of a Retired Member, or a Beneficiary of a deceased Retired member, but not a deferred vested Member), together with, should such a person have died on or after January 1, 2017, their estate or heirs or beneficiaries (for any future adjusted Plan Payment):" *Austin v. Bell Canada*, 2019 ONSC 5961 at para. 3.[ps2id id='3' target='/]
[4] 1992, S.O. 1992, c. 6.[ps2id id='4' target='/]
[5] *Austin*, para. 10.[ps2id id='5' target='/]

[6] *Austin*, paras. 47, 45 and 43, citing Even Lee, "Opinion analysis: Battle of statutory interpretation canons ends in defeat for convicted sex offender", SCOTUSblog (March 1, 2016). [ps2id id='6' target='/]
[7] *Austin* at para. 64, citing *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways*), [2010] 1 S.C.R. 69 (S.C.C.), at para 72.[ps2id id='7' target='/]
[8] *Austin* at para. 63, citing *Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744 (Ont. C.A.), para 88, quoting *National Trust Co. v. Mead,* [1990] 2 S.C.R. 410 (S.C.C.), 425.[ps2id id='8' target='/]
[9] *Austin* at para. 69.[ps2id id='9' target='/]
[10] See, e.g. *Austin* at para. 31.[ps2id id='10' target='/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.