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## **SCC RULES: DO NOT DEDUCT PENSION BENEFITS FROM WRONGFUL DISMISSAL DAMAGES**

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*By Barry W. Kwasniewski\**

### **A. INTRODUCTION**

The Supreme Court of Canada (the “Court”) released its decision on December 13, 2013 in *IBM Canada Limited v Waterman* (“*Waterman*”),<sup>1</sup> which ended a lengthy legal battle between the company and one of its long-term British Columbia employees. The decision clarifies that a dismissed employee’s pension benefits are not to be deducted from his or her wrongful dismissal damages. This decision, to be discussed in this *Charity Law Bulletin*, is important for charities and not-for-profits with employee pension plans, which may be considering terminating employees who have reached the age where they may be eligible to receive pension payments.

### **B. THE FACTS**

Richard Waterman had worked for the appellant IBM Canada Ltd. (“IBM”) for 42 years before being dismissed without cause on March 23, 2009, having participated in IBM’s defined benefit pension plan. IBM dismissed Mr. Waterman, who was 65 years old at the time, on providing only two months’ notice. Upon being dismissed, Mr. Waterman was entitled to receive his full pension, given his age and length of service. Dissatisfied with IBM’s termination package, Mr. Waterman sued for wrongful dismissal in the Supreme Court of British Columbia. The trial judge decided that Mr. Waterman should have received a reasonable notice period of twenty months. Further, in calculating the monetary damages owing, the trial judge did not

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<sup>1</sup> *IBM Canada Limited v. Waterman*, 2013 SCC 70, available online at: <http://canlii.ca/t/g2bvx>

deduct the pension benefits that were provided to the employee during the notice period (\$2,124.25 per month). At trial, IBM argued that these pension benefits should be deducted from reasonable notice damages, in order to prevent “double recovery”. IBM’s position was that if Mr. Waterman was to be paid both wrongful dismissal damages and pension benefits, he would be in a better financial position as compared to if he was not terminated, which, it argued, was contrary to recognized common law damage recovery principles. The decision was appealed by IBM to the B.C. Court of Appeal, which dismissed the appeal, confirming that the pension benefits were not deductible from the damages for wrongful dismissal. IBM then sought and obtained leave to appeal for that part of the decision to the Supreme Court of Canada.

### **C. REASONS OF THE COURT**

The Court considered IBM’s central argument, which essentially was that pension payments are a substitute or replacement for salary, and should be treated in the same manner as, for example, disability insurance payments, which were held by the court to be deductible from wrongful dismissal damages in the 1997 decision *Sylvester v. British Columbia*.<sup>2</sup>

However, the majority of the Court ruled that unlike disability benefits, which are specifically paid in lieu of salary when an employee is unable to work for medical reasons, pension benefits are a form of “collateral benefit”, which were earned and owned by the employee. Therefore, while pension benefits do provide a form of regular income, they are not considered to be a substitute for salary. As such, the Court distinguished the *Sylvester* decision and found that the reasoning was not applicable to pension benefits.

In addition, the Court examined the issue from a contractual perspective. Mr. Waterman’s employment contract did not address whether or not pension benefits were to be deducted from any pay in lieu of notice. Therefore, the contract did not explicitly prohibit the employee from receiving both the pension benefits and salary on termination. Thus, the Court determined that it would be unjust to imply a contractual term that would impose a deduction that had not been specifically agreed to by the parties.

The Court also considered public policy concerns, and confirmed that an employer should not be permitted to deduct the employee’s pension benefits from reasonable notice damages, in that if a deduction was permitted, employers would be enticed to terminate pensionable employees as a cost saving strategy. As

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<sup>2</sup> *Sylvester v British Columbia*, [1997] 2 SCR 315 [*Sylvester*], available online at: <http://canlii.ca/t/1fr0g>

stated by the court: “This is not an incentive that the law should provide.”<sup>3</sup> As a further matter of public policy, the Court also noted that deducting the benefits only in the case of pensionable employees would constitute unequal treatment of those employees, as compared to employee with no pension entitlements.

## D. CONCLUSION

The *Waterman* decision highlights an issue that will likely arise more frequently in the future, as employees in an ageing workforce are terminated. If employers, including charities and not-for-profits, want to deduct pension payments from amounts otherwise owing as pay in lieu of notice on termination, this should be expressed in the employment contracts. Any such contractual provision must not result in the employee receiving less than the statutory minimums set out in the applicable employment standards laws. However, in light of the comments by the Supreme Court of Canada, which express the court’s public policy concerns, it remains to be decided if courts will declare such contractual provisions enforceable.

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<sup>3</sup> *Supra* note 1 at para 93.