



No. VLC-S-S-095159
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JAMES WELDON and LEONARD BLEIER, suing on their own behalf and in a representative capacity on behalf of all former members of defined benefit pension plans sponsored, directed, administered or advised by the Defendants and their predecessors who were caused by the Defendants and their predecessors to cease to participate in those defined benefit pension plans and to participate only in defined contribution pension plans on or about January 1, 1993

PLAINTIFF

AND:

**TECK METALS LTD., COMINCO PENSION
FUND COORDINATING SOCIETY and TOWERS PERRIN INC.**

DEFENDANTS

Brought under the *Class Proceedings Act*

RESPONSE TO CONSOLIDATED AND AMENDED CIVIL CLAIM

Filed by: Teck Metals Ltd. and Cominco Pension Fund Coordinating Society

(the "Cominco defendants")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Cominco Defendants' Response to Facts

1. Subject to paragraph 5 below, the facts alleged in paragraphs 1, 2, 3, 4, 6, 7, 8, 10, the first sentence of paragraph 11, and paragraphs 12, 15, 18, 19, 27 and 40 of the consolidated and amended notice of civil claim are admitted.

2. The facts alleged in the second sentence of paragraph 11 and paragraphs 13, 14, 16, 20 to 26, 28 to 30, 32 to 35, 37 to 39 and 41 to 44 of the consolidated and amended notice of civil claim are denied.
3. ^
4. The facts alleged in paragraphs 9, 17, 31 and 36 of the consolidated and amended notice of civil claim are outside the knowledge of the Cominco defendants.
5. Paragraph 5 of the notice of civil claim alleges that the action is brought on behalf of a "Class" which has not yet been certified. The Cominco defendants do not admit anything in respect of putative Class Members whose identity is not yet ascertainable.
6. Concerning the first sentence of paragraph 11 of the consolidated and amended notice of civil claim, Teck's status as a statutory administrator is a pleading of law, not fact.

Division 2 – Cominco Defendants' Version of Facts

7. ^
8. ^
9. ^

Reasons for the establishment of a defined contribution pension plan

10. Prior to January 1, 1993, the plaintiff and other salaried employees of Cominco Ltd and certain affiliates (collectively, 'Cominco employees') were members of Cominco Ltd's defined benefit pension plan called the Basic Retirement Income Plan ('BRIP').
11. Effective January 1, 1993, Cominco Ltd implemented a new pension plan for Cominco employees called the Cominco Retirement Income Plan ("CRIP").
12. CRIP included a defined contribution pension plan (the "DC Plan") as a plan segment within CRIP. The former BRIP remained as a defined benefit plan segment (the "DB Plan") within CRIP.
13. Cominco Ltd implemented the DC Plan on the advice of Towers Perrin Inc ("Towers").
14. Contrary to paragraph 13 of the consolidated and amended notice of civil claim, prior to the establishment of the DC Plan, it was not known, nor was it expected, that the Cominco pension plans would be affected by a long term decline in interest rates. Nor was it known or expected that the Cominco pension plans would suffer an increased risk that investment returns would be less than predicted or that annuity costs would be greater than predicted. The investment rate of return achieved in the Cominco pension

plans from 1982 through 1995 was reported to Cominco employees annually and was follows:

1982	23%
1983	19%
1984	6%
1985	9%
1986	16%
1987	5%
1988	12%
1989	17.1%
1990	1.7%
1991	15.3%
1992	5%
1993	19.8%
1994	2.8%
1995	15.9%

15. Contrary to paragraph 14 of the consolidated and amended notice of civil claim, Towers did not recommend to Cominco Ltd. that it change its pension plan design primarily to reduce an investment and annuity risk, nor did Cominco Ltd accept any such advice.
16. Cominco Ltd's decision to implement the DC Plan was not motivated by a perceived risk that long term interest rates would fall or a perception that Cominco Ltd was exposed to an adverse investment risk and annuity risk associated with the DB Plan, as alleged by the plaintiff at paragraphs 13 and 14 of the consolidated and amended notice of civil claim.

Communications with the plaintiff and other employees

17. Beginning in 1988, Cominco Ltd. undertook extensive consultations with potentially affected employees prior to the decision to implement the DC Plan and its formal implementation.
18. Prior to and subsequent to the formal announcement of the DC Plan, Cominco Ltd provided information to Cominco employees, including the plaintiffs, through large meetings and one-on-one meetings as well as by employee bulletins, an Employee Information Handbook, and the Information Material described in paragraph 23 of the consolidated and amended notice of civil claim.
19. Cominco Ltd took advice from, and collaborated with, Towers in the preparation of the Information Material.
20. Cominco Ltd formally notified Cominco employees, including the plaintiffs, of the intended date of the implementation of the DC Plan and the election available to employees, as described in paragraph 20 of the consolidated and amended notice of civil claim (the "Election"), by letter from the president dated August 19, 1992.
21. For most employees, the deadline to make the Election was November 30, 1992, but some employees were offered the opportunity to elect during the month of December 1992.
22. The DC Plan was not an inferior pension plan to the DB Plan, as alleged by the plaintiff at paragraphs 21 and 22 of the consolidated and amended notice of civil claim. To the contrary, the DC Plan was potentially a better pension plan for some Cominco employees.
23. The Information Material was not prepared with the intention of causing all employees or any particular employee or group of employees to transfer to the DC Plan as alleged by the plaintiffs at paragraphs 25, 26 and 34 of the notice of civil claim. To the contrary, the Information Material was prepared to enable each employee to make his or her own decision. The booklet stated:

The [Employee Information Handbook], this booklet and the computer program should provide you with all the information you need to make an **informed decision**. But **only you** can make that decision. [p 2]

...

After a **full review**, including meetings with many employees, the decision has been made and DCPlan will be the Cominco's plan of

the future. Current members of BRIP will have the choice and the program is designed to **help employees make that choice.**

Defined benefit plans such as BRIP are designed to provide the greatest benefit to employees who spend their entire career with one employer. While BRIP is an excellent plan for **career employees**, it may not be as appropriate for employees who think that they may be facing a **career change** before retirement. DCPlan may be more suitable for these employees.

Factors to consider are:

- Your expectations of your career
- Your expectations of future economic conditions
- The degree of security offered by the two plans.

[p 5]

...

So, please, look at your options carefully before you make your decision. Look at the comparisons. Assess when you might leave Cominco. Look at different economic scenarios.

We don't wish to influence your decision.

We do want you to choose what is **best for you.** [p 6]

[all emphasis is in original]

24. Cominco Ltd intended that employees including the plaintiffs would rely on the Information Material in the context of the other material provided and the employees' own inquiries and assessment of relevant considerations.
25. The passages quoted from the booklet at paragraph 28 of the consolidated and amended notice of civil claim are incomplete. They do not state all the reasons given in the booklet, and the booklet did not purport to state all the reasons for the decision to implement the DC Plan.
26. Contrary to the plaintiffs' allegation at paragraph 29 of the consolidated and amended notice of civil claim, the purpose of the computer program provided to employees was not only to allow employees to compare the anticipated value of their pensions under the DB Plan with the anticipated value under the DC Plan. The purpose was to allow

employees to explore different future scenarios and evaluate the sensitivity of projected values to changes in the economic assumptions. Under the heading, 'Questions and Answers', the booklet stated:

5 Why should I want to change the economic assumptions in the program? I don't know anything about economics.

Following are some of the **risks and benefits** of each plan that can be modelled by changing the economic assumptions:

- Although BRIP promises you the **benefit** that is **defined** by the plan, that definition is dependent on your **service** and your **earnings**. Therefore, if either your service or your earnings turn out to be less than expected, your benefit will not be as great as expected. To test this, try a **salary increase assumption** that is lower than the guidelines. And don't forget to look at results for dates in the near future, as well as close to your expected retirement date.
- On the other hand, if your salary increases **more** than you expect (you might get a series of promotions), your value under BRIP could turn out substantially greater than you expect. To test this, try a salary increase assumption that is higher than the guidelines.
- In DCPlan, you will have control of your investment decisions among the funds offered by the plan. If **investment returns** turn out to be very high during the period before you retire (for instance, if you trade astutely among the funds), your DCPlan retirement income will increase, while in BRIP investment performance (good or bad) has no effect on benefits. Similarly, if investment return turns out **lower** than expected, your retirement income in DCPlan will be smaller than expected. If you consistently buy high and sell low, it is possible in DCPlan to end up with **no investment return** or a **negative investment return**. To try out different investment returns, change the **DCPlan interest rate assumption**. To try very good and very bad investment results, ignore the "guidelines" warning.

[all emphasis is in original]

27. Taken as a whole, the Information Material was accurate and fair in its portrayal of the facts and relevant considerations, having regard to what was known at the time. In further answer to paragraph 30 of the consolidated and amended notice of civil claim:
- (a) To the extent that employees who elected to transfer to the DC Plan experienced an increased exposure to investment risk, the additional exposure was obvious and was addressed in the Information Material as set out above;
 - (b) The particular passages from the Booklet quoted at paragraph 28 of the notice of civil claim were fairly stated in that the DC Plan was potentially better for certain employees, not limited to particularly young employees and those who might leave their employment before age 48, and those for whom the DC Plan was potentially better were offered the opportunity to transfer to it;
 - (c) Changes in taxation rules effective January 1, 1991, made defined contribution pension plans potentially more attractive than had been the case earlier, as stated in the Information Material;
 - (d) The Booklet correctly advised that "DC Plan Members will have more RRSP room after 1993";
 - (e) Any potential benefits to Cominco Ltd, through reduced pension costs and expenses in future years, were irrelevant to an employee's decision whether to elect to transfer to the DC Plan;
 - (f) Having regard to the purposes for which the Computer Program was tendered, the DB Plan value calculations offered through the Program were reasonable and appropriate;
 - (g) The purported existence of a continuing long term decline in interest rates was unknown at the time, while the possibility that interest rates would decline was disclosed and employees were advised to explore the implications of a possible decline together with other possible economic developments;
 - (h) The inclusion of a 6% minimum interest rate within the economic model represented by the Computer Program was a reasonable constraint requiring no further explanation, in the circumstances and at the time;
 - (i) The use within the Computer Program of an assumed investment rate return, net of administrative expenses, was reasonable and required no further explanation, in the circumstances and at the time;
 - (j) Having regard to the purposes for which the Computer Program was tendered, a reasonable explanation of the rate of return assumption was provided;

- (k) Cominco Ltd's costs of administration of the DB Plan could not be compared to the aggregate of expected administrative expenses to be incurred by DC Plan members;
- (l) The investment management fees that would be charged to funds invested through DC Plan were disclosed to Cominco employees in materials provided in conjunction with the Information Material. The impact of aggregated administrative expenses on expected investment returns was unknowable and not material.

28. In further answer to paragraphs 30(a), (g) and (h) of the consolidated and amended notice of civil claim:

- (a) The risks of a decline in long term interest rates and the consequent annuity risk were specifically identified and addressed in the Information Material. Under the heading, 'Questions and Answers', the booklet stated:

7. I don't like taking on new risks. Are there any risks associated with DCPlan other than those I can model by looking at the program?

- If interest rates are low at the time you purchase your DCPlan annuity, your retirement income will be smaller than expected – even though you may have earned a very good investment return while your value was accumulating. To mitigate this effect, DCPlan will offer (to the extent permitted by Revenue Canada) the flexibility to purchase **deferred annuities** before retirement.

- (b) Deferred annuities were made available for immediate purchase by any Cominco employee who wished one and some did.

29. Cominco employees, including the plaintiffs, were given a reasonable time to find and instruct independent advisors, if they so chose, and make an informed decision regarding the Election.

30. Contrary to paragraph 33 of the consolidated and amended notice of civil claim, from 1982, Cominco Ltd disclosed to Cominco employees, including the plaintiffs, in pension plan annual reports, the actual pension cost experience and the details of the financial performance of all the Cominco pension plans, including the current and past service cost, value of the DB Plan assets and associated actuarial liabilities, and the investment rate of return on pension assets as set out above.

31. Cominco Ltd had appropriate regard to the interests of Cominco employees and pension plan members, including the plaintiffs, in preparing and distributing the Information Material.

Events following the implementation of the DC Plan

32. Cominco Ltd and its successors provided the plaintiffs and other DC Plan members with an appropriate mix of investment alternatives, in the context of the DC Plan.
33. ^
34. At all material times, the only involvement of the Cominco defendant, Cominco Pension Fund Coordinating Society ("CPFCS"), was as a custodial trustee of the assets of the pension plans administered by Cominco Ltd. CPFCS had no employees and played no part in the actions alleged to give rise to the plaintiff's claim.

Division 3 – Additional Facts

35. ^
36. Prior to January 1, 1993, there was no pension standards legislation in British Columbia. Most Cominco employees were located in British Columbia. The company and its affiliates also employed a significant number of employees in the North West Territories, and smaller numbers of employees in other provinces.
37. At all material times, by reason of Cominco Ltd's operations in other jurisdictions, the DB Plan was registered with federal Office of the Superintendent of Financial Institutions pursuant to the *Pension Benefits Standards Act 1985* RSC 1985, c 32.
38. The federal Office of the Superintendent of Financial Institutions approved the transfer of pension assets from BRIP to DC Plan effective January 1, 1993.
39. ^

Part 2: RESPONSE TO RELIEF SOUGHT

40. The Cominco defendants oppose the granting of the relief sought in paragraphs 45(a) to (i) of the consolidated and amended notice of civil claim.

Part 3: LEGAL BASIS

41. As an employer, Cominco Ltd. owed the plaintiffs and its other employees a duty of good faith but not a fiduciary duty to act only in the plaintiffs' interests.

42. Prior to June 23, 2006, by virtue of the registration of the DB Plan pursuant to the provisions of the *Pension Benefits Standards Act 1985*, RSC 1985, c 32, Cominco Ltd was the statutory administrator of the DB Plan and was governed by s 8 of the legislation in respect of its acts of administration.
43. In preparing and providing the Information Material, Cominco Ltd's only relevant statutory duty owed to the plaintiff and other members of BRIP was its duty, pursuant to s 8(4) of the *Pension Benefits Standards Act 1985*, to exercise the degree of care that a person of ordinary prudence would exercise in dealing with the property of another person. Cominco Ltd complied with the duty.
44. In preparing and providing the Information Material, Cominco Ltd's only relevant common law duties were to act in good faith and exercise reasonable care.
45. Cominco Ltd acted in good faith. The Information Material and other material provided to the plaintiff and others was fair and accurate. Cominco Ltd exercised reasonable care in the preparation of all of the material provided and it contained no misrepresentations.
- 45A As a custodial trustee, CPFCS owed the plaintiffs and other beneficiaries of BRIP fiduciary duties and a duty of care, but only in respect of its limited role. CPFCS owed no duties in connection with the preparation and provision of information and materials to Cominco employees as alleged. Further, CPFCS did not owe the beneficiaries of BRIP a duty to warn them of the risk of transferring to the DC Plan.
46. In the alternative, the plaintiff's cause of action was complete on January 1, 1993 and this action is barred by the *Limitations Act* RSBC 1996, c 266.
47. Upon becoming a member of DC Plan, the plaintiffs were entitled to purchase a deferred annuity providing the same pension as they would have received under BRIP, and the plaintiffs have therefore not suffered the loss alleged.
48. In the further alternative, by failing to purchase a deferred annuity, the plaintiffs have failed to mitigate their losses.
49. In the further alternative, if the plaintiffs' cause of action was not complete on January 1, 1993 and would only be complete upon retirement, the plaintiff, James Weldon, is not yet retired and has no present cause of action.


Cominco defendants' address for service:

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Attention: Irwin G. Nathanson, Q.C./Geoffrey B. Gomery, Q.C.

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Date: 26 September 2012



Signature of Geoffrey B. Gomery, Q.C.

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

THIS RESPONSE TO CONSOLIDATED AND AMENDED CIVIL CLAIM is prepared by Geoffrey B. Gomery, Q.C., of the firm of Nathanson, Schachter & Thompson LLP, Barristers and Solicitors, whose place of business and address for service is Suite 750 – 900 Howe Street, Vancouver, B.C. V6Z 2M4, telephone (604) 662-8840 and whose fax number for delivery is (604) 684-1598.