

Amended pursuant to the Order of Mr. Justice
N. Smith pronounced on 21 June 2012, and
pursuant to Supreme Court Civil Rule 6-1(1)(b)(i)
Original filed on November 30, 2011

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY
OCT 01 2012

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
commencing on or about January 1, 1993, wherever they reside.

PLAINTIFFS

AND:

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

DEFENDANTS

CONSOLIDATED AND AMENDED
RESPONSE TO CIVIL CLAIM
[Original filed November 30, 2011]

Filed by: the Defendant Towers Perrin Inc.

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 Response of Towers Perrin Inc. to Facts

1. In this pleading, the defendant Towers Perrin Inc., now known as Towers Watson Canada Inc. ("Towers"), employs the defined term "Teck" to refer to Cominco Ltd., as well as to Teck Metals Ltd. Any admissions or allegations in this pleading as to Teck are admissions in respect only of that term as defined herein, not as defined in the Notice of Civil Claim or elsewhere.
2. Towers denies each and every allegation in the Consolidated and Amended Notice of Civil Claim (the "Claim"), except as specifically admitted in this pleading.
3. With respect to para. 5 and all other paragraphs of the Claim in which putative "class members" are mentioned, Towers does not accept that there are any class members as this matter is not certified under the *Class Proceedings Act*; admissions and allegations in this pleading are only in respect of the Plaintiffs.
4. Towers admits the facts alleged in paragraphs 1 - 4, 6, 7, 9, 10, 17, 18, and 23 of the Claim.
5. Towers admits the allegations at the following paragraphs of the Claim as qualified herein:
 - (a) Para. 11, only as to Towers acting as actuarial advisor to Teck as to design, funding, administration, and amendment of its pension plans.
 - (b) Para. 15, only as to the date and fact of Teck implementing the DC Plan. Towers denies that Teck implemented the DC Plan "on the advice...of Towers" to the extent that the quoted phrase implies that Towers recommended that Teck implement the DC Plan;
 - (c) Para. 19, only as to Teck informing the Plaintiffs of the irrevocable nature of the Election. Towers denies communicating directly with the Plaintiffs at any material time;
 - (d) Para. 20, only as to Teck informing the Plaintiffs of the deadline of the Election. Towers denies communicating directly with the Plaintiffs at any material time;

- (e) Para. 24, only as to Towers' involvement in preparing the Computer Program as that term is defined in the Claim. Towers did not draft, or approve the contents of, the Booklet or any other communications with employees in connection with the choice between BRIP and DCPlan;
 - (f) Para. 26, only in that Towers was aware that Teck intended to provide the computer program to persons in the Plaintiffs' positions for the purpose of assisting them with the decision of whether to switch to DCPlan or stay with BRIP;
 - (g) Para. 31, only in that Towers admits that it had no communications with the Plaintiffs; and,
 - (h) Para. 36, only in that the Plaintiffs switched to DCPlan as alleged. The Plaintiffs' reliance on the Information Material, or, in the alternative, the reasonableness of any such reliance, is denied.
6. Towers says that the excerpts from the materials referred to in paras. 27, 28 and 29 of the Claim are incomplete, but that the documents speak for themselves.

Specific Responses

- 7. In specific response to para. 14 of the Claim, Towers denies that it recommended that Teck introduce a DC pension plan.
- 8. In specific response to para. 16 of the Claim, Towers says that Teck did not at any material time articulate to Towers the purposes alleged in that paragraph, and that Towers did not act in furtherance of any such purpose.
- 9. In specific response to para. 22 of the Claim, Towers says that the paragraph does not advance a coherent allegation. However, to the extent that the Plaintiffs intend to say in that paragraph that Towers had - or claimed - any ability to predict the performance of a DC fund and the amount of the pension that could be purchased from it, the allegation is false: such prediction would necessarily be constructed on forward-looking economic assumptions whose accuracy is inherently unknowable.

10. In specific response to paras. 25 and 34 of the Claim, Towers denies any

(a) instruction from Teck; and,

(b) actual intention;

to cause any person to make any particular choice with respect to the Election.

11. In specific response to that section of para. 29 of the Claim, which reads:

Teck informed the plaintiffs...that the purpose of the Computer Program was to allow the plaintiffs...to input numbers projecting the anticipated value of their pensions under the DB Plan with the anticipated value under the DC Plan

Towers says that:

(a) the Plaintiffs were not so informed by Teck or Towers; and,

(b) the purpose of the Computer Program was not in fact that articulated in para. 29 of the Claim.

12. In specific response to paras. 30 and 35 of the Claim, Towers denies

(a) that the Information Material was inaccurate, incomplete, or misleading, as alleged or at all; and,

(b) that the Information Material caused the Plaintiffs to switch to DCPlan.

13. In specific response to para. 32 of the Claim, Towers says that it had no role in setting the amount of time for the Election to be made, but that in any event that the time allowed was reasonable and sufficient.

14. In specific response to para. 33 of the Claim, Towers says that

(a) At no time did it counsel Teck to withhold from the Plaintiffs any information to which they were entitled, as alleged or otherwise;

- (b) At no time was it aware that any information to which the Plaintiffs were entitled was being withheld from them, as alleged or otherwise;
- (c) Teck did not in fact withhold from the Plaintiffs any information to which they were entitled, as alleged or otherwise; and,
- (d) Teck provided to the Plaintiffs each year a statement for BRIP disclosing their benefits and the financial condition of the pension fund.

15. In specific response to para. 39 of the Claim, Towers

- (a) did not draft, or approve the contents of, the Booklet;
- (b) was entitled to favour Teck's interests over those of the Plaintiffs; but,
- (c) did not in fact favour Teck's interests over those of the Plaintiffs.

16. In specific response to para. 40 of the Claim, Towers says that all of the tools necessary for the Plaintiffs to

- (i) monitor the value of their DCPlan balances; and,
- (ii) ascertain the income that could be purchased with them at any given time;

were at all material times available to them.

17. In specific response to para. 42 of the Claim, Towers says that:

- (a) The allegation referring to an "investment vehicle or strategy which would permit them to apply their defined contribution account balances . . . to obtain the pension income that they anticipated based on the Information Material" appears to imply a guaranteed level of retirement income, which Teck specifically advised the Plaintiffs that DCPlan did not offer;
- (b) The Plaintiffs could not, and did not, reasonably expect any particular level of retirement income based on the Information Material; and,

- (c) Teck provided to the Plaintiffs a range of investment alternatives for their DC account balances that were reasonable in the circumstances, and disclosed those options to the Plaintiffs in advance of the choice to switch to DCPlan.
- 18. In specific response to para. 43 of the Claim, Towers says that Teck in fact offered to the Plaintiffs from time to time the option to purchase a deferred annuity, which purchase would have had the protective effect described in that paragraph.
- 19. In specific Response to para. 45 of the Claim, Towers denies that the Plaintiffs have suffered or will suffer damages, as alleged or at all.

Division 2 Towers' Version of Facts

BRIP

- 20. In or about 1992, Teck, then called Cominco Ltd., had a pension plan called the Basic Retirement Income Plan ("BRIP").
- 21. The Plaintiffs were members of BRIP, as were all of Teck's other salaried, non-union employees.
- 22. BRIP was a defined benefit ("DB") pension plan.
- 23. Members of BRIP were entitled to a benefit at retirement in a monthly amount calculated by reference to a formula taking into account each member's
 - (a) age;
 - (b) length of service; and,
 - (c) earnings before retirement.

The Advent of DCPlan

24. In 1992, Teck determined to add to BRIP a new defined contribution ("DC") pension structure called DCPlan, of which all employees hired at Teck after September 1, 1992, would automatically become members.
25. Teck also determined that it would offer to members of BRIP a one-time opportunity - and at each member's sole option - to transfer their pension rights from BRIP to DCPlan (the "Offer").
26. Towers did not encourage or advise Teck to consider implementing DCPlan.
27. In the process of implementing DCPlan, the name of the pension plan was changed from BRIP to Cominco Ltd. Retirement Income Plan for Non-Union Employees ("CRIP"), with CRIP composed of two segments: BRIP and DCPlan.

The General Nature of DB and DC Plans

28. DB plans vary considerably from plan to plan, but typically entitle members to be paid a fixed monthly pension upon retirement, the amount of which is determined by a formula taking into account, *inter alia*, each employee's length of service and/or income level in the period preceding retirement.
29. The salient features of typical DB plans include:
 - (a) They result in a pension which, so long as the plan remains solvent, is calculable with knowledge of the employee's years of service and earnings;
 - (b) They result in a reduction of the available room for contributions to RRSP accounts by employees during working years, sometimes eliminating that room entirely;
 - (c) They offer no opportunity for the employee to make investment decisions that might affect the amount of his or her pension income;

- (d) The value of a member's pension benefit rises dramatically as the member approaches retirement. This is particularly true when the benefit depends on earnings during the last few years of employment and/or the plan subsidizes to those who retire early from active employment; and,
 - (e) When an employee changes jobs mid-career, benefits are frozen on departure and worth substantially less than the value projected at future retirement.
30. Likewise, DC plans vary widely according to their terms, but typically in such a plan (and assuming a plan in which the employee contributes nothing) the employer contributes a percentage of the employee's salary during that year, in monthly instalments, to the employee's DC account. At retirement, the employee uses the resulting capital sum to fund his or her retirement in whole or in part. The size of that capital sum, and the amount of income that can be drawn from it, is a function of the contribution rate, the employee's length of service and salary, the performance of the investments that have been made, and interest rates at the time the employee uses the balance to purchase an annuity (should he or she choose to do so).
31. The salient features of typical DC plans include:
- (a) The size of the capital sum at retirement is unknown in advance of retirement;
 - (b) The size of the income that can be drawn from a given capital sum will depend on prevailing interest rates, and is therefore unknown until the employee actually uses the lump to purchase an annuity contract (which some never do);
 - (c) They tend to leave greater RRSP contribution room for the employee, compared to a typical DB Plan;

- (d) They offer the employee the ability to make investment decisions that might affect the size of his or her retirement income; and,
- (e) The value of the benefits tends to accumulate in a more uniform manner over the employee's career, as compared to a typical DB Plan.

Towers' Mandate

- 32. Towers had been the actuary for BRIP since the latter's creation.
- 33. Teck extended Towers' mandate, beyond that of plan actuary, to perform certain work for it in respect of the introduction of DCPlan. That extended mandate was limited in scope and extended only to:
 - (a) advising and assisting Teck with structuring DCPlan;
 - (b) assisting Teck with redesigning its pension administration computer system so as to be able to accommodate DCPlan;
 - (c) creating an Interactive Decision Model ("IDM") - a DOS-based computer program for distribution to the members of BRIP designed to model how BRIP might compare to DCPlan in a range of economic assumptions, many of which the user could manipulate to conduct a sensitivity analysis, and in light of certain personal information entered manually into the program by the employee;
 - (d) assisting Teck with the selection of a fund custodian and record keeper for DCPlan; and,
 - (e) representing Teck in its dealings with the federal pension regulator (the Office of the Superintendent of Financial Institutions or OSFI) to ensure that the introduction of DCPlan satisfied all regulatory requirements associated with the introduction of DCPlan.
- 34. In particular, in respect of the introduction of DCPlan, Teck did not retain Towers to do, and Towers did not in fact do, any of the following:
 - (a) Draft, edit, or control the content of any printed material distributed to Teck's employees; or,
 - (b) Communicate directly with any of Teck's eligible employees for the purposes of explaining the nature of the Offer or the implications or characteristics of BRIP or DCPlan, either individually or in a group.

35. All of Towers' work for Teck, including that in respect of the Offer and the introduction of the DCPlan discussed in paras. 33 and 34, above, met or exceeded the relevant contemporaneous standard of care.
36. Teck did not retain Towers to, nor did Towers in fact, draft, edit, or perform quality control on the content of the Informational Materials other than the IDM.

The IDM

37. Towers prepared the IDM based on detailed instructions, specifications and content provided to it by Teck.
38. The IDM was capable of modelling possible DB and DC benefits based in part on the following user-selectable variables and assumptions ("User Assumptions"):
 - (a) DCPlan Interest Rate: user-selectable between 6% and 12%;
 - (b) Salary Increase Rate: user selectable without restriction; and,
 - (c) Inflation Rate: user selectable without restriction.
39. The 6% to 12% range of user-selectable rates for the DCPlan Interest Rate assumption was reasonable and in accordance with contemporary actuarial thinking and practice.
40. However, all of the User Assumptions represented forward-looking economic variables, and the degree to which any chosen set of assumptions might reflect real-life experience was accordingly inherently unknowable.
41. Contrary to the allegations set out at para. 29 of the Claim, Teck specifically told the employees that the purpose of the IDM was to help them make their decision about whether to transfer to DCPlan, and that the tables and graphs that the IDM could generate were

...projections only, based on the assumptions shown, and should not be taken to represent the actual values you may receive in the future. The values are given for comparison purposes only.

The Offer

42. On or about August 19, 1992, Teck announced to all current employees who were members of BRIP that they would have the opportunity to become instead members of DCPlan.
43. Pursuant to the Offer, any employee who wished to become a member of DCPlan would:
 - (a) relinquish all of that employee's rights in BRIP;
 - (b) receive an initial account value ("IAV"), representing the actuarial present value, calculated upon certain assumptions, of the employee's pension entitlement under BRIP as of January 1, 1993, which would be deposited to the employee's new DCPlan account;
 - (c) receive thereafter regular contributions from Teck to the employee's DCPlan account in the amount of 5% of that employee's pensionable earnings. That employee would direct the investment of the balance in that employee's DCPlan account, within a range of options disclosed to the employee in advance.
44. The Offer was open for acceptance until November 30, 1992, although some employees were offered the opportunity to accept the Offer as late as December 1992.
45. Switching to DCPlan required a positive election; employees who remained silent as to whether they wished to accept the Offer would stay in BRIP by default.

Materials Given to the Employees

46. In or about September, 1992, Teck provided to each employee who was eligible to switch from BRIP to DCPlan the following materials ("Educational Materials") designed in whole or in part to assist them with that choice:
- (a) bulletins concerning the BRIP/DCPlan choice;
 - (b) an Employee Information Handbook;
 - (c) a booklet entitled *Introducing DCPlan: Your New Pension Alternative* (the "Booklet");
 - (d) the IDM; and,
 - (e) a handout entitled "Annuities".

Informational Seminars

47. In addition to the information contained in the materials distributed to the employees and discussed in para. 46, above, Teck, before the deadline for acceptance of the Offer
- (a) held group meetings for eligible employees; and,
 - (b) offered to eligible employees personal meetings with Teck's pension staff,
- all of which were for the purpose of educating Teck's employees as to the considerations they might bring to bear in making the choice between BRIP and DCPlan.

Accepting the Offer

48. The Plaintiffs accepted the Offer before the deadline and as a result became members of DCPlan effective January 1, 1993.
49. The Plaintiffs accepted the Offer without being misled, other than by their own negligence as described herein.

No Duty of Care to Plaintiffs

50. In respect of the Offer and of the introduction of DCPlan, Towers:
- (a) was instructed and paid by Teck and not by BRIP, DCPlan or any of their members;
 - (b) was entitled, and required, to take instructions exclusively from Teck;
 - (c) was required to have regard only to Teck's interests;
 - (d) had no interaction with the Plaintiffs in respect of the merits of the Offer; and,
 - (e) owed the Plaintiffs no duty of care.
51. The Plaintiffs were unaware of Towers' involvement in the introduction of DCPlan.

No Reasonable Reliance

52. In accepting the Offer, the Plaintiffs did not in fact rely
- (a) on the Educational Materials or any part of them that is alleged in the Claim to be untrue, inaccurate, or misleading;
 - (b) on any alleged statement or omission by Teck which is alleged to be untrue, inaccurate or misleading; or,
 - (c) on any alleged statement or omission by Towers that is alleged to be untrue, inaccurate, or misleading.
53. In the alternative, in accepting the Offer, the Plaintiffs relied on the Educational Materials, or on alleged statements or omissions by Teck or Towers, for a purpose or in a manner that was unreasonable.
54. In particular, in accepting the Offer, the Plaintiffs unreasonably took the assumptions in, and models produced by, the IDM as
- (a) guarantees of benefits that they would receive at retirement;

- (b) suggestions that the Plaintiffs were likely to receive the benefits modelled under any particular set of assumptions; or
- (c) as a statement that the economic variables used as input assumptions, including the User Assumptions, were likely to be similar to those prevailing over their careers and/or at the time they retired or annuitized (if ever).

55. In accepting the Offer, the Plaintiffs in fact relied primarily or wholly on their own expectations that the assumptions used in the IDM - and in particular the range of annual investment returns of 6% to 12% - were unduly conservative, and that the investment returns on their DCPlan balances would exceed those rates.

Contributory Negligence

56. Towers repeats the allegations at paras. 52 to 55, above.
57. If the Plaintiffs accepted the Offer based on any incorrect understanding, then they did so not due to any wrongful act of Towers or of Teck, but due in whole or part to their own negligence, particulars of which are as follows:
- (a) Failing to consult a financial advisor or retirement planner in respect of the relative merits of BRIP and DCPlan in light of their personal circumstances, despite having been advised to do so;
 - (b) Failing to review, and ensure that they understood, all of the information Teck provided to them, including in the Educational Materials, for the purpose of allowing them to understand the relative benefits of BRIP and DCPlan to him in light of their personal circumstances;
 - (c) Failing to attend, or to pay attention to and ensure they understood, the information presented to them at either the individual or group meetings offered by Teck for the purpose of allowing them to understand the relative benefits of BRIP and DCPlan to them in light of their personal circumstances;

- (d) Failing to read, heed, or ensure that they understood the warnings in the Educational Materials and elsewhere about the additional risk they would have to accept if they chose to convert to DCPlan from BRIP, including the caution that prevailing interest rates at the time of retirement might result in a lower than expected retirement income;
- (e) Failing to read and ensure that they understood the annual pension statements and reports available to them regarding BRIP;
- (f) Failing to monitor their DCPlan account balances and the pension that could be purchased with them to ensure that they were aware of their positions relative to any personal targets for retirement income;
- (g) Failing to avail themselves of the opportunity to purchase an annuity immediately after accepting the Offer, or at any time thereafter; and,
- (h) Failing to make inquiries of Teck as to any matters regarding the relative merits of BRIP and DCPlan in light of their personal circumstances, despite Teck having invited them to do so.

Failure to Mitigate

58. If the Plaintiffs have suffered loss for which Towers ought to be liable, then the Plaintiffs have failed to mitigate that loss, including, *inter alia*, by failing to purchase a deferred annuity or annuities when Teck made them available.

Division 3 Additional Facts

59. Towers does not wish to raise any additional facts other than those alleged in Division 2.

Part 2: RESPONSE TO RELIEF SOUGHT

60. Towers opposes the relief sought in the Claim.

Part 3: LEGAL BASIS

- 61. In respect of its work on the IDM, Towers was not acting as administrator of BRIP or DCPlan, but as contractor to Teck, and owed the Plaintiffs no duty.
- 62. Towers did owe a duty of care to Teck, including a duty not to enter into a conflict of interest.
- 63. The wrongs complained of in the Claim occurred, at the latest, in January of 1993. The action is statute-barred by the *Limitation Act*, R.S.B.C. 1996, c. 266 as amended.
- 64. Towers pleads the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333, as amended.

Towers' address for service:

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 Barristers and Solicitors
 1700 - 666 Burrard Street
 Vancouver, BC V6C 2X8
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Attention: Michael L. Bromm

Fax number address for service (if any):

604-681-1825

E-mail address for service (if any):

mbromm@stikeman.com

Place of trial:

Vancouver

The address of the registry is:

800 Smithe Street
 Vancouver, BC V6Z 2E1

Dated:

2012 October 1



Signature of Michael L. Bromm

- | | |
|---|---|
| | Defendant |
| X | Lawyer for Defendant Towers Perrin Inc. (now Towers Watson Canada Inc.) |

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.

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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 those defined contribution pension plans commencing on or about January 1, 1993, wherever they reside.

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