

CITATION: Ault v. Canada (Attorney General), 2011 ONCA 147
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COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., MacPherson and Cronk JJ.A.

BETWEEN

Margaret Ault, Robert Collier, Robert C. Temple, Rod Shepherd, Richard Findlay, David
Luck, Lucie Nobert, Marie-France Dufour, Bryan Armstrong

Plaintiffs
(Respondents)

and

Attorney General of Canada

Defendant
(Appellant/Respondent by way of cross appeal)

and

Sylvain Parent, Welton Parent Inc., Loba Limited and Raymond Jemus

Third Parties
(Respondents/Appellants by way of cross-appeal)

DOCKET: C49446

AND BETWEEN

David Luck

Plaintiff

(Appellant/Respondent by way of cross-appeal)

and

Attorney General of Canada

Defendant

(Respondent/Appellant by way of cross-appeal)

William McDowell, Monique Jilesen, Elizabeth Richards and Emily Graham, for the
Attorney General of Canada

Dougald Brown, for the respondents in C49464 and for the appellant in C49446

Howard Yegendorf, Marcia Green and Stephanie Lewis for the third party respondents

Heard: January 25 and 26, 2011

On appeal from the judgment of Justice Catherine D. Aitken of the Superior Court of
Justice, dated September 3, 2008, with reasons reported at (2008), 80 C.C.P.B. 1 and
2010 ONSC 1423.

By the Court:

OVERVIEW

[1] Following a 39-day trial, the trial judge awarded damages for negligent misrepresentation to seven of the eight plaintiffs who had sued the federal government, excluding David Luck. The Attorney General of Canada (the “AGC”) and Mr. Luck both appeal from that decision.

BACKGROUND

[2] The events giving rise to this litigation occurred more than a decade ago.

[3] Prior to October 15, 2000, one option for transferring pension monies between the Public Service Superannuation Plan (the “PSSP”) and private pension plans was by means of a reciprocal transfer agreement (“RTA”). Treasury Board Secretariat (“TBS”), the administrative arm of the Treasury Board, was responsible for negotiating such pension portability agreements with “approved” employers with valid private pension plans. One advantage of transferring monies pursuant to a RTA was that, in some cases, the transfer value was higher than it might otherwise have been (two times contributions plus interest).

[4] One of the 300 or so RTAs at the time was the Loba RTA. It was the brainchild of Sylvain Parent, an actuary and pension consultant. Mr. Parent was the principal actuary of Welton Parent Inc. (formerly known as Welton Beauchamp Parent Inc. (“WBP”)), an actuarial firm with a pension consulting focus. Leading up to the October 15, 2000 deadline for transferring monies pursuant to a RTA, Mr. Parent and WBP actively recruited federal public servants to join Loba Limited (“Loba”) on the basis that it would be financially advantageous from a pension perspective. They attracted significant interest in Loba and some 120 public servants, including the plaintiffs, joined the consulting company. Mr. Parent was the President of Loba and owned both it and WBP through a personal holding company.

[5] The idea was that federal employees would resign from their employment with the public service, join Loba, and transfer their pension monies to the Loba pension plan (the “Loba Plan”). The employees would remain with Loba only as long as it took to have their pension monies transferred. Once that happened, they would quit Loba and transfer their monies out of the Loba Plan, which was structured to permit cash payouts.

[6] While TBS had negotiated the Loba RTA, it had concerns about the legitimacy of the Loba pension scheme. For instance, it was concerned about the payout of pension monies in cash and, further, that the Loba Plan might not meet all requirements for registration under the *Income Tax Act*, R.S.C. 1985, c. 1.

[7] As a result of concerns about the Loba arrangements, TBS put a hold on transfers to the Loba Plan during the summer of 2000. The plaintiffs were not made aware of the hold.

[8] While the hold was eventually lifted, TBS officials continued to have concerns about the validity of the Loba Plan, which they communicated to the Canada Revenue Agency (the “CRA”). The CRA shared its concerns about the Loba Plan and other similar plans.

[9] In particular, the CRA set out its concerns in writing in a letter to TBS dated September 7, 2000 (the “TBS Letter”) and in a second similar letter to Loba and WBP dated September 15, 2000 (the “Parent Letter”). The CRA intended that the TBS and Parent Letters be distributed to all those interested in RTAs so that they would be aware

of the risks and could make an informed choice about their pension funds. The CRA asked TBS officials and Mr. Parent to distribute the letters setting out its concerns.

[10] For various reasons, the TBS and Parent Letters were not broadly distributed as intended and requested by the CRA. The eight plaintiffs in this case did not receive copies of either letter and were not informed of most of the information contained in the letters.

[11] In the meantime, various government communications advised employees that if they applied by the October 15th RTA deadline, their monies would be transferred to the private pension plans designated by them. There was no mention in any of these communications of any risks associated with the transfer of pension monies pursuant to a RTA and, in particular, the Loba RTA.

[12] In this case, some time after they had quit the public service and commenced employment with Loba, the plaintiffs learned that transfers to the Loba Plan had been suspended, that the RCMP was investigating Loba and Mr. Parent, and that the CRA was investigating the Loba Plan.

[13] In 2003, the CRA filed a Notice of Intent to Revoke the Loba Plan, and the Federal Court of Appeal upheld that decision: 2004 D.T.C. 6680 (F.C.A.). Mr. Parent's subsequent attempt to have the Loba Plan re-registered was unsuccessful: 2009 D.T.C. 5033 (F.C.A.).

[14] As a result of the revocation, the plaintiffs' pension monies were not transferred to the Loba Plan.

[15] The plaintiffs (except for Mr. Luck who did not claim any pension losses) sued the AGC, claiming the difference between: (1) the benefits (salary, pension, severance pay, health coverage, life insurance coverage) they would have received between the date of resignation from the public service and the date they likely would have retired from the public service had they not joined Loba; and (2) the benefits (earnings, pension, etc.) they actually received over the same period. All earned less after leaving the public service than they would have earned had they remained in the public service until their retirement date. They also lost certain benefits available to public servants.

[16] The AGC in turn brought third party actions against Loba, Mr. Parent, and WBP (collectively, the "Loba Parties") for negligent misrepresentation and breach of fiduciary duty.

TRIAL JUDGE'S REASONS

[17] The trial judge concluded that the AGC was liable for negligent misrepresentation. The core of the trial judge's findings against the AGC was:

- 1) the AGC owed duties of care to the plaintiffs as employer and pension plan administrator;

- 2) the AGC made explicit, implied and omitted representations regarding the availability of the Loba RTA as a legitimate pension portability option, which representations were misleading:
 - a) there were explicit representations relating to the existence, legality and accessibility of the Loba RTA;
 - b) there was an implied representation that the government had satisfied itself that “approved” employers with RTAs with the government, including Loba, were legitimate employers and that the government was unaware of any circumstances that raised serious doubts as to whether a transfer could be made under the Loba RTA; and
 - c) there was an omitted representation in the failure to advise the plaintiffs that there was a significant identifiable risk that the CRA would deregister the Loba Plan.
- 3) the key negligence was the failure to distribute the TBS Letter from the CRA detailing the CRA’s concerns about pension transfers from the government to entities like Loba, or a failure to distribute the information in the TBS Letter, to the plaintiffs;
- 4) the plaintiffs reasonably relied on the AGC’s representations; and
- 5) the explicit, implied and omitted representations caused the plaintiffs’ loss of government and pension income.

[18] The trial judge held that the Loba Parties were also liable to the plaintiffs for negligent misrepresentation, as well as for breach of fiduciary duty. Her central findings in relation to the Loba Parties were:

- 1) the Loba Parties owed duties of care to the plaintiffs;
- 2) the Loba Parties did not owe fiduciary duties to the plaintiffs prior to their joining the Loba Plan, but did so thereafter;
- 3) the Loba Parties made negligent misrepresentations to the plaintiffs;
- 4) the key negligent misrepresentation was the failure to provide the plaintiffs with the TBS and Parent Letters or the information contained in the letters;
- 5) the failure in 4) also amounted to a breach of fiduciary duties on the part of the Loba Parties;
- 6) in addition, the Loba Parties withheld information about the Loba Plan beginning in January 2001 in further breach of their fiduciary duties.

[19] Having concluded that both the AGC and the Loba Parties were liable to the plaintiffs, the trial judge apportioned liability as between them at 80 per cent for the AGC and 20 per cent for the Loba Parties.

[20] In the result, the AGC was ordered to pay damages to the plaintiffs as follows:

Margaret Ault

\$124,961.00

Robert Collier	\$355,860.00
Robert C. Temple	\$235,663.00
Rod Shepherd	\$615,947.00
Richard Findlay	\$586,205.00
Lucie Nobert	\$468,022.00
Bryan Armstrong	\$446,143.00

[21] The trial judge also ordered that the Loba Parties were jointly and severally liable to the AGC for contribution and indemnity in respect of the AGC's damages in the following amounts:

Margaret Ault	\$24,992.20
Robert Collier	\$71,172.00
Robert C. Temple	\$47,132.60
Rod Shepherd	\$123,189.40
Richard Findlay	\$117,241.00
Lucie Nobert	\$93,604.40
Bryan Armstrong	\$89,228.60

[22] The eighth plaintiff in the action was David Luck. As noted, he advanced a claim for lost salary but made no pension loss claim. He did not lead evidence about the

capitalized value of his pension benefits. The trial judge observed (correctly, as it turns out) that it was possible that the capitalized value of the actual pension he received would be greater than the capitalized value of the pension he would have received had he remained in the public service until his anticipated retirement date. In these circumstances, the trial judge determined that, although Mr. Luck had suffered a proven loss of \$108,525 relating to his loss of salary and severance pay (which the trial judge would have reduced by 10 per cent for contributory negligence), his failure to lead evidence about his pension situation disentitled him to damages because he “chose to leave out a piece of the puzzle.” In her view, it was necessary to look at the “net impact” of the financial ramifications of Mr. Luck’s resignation. Thus, as a material evidential gap existed, Mr. Luck’s damages claim failed.

[23] The trial judge awarded costs to the plaintiffs totalling \$708,399 and, by analogy to the damages apportionment, she ordered that the Loba Parties were jointly and severally liable to the AGC for contribution and indemnity in the amount of \$139,675 in respect of these costs.

[24] The trial judge ordered that Mr. Luck pay costs of \$20,000 to the AGC.

[25] In the third party actions, the trial judge ordered that the Loba Parties pay the AGC costs of \$100,000.

ISSUES ON APPEAL

[26] The AGC raises five issues on the main appeal:

- 1) Did the trial judge err in finding that the AGC owed the plaintiffs a duty of care?
- 2) Did the trial judge err in finding that the AGC had breached the duty by making an untrue, inaccurate or misleading representation that was reasonably relied on by the plaintiffs?
- 3) Did the trial judge err in finding that the AGC had caused the plaintiffs' losses?
- 4) Did the trial judge err in her apportionment of liability as between the AGC and the Loba Parties?
- 5) Did the trial judge err in failing to award the AGC its total partial indemnity costs against the Loba Parties in the third party actions?

[27] The Loba Parties cross-appealed the costs ruling of the trial judge in the third party actions. They sought to set aside the \$100,000 costs award made against them and to replace it with an order that the AGC pay them substantial indemnity costs of \$592,861. The Loba Parties abandoned their cross-appeal at the appeal hearing.

[28] Mr. Luck appeals the trial judge's dismissal of his damages claim on the basis that the trial judge erred by linking his inferred "pension gain" to his proven salary loss. The AGC cross-appeals, asking among other things that any damages awarded reflect Mr. Luck's contributory negligence.

[29] At the appeal hearing, the court did not call on the plaintiffs to respond to issues 1, 2 and 3.

THE AGC'S APPEAL

(1) Duty of care

[30] The existence of a duty of care is the first of five requirements set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, at para. 33, for establishing negligent misrepresentation.

[31] The trial judge concluded that the Treasury Board, as employer and as pension plan administrator, owed a duty of care to the plaintiffs. The AGC submits that the trial judge erred in reaching this conclusion for two reasons: first, she failed to respect the distinct and separate statutory responsibilities of the Treasury Board, as employer and plan administrator, and the CRA, as the regulator of pension plans under the *Income Tax Act*; and second, she erroneously determined that the duty being alleged in this case fell within a recognized category or an analogous one. We do not accept these submissions.

[32] On the first point, the trial judge was very careful in the way she described the locus within the federal government for the potential duty of care in this case – it was the Treasury Board, as employer and plan administrator, the Superannuation Directorate, which was responsible for the actual administration of the PSSP, and compensation advisors within the employing departments, who were responsible for advising employees regarding superannuation matters. She said (at para. 611):

Public servants such as Charko, Gravelle and Macpherson working at the Pensions Division [of TBS], Soucoup and Swan working at the Superannuation Directorate [of Public Works and Government Services Canada] and the compensation advisors working in the employing departments and agencies, ought reasonably to have foreseen that public

servants, such as the Plaintiffs, considering exercising their right as members of the PSSP to take advantage of [a] RTA would rely on their representations regarding the existence, legality and accessibility of that RTA. I also find that reliance on those representations by public servants in the Plaintiffs' position, in the particular circumstances of these cases, was reasonable. I conclude that Charko, Gravelle, Macpherson, Soucoup, Swan, the compensation advisors in the departments and agencies, and those to whom all of these individuals reported, had an obligation to be mindful of the Plaintiffs' interests in going about their responsibilities as the Plaintiffs' employer and as administrator of the Plaintiffs' pension plan.

[33] It is true that other branches of the government, including the CRA, and other government-related entities, such as the RCMP, were involved in various ways in assessing, investigating and regulating the RTA program. However, the plaintiffs' claim – about money they alleged they had unfairly lost – was against their employer and their pension plan administrator. As explained by the trial judge (at para. 627):

What is being suggested [by the plaintiffs] is that, where the Pensions Division, that is charged with overseeing the RTAs entered into by the Treasury Board for the benefit of PSSP members, has specific knowledge of a significant risk associated with a category of such RTAs, the Treasury Board owes a duty of care to public servants whom it knows to be considering an RTA to advise them of the existence of that risk.

[34] On the second point, the AGC submits that there is no established duty in law on an employer to provide information about the viability of a prospective new employer's (Loba's) pension plan.

[35] This misses the point that the entire RTA program was created by the federal government and that the federal government had created an internal apparatus, anchored in TBS and fleshed out with pension divisions and compensation advisors, that was deeply involved in administering the program. Any step taken by an employee towards transferring his or her pension monies pursuant to a RTA with a new employer had an immediate impact on the employee's status as a federal public servant (gone), salary (gone), and pension (transferred). Accordingly, it was the plaintiffs' longstanding and current status as employees in the federal public service – not their potential new employment with a different employer – that grounds the duty of care.

[36] The government was not only the employer of the plaintiffs. It was also the administrator of the PSSP of which all the plaintiffs were members as federal government employees. As this court said in *Hembruff v. Ontario Municipal Employees Retirement Board* (2005), 78 O.R. (3d) 561, at paras. 66 and 67, leave to appeal refused, [2006] S.C.C.A. No. 3, there is a special relationship between the administrator of a pension plan and the members of the plan and, as a result, the administrator has an obligation to be mindful of plan members' interests when administering the plan. In these circumstances, framing a duty of care in terms of providing information to employees and plan members about a known "significant risk associated with a category of such RTAs" fits comfortably within the description of the duty of care in the pension case law. There is nothing novel about the duty of care found by the trial judge in this case.

(2) Misrepresentation and reliance

[37] The trial judge concluded that “the explicit, implied and omitted representations of the federal Crown to the Plaintiffs regarding the availability of the Loba RTA as a legitimate option for them to consider were misleading.” The AGC contends that the trial judge erred in reaching this conclusion because what the employees were told by various representatives of the government including, especially, their compensation advisors, was accurate and, with respect to omissions, there was no obligation to provide the information.

[38] We do not accept this submission. Whether or not a statement or implied statement is a misrepresentation is a finding of fact that depends on the trial judge’s assessment of the evidence and inferences drawn from the evidence: see *Kerr v. Danier Leather Inc.* (2005), 77 O.R. (3d) 321 (C.A.), at para. 139, aff’d [2007] 3 S.C.R. 331. Such a finding should not be disturbed unless there is a palpable and overriding error in the trial judge’s assessment of the evidence: see *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (C.A.), at para. 85, leave to appeal refused, [2000] S.C.C.A. 96.

[39] In our view, the evidence marshalled by the trial judge to support her conclusion of misrepresentation was very strong indeed. Although there were many facets to this evidence, we would mention just one by way of illustration, namely, the disconnect between what senior TBS administrators knew in the months running up to the October 15, 2000 cutoff date for RTAs about the significant risks associated with transfers to the

Loba Plan and the ignorance of the lower level compensation advisors – the people who actually met with and assisted the employees – about those risks. As explained by the trial judge (at para. 668):

In cross-examination, Charko acknowledged that he expected that the information provided to the Plaintiffs by compensation advisors would be “complete”. All of the compensation advisors who dealt with the Plaintiffs were operating on the incorrect premise that the Loba RTA was a routine arrangement and transfer payments would occur in the normal course under the Loba RTA. Since they were unaware that the Treasury Board had previously put the Loba transfers on hold and that the Treasury Board was in possession of information that could result in its again putting the transfers on hold or suspending them indefinitely, the compensation advisors were not in a position to advise the Plaintiffs of the existence of these risks. In essence, they were not in a position to provide the Plaintiffs with the relevant information they needed in order to make an informed decision relating to their pension options. Had the compensation advisors been aware of the existence of Treasury Board concerns and of the earlier hold on transfers, at the very least, they could have advised the Plaintiffs to make further inquiries of the Treasury Board before submitting their resignations from the public service. That was not done.

[40] There is nothing in this reasoning or in the rest of the trial judge’s analysis on the misrepresentation issue that could fairly attract the label ‘palpable and overriding error’.

[41] The same analysis and conclusion is apposite with respect to the AGC’s assertion that the plaintiffs did not reasonably rely on the information that they received from the AGC’s compensation advisors. Again, the standard of review of this issue is palpable and overriding error. Again, the trial judge dealt comprehensively with the evidence,

including, importantly, providing an individual assessment of the evidence relating to reliance for each employee. She expressed her conclusion in this fashion (at para. 868):

The substance of the evidence of each Plaintiff was that he or she had relied on the written and/or oral communications from government representatives in concluding that a transfer of pension entitlements from the PSSP to the Loba pension plan pursuant to the Loba RTA was a routine matter, assuming the Plaintiff resigned from the public service, became employed with Loba and submitted an Appendix B before October 15, 2000. I interpret the Plaintiffs' evidence as being that they relied on the written and/or oral communications from government representatives in concluding that the government was not aware of circumstances that created a significant risk that the Loba pension plan would be de-registered and transfers under the Loba RTA would never occur. I also accept the evidence of all of them that, had they been made aware that a significant risk existed that a transfer of their pension entitlement into the Loba pension plan might not occur, this would have impacted their decision to leave the public service to join Loba.

[42] Again, our conclusion is that there is nothing in the trial judge's analysis on the reliance issue that could fairly attract the label 'palpable and overriding error'. The employees clearly relied on the advice of professional people in the government whom they trusted and, as found by the trial judge, their reliance was entirely reasonable.

(3) Causation

[43] The AGC argues that the trial judge erred in finding that the AGC's negligent misrepresentations caused the damages she awarded. We disagree.

[44] The basic test for determining causation in cases of negligence is the “but for” test. The plaintiff bears the burden of showing that “but for” the negligent act or omission of the defendant the injury or harm would not have occurred.

[45] The “but for” test recognizes that compensation for negligent conduct should only be made where there is a substantial connection between the injury and the defendant’s conduct: *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, at para. 23. In assessing the issue of “substantial connection”, courts consider whether the damages claimed were a reasonably foreseeable result of the defendant’s negligence. In cases where there is not a substantial connection between the damages and the negligence, the damages are said to be too remote for recovery.

[46] The trial judge found as a fact that had the AGC advised the plaintiffs prior to their resignations from the public service of the significant risks that were identified by the CRA as being associated with Loba-type arrangements, the plaintiffs would not have resigned from the public service to join Loba. The trial judge went on to conclude that it was the act of leaving the public service to join Loba that resulted in the damages because the plaintiffs’ employment with Loba did not provide them with the same salary and other benefits as those to which they would have been entitled had they continued in the public service.

[47] Each of the plaintiffs testified to the facts as found by the trial judge. We see no basis to interfere with these findings. Thus, it can be said that “but for” the AGC’s

negligent misrepresentations, the plaintiffs would not have incurred the damages awarded.

[48] The AGC argues, however, that the damages awarded by the trial judge for the loss of salaries and benefits are not substantially connected to the AGC's negligent misrepresentations and are, therefore, not compensable. The AGC makes three arguments in this regard.

[49] First, the AGC argues that the damages were not reasonably foreseeable to the AGC. The AGC had no way of knowing whether the plaintiffs would earn more or less at their Loba jobs. That being the case, the AGC could not have reasonably foreseen the damages claimed.

[50] The trial judge addressed this issue squarely. She pointed out that a senior TBS official, Ann Gravelle, realized that if public servants resigned to join Loba and transfers were indefinitely suspended under the Loba RTA, the public servants risked incurring precisely the type of losses that they claimed in this case. Gravelle, who was one of the principal TBS actors on this file, foresaw exactly the situation that ensued and led to the plaintiffs' damages. In our view, the losses that give rise to the damage awards were reasonably foreseeable to the AGC.

[51] Second, the AGC argues that it did not induce the plaintiffs to leave their public service employment and that the lack of any inducement weighs against a finding of causation. While evidence of an inducement may be strong evidence to support a finding

of causation, it is not essential. In a case of negligent misrepresentation, a plaintiff need prove only that he or she relied on the misrepresentation in taking the course of action that led to the damage.

[52] In this case, the trial judge found reliance and had ample evidence to support her finding.

[53] Finally, the AGC argues that the Loba Parties' misrepresentations met the "but for" test and that had it not been for those misrepresentations, the plaintiffs would not have left the public service. The fact that Mr. Parent, the principal of Loba, also made misrepresentations to the plaintiffs does not negate the AGC's liability. The trial judge found that the plaintiffs relied on the AGC's misrepresentations and that those misrepresentations were a cause of the loss. It is not the law that a particular defendant's negligent misrepresentation must be the sole cause of the plaintiff's loss. There can be more than one substantial cause. It is sufficient that the plaintiff relied on the defendant's statements to his or her detriment: *NBD Bank*, at para. 78. Indeed, when there is more than one tortious cause, the court may apportion liability among tortfeasors.

(4) Apportionment of liability

[54] The AGC argues that the trial judge failed to properly assess the apportionment of liability. It contends that the Loba Parties' negligence was the largest cause, by far, of the plaintiffs' damages and that the trial judge's 80:20 apportionment in favour of the Loba

Parties should be reversed, so that the Loba Parties are held 80 per cent liable and the AGC's proportionate fault is reduced to 20 per cent.

[55] In support of this argument, the AGC attacks the trial judge's apportionment on several bases. Among other matters, it submits that the trial judge erred by concluding that the Loba Parties owed no fiduciary duties to the plaintiffs before the date on which the plaintiffs became members of the Loba Plan. It also maintains that when assigning degrees of fault to the AGC and the Loba Parties, the trial judge failed to consider the Loba Parties' fiduciary duties and their breaches of those duties. Finally, the AGC contends that the trial judge's apportionment of liability does not properly reflect her own description of the nature and extent of the Loba Parties' blameworthy acts with respect to the plaintiffs. These errors, the AGC says, led to the failure to assign to the Loba Parties a degree of responsibility that accurately reflects their blameworthy conduct.

[56] The test for appellate interference with a trial judge's apportionment of liability is an exacting one: "The apportionment of liability is primarily a matter within the province of the trial judge. Appellate courts should not interfere with the trial judge's apportionment unless there is demonstrable error in the trial judge's appreciation of the facts or applicable legal principles (citations omitted)": *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, at para. 57. See also *Martin v. Listowel Memorial Hospital* (2000), 51 O.R. (3d) 384 (C.A.), at para. 20. A similar deferential standard applies to a trial judge's conclusion that a fiduciary duty did not exist on the specific facts of a given

case. Absent an error of law or a palpable and overriding error of fact, such a finding must be upheld on appeal: *Galambos v. Perez*, [2009] 3 S.C.R. 247, at para. 49.

[57] In this case, we are satisfied that these high thresholds for interference with the trial judge's apportionment and her fiduciary finding have been met. In our view, the trial judge erred by concluding that the Loba Parties owed fiduciary duties to the plaintiffs only after the plaintiffs became members of the Loba Plan. She further erred by failing to properly account in her apportionment analysis for the fiduciary duties owed and breached by the Loba Parties. Finally, the trial judge erred by apportioning liability in a way that is fundamentally inconsistent with her own description of the blameworthy conduct of the parties. These errors displace the deference that ordinarily would be accorded to the trial judge's apportionment. They resulted in a material understatement of the Loba Parties' degree of fault. Accordingly, the trial judge's apportionment of liability cannot stand.

**(a) Trial Judge's consideration of the
Loba Parties' fiduciary duties**

[58] The trial judge held that, in their roles as the administrator and third party administrator of the Loba Plan, the Loba Parties owed fiduciary duties to the plaintiffs from the date when the plaintiffs became members of the Loba Plan. The latest date on which any of the plaintiffs joined the Loba Plan was October 14, 2000, the day prior to the cutoff date for transfers of pension funds under the Loba RTA. The trial judge

rejected the AGC's contention that the Loba Parties owed fiduciary duties to the plaintiffs before the plaintiffs joined the Loba Plan.

[59] The trial judge also held that Mr. Parent and WBP, as consulting actuaries, owed additional duties to the plaintiffs based on the professional and ethical standards for actuaries prescribed in the *Rules of Professional Conduct* promulgated by the Canadian Institute of Actuaries (the "CIA"), the regulator of actuaries in Ontario. The trial judge concluded that these additional obligations gave rise to ordinary tort law, rather than fiduciary, duties of care to the plaintiffs.

[60] The trial judge did not refer explicitly to the Loba Parties' fiduciary duties in her apportionment analysis. However, contrary to the AGC's submission, we think that she did so implicitly when she said in her apportionment reasons (at para. 1313):

I have found that the most significant negligent misrepresentation made by Parent, Loba and WBP was their failure to advise the Plaintiffs ... about the contents of [the TBS and Parent Letters]. As the Loba pension plan administrator or third party administrator, and as an actuary, Parent had a professional duty to disclose this information. Parent let his own wishful thinking and certainty about the legitimacy of the Loba arrangements get in the way of his obligation to make full disclosure to the Loba pension plan members. He put the financial interests of himself, Loba and WBP ahead of those of the Plaintiffs ... in not disclosing this information.

[61] The trial judge had earlier found that the Loba Parties' deliberate non-disclosure of the TBS and Parent Letters or the information contained in them was a breach of their fiduciary duties. Thus, while the trial judge did not use the label "fiduciary duty" in her

apportionment analysis, it is implicit in the above-quoted passage from her reasons that she took account of those fiduciary duties that she concluded were owed by the Loba Parties to the plaintiffs.

[62] However, for the purpose of her assessment of the Loba Parties' proportionate degree of responsibility, the trial judge's consideration of the Loba Parties' breaches of fiduciary duty was confined to their conduct from the date that the plaintiffs joined the Loba Plan.

[63] This is confirmed by the trial judge's comments, set out above. In those comments, the trial judge referred both to the Loba Parties' role as the administrator or third party administrator of the Loba Plan, and to Mr. Parent's role as an actuary. On the trial judge's findings, the former role gave rise to fiduciary duties after the plaintiffs became members of the Loba Plan, while Mr. Parent's role as an actuary in relation to the plaintiffs was not fiduciary in nature. Further, the non-disclosure emphasized by the trial judge was described by her as the obligation to make full disclosure "to the Loba pension plan members".

(b) Errors in the trial judge's fiduciary analysis

[64] In our view, the trial judge erred in her fiduciary analysis by holding that the Loba Parties owed no fiduciary duties to the plaintiffs before the plaintiffs joined the Loba Plan. This error, in turn, led the trial judge to inappropriately narrow her consideration of

the extent and significance of the Loba Parties' breaches of their fiduciary duties for the purpose of apportionment of liability. We say this for the following reasons.

[65] First, the trial judge's finding regarding the date on which the Loba Parties' fiduciary duties first commenced conflicts with her own factual findings concerning the nature of the relationship between the parties and the circumstances surrounding that relationship prior to the plaintiffs joining the Loba Plan. The trial judge found that:

- (1) Mr. Parent held himself out to the plaintiffs as being an actuary and pension expert;
- (2) during his interactions with the plaintiffs, Mr. Parent acted in a variety of different capacities, including as a consulting actuary with expertise in pension matters, "when he advised [the plaintiffs] about their entitlement under the PSSP, their potential entitlement under the Loba [Plan], and the options available to the Plaintiffs to realize that value after it arrived in the Loba [Plan]";
- (3) Mr. Parent was also functioning as principal of WBP, "the consulting actuary to the Plaintiffs";
- (4) Mr. Parent knew that the plaintiffs looked to him and to WBP "for information about their pension entitlements *because* he was an actuary" (emphasis in original);
- (5) Mr. Parent realized that the plaintiffs "would place trust in the information he provided in great measure because he was a professional actuary subject to professional obligations";
- (6) the plaintiffs provided personal and confidential information to Mr. Parent and WBP during their pre-October 15, 2000 consultations with them, including information "about their family situations, their incomes, their positions and their goals for the future",

which none of the plaintiffs would have shared with Mr. Parent “unless they believed that [he] was under a duty to use that information for their benefit”. In addition, when Mr. Parent “*was explaining employment opportunities at Loba*” to each plaintiff (i.e. in his consultations with the plaintiffs prior to their resignations from the public service), Mr. Parent knew each plaintiff’s age, years of service with the public service, position, income level and retirement plans (emphasis added);

- (7) Mr. Parent knew that each plaintiff considered their pension funds with the PSSP as “one of his or her most significant assets” and that each plaintiff “would be relying heavily on what he told them about Loba, the Loba [Plan] and the Loba RTA *in deciding whether to leave the public service and join Loba*” (emphasis added);
- (8) Mr. Parent was also aware that the plaintiffs “were being asked to make a very significant decision about their future in a short time frame” and that they had “minimal opportunity to gather information relevant to that decision” and “very little opportunity to consult any other professionals concerning the Loba option”;
- (9) the subject matter being dealt with by Mr. Parent in his role as a consulting actuary was very complex;
- (10) Mr. Parent realized the limits of the plaintiffs’ knowledge regarding pensions. The plaintiffs did not have the skills to verify the numbers or the options outlined by Mr. Parent;
- (11) as far as the plaintiffs and Mr. Parent were aware, no one had as much expertise about the Loba Plan as Mr. Parent did;
- (12) given their limited pension knowledge and “the complexity of the subject matter and its inaccessibility to the average person”, the plaintiffs were vulnerable;

- (13) Mr. Parent realized that the plaintiffs “*were looking to him for relevant information to inform their decision whether or not to leave the public service and join Loba*” (emphasis added); and
- (14) had the plaintiffs been made aware that “a significant risk existed that a transfer of their pension entitlement into the Loba pension plan might not occur”, this “would have impacted their decision to leave the public service to join Loba”. In particular, had the plaintiffs been told of the information in the TBS and Parent Letters, the plaintiffs would not have decided to leave the public service to join Loba and, therefore, would not have suffered any damages.

[66] The trial judge was entitled to make these findings on the evidence before her and they are not challenged on appeal. These findings concern the nature of the relationship between the parties and the circumstances surrounding that relationship prior to the date on which the plaintiffs joined the Loba Plan. They reflect elements of trust, reliance, confidence and vulnerability in the relationship and dealings between the parties during the plaintiffs’ pre-October 15, 2000 consultations with the Loba Parties. As we will elaborate, these relational features underlie the notion of a fiduciary duty. See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. In our view, these findings compel the conclusion that the Loba Parties’ fiduciary duties arose before the plaintiffs joined the Loba Plan.

[67] We also note that, at the relevant times, Mr. Parent owned both Loba and WBP through his personal holding company. He served as Loba’s President and the representative of the Loba Parties in their dealings with the plaintiffs before they joined the Loba Plan. The trial judge found that Mr. Parent was the directing mind of Loba’s and

WBP's operations and their agent during his consultations with the plaintiffs. It was Mr. Parent who met or spoke to all the plaintiffs "to explain what their relationship would be with Loba and what benefits they could receive under the Loba RTA and Loba pension plan". It was also Mr. Parent who "answered the Plaintiffs' questions about the Loba arrangements – both before and after they joined Loba".

[68] On these facts, the trial judge concluded that, like Mr. Parent personally, Loba owed duties of care to the plaintiffs. We agree. Moreover, in the circumstances that obtained here, Loba is fixed with the consequences of Mr. Parent's and WBP's breaches of their fiduciary duties.

[69] There is a second difficulty with the trial judge's fiduciary analysis. Although the trial judge relied on many of the findings described above to support her conclusion that the Loba Parties owed duties of care to the plaintiffs prior to the date on which they joined the Loba Plan – duties that she found attracted a "high" standard of care – she held that these duties were not impressed with fiduciary obligations. This conclusion is at odds with the applicable jurisprudence regarding the distinctions between the fiduciary obligation and the ordinary tort law duty of care. While these duties may sometimes overlap, they remain conceptually and functionally unique: see *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at p. 272.

[70] In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 404, the Supreme Court endorsed the following description of the fiduciary principle, set out in *Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326 (C.A.), at p. 341:

Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element ... referred to as confidentiality.

[71] The Supreme Court also indicated at p. 405:

[T]he fiduciary duty may properly be understood as but one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others ... the concept of vulnerability ... is an important indicium of [the existence of a fiduciary relationship].

[72] In this context, *Hodgkinson* holds at p. 405:

[W]hile both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, *the presence of loyalty, trust and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.* [Emphasis added.]

[73] Ultimately, the trial judge appears to have rejected the notion that the Loba Parties owed fiduciary duties to the plaintiffs before they joined the Loba Plan on the basis of three main factors (at para. 958):

- (1) Mr. Parent had minimal interaction with each of the plaintiffs in his role as consulting actuary;
- (2) the plaintiffs sought information from Mr. Parent based on an actuarial analysis. They did not seek or obtain advice or recommendations “in a broader sense”; and
- (3) the plaintiffs were aware that due to Mr. Parent’s obligations to WBP and Loba, he had other interests and “divided loyalties”.

[74] In our opinion, the trial judge’s emphasis on these factors was misplaced. We note first, the duration and frequency of Mr. Parent’s contacts with the plaintiffs before they joined the Loba Plan, while part of the context of their dealings, is not determinative of the existence of fiduciary obligations. Fiduciary law focuses on relationships. It is the nature of the relationship at issue as well as the surrounding circumstances that give rise to fiduciary duties. See *Galambos*, at para. 70; *Lac Minerals*, at p. 648.

[75] Further, and significantly, although the trial judge framed the scope of Mr. Parent’s consulting services narrowly in the above-mentioned part of her reasons, this is inconsistent with her other findings that cast the services provided to the plaintiffs prior to their resignations from the public service in considerably broader language. For example, the trial judge elsewhere held that Mr. Parent (and therefore also WBP and Loba) advised the plaintiffs before they quit the public service and joined Loba about: (1) their entitlements under the PSSP; (2) their potential entitlements under the Loba Plan; (3) the available options to realize value after their funds arrived in the Loba Plan; and (4) their employment opportunities at Loba.

[76] The trial judge also held that the plaintiffs trusted and relied on the information and advice provided by the Loba Parties, including in respect of their decisions “whether to leave the public service and join Loba”. These findings implicate the plaintiffs’ dependency on the Loba Parties and their vulnerability from the outset of the parties’ consultations.

[77] Finally, the fact that the plaintiffs knew that Mr. Parent was not acting as a completely independent actuary does not answer the question whether the Loba Parties were fiduciaries. Mr. Parent failed to fully disclose the nature of the Loba Parties’ conflicting interests in the Loba pension plan arrangements, including his own “divided loyalties”, to the plaintiffs. Further, as the trial judge herself observed, a duty of loyalty is “inherent to any professional relationship”, including that of an actuary and his or her client.

[78] When the trial judge’s findings about the relationship between the parties prior to the date on which the plaintiffs joined the Loba Plan are viewed as a whole, they strongly militate in favour of the conclusion that the Loba Parties’ fiduciary duties arose before that date. The relationship of trust and confidence between the parties began when the plaintiffs approached Mr. Parent and disclosed highly personal and confidential information to him in reliance, to his knowledge, on his qualifications and expertise as an actuary and pension expert who was providing professional actuarial and pension-related services about a complex subject matter that was beyond the plaintiffs’ own experience and evaluative skills.

[79] Finally, the trial judge's fiduciary analysis is also problematic in that it undermines and minimizes Mr. Parent's and WBP's obligations as actuaries whose professional conduct is regulated by the standards set by the CIA, their self-regulating body.

[80] As we have said, the trial judge found that Mr. Parent owed the plaintiffs a duty of care in accordance with the CIA *Rules of Professional Conduct* that bind actuaries in Ontario. She also held that WBP, "as the actuarial firm for whom Mr. Parent worked, owed the same duty of care" to the plaintiffs.

[81] The evidence at trial established that the applicable CIA *Rules* oblige actuaries, among other things, to refrain from any professional conduct involving misrepresentation and to make "full and timely disclosure" to a client of "the sources of all direct or indirect compensation that the member or the member's firm has received or may receive" in relation to a professional services assignment.

[82] The trial judge considered Mr. Parent's and WBP's obligations to the plaintiffs under the CIA *Rules* in the context of determining whether they owed an ordinary duty of care to the plaintiffs. Later in her reasons, she also acknowledged that their obligations under the CIA *Rules* was a factor supporting the conclusion that they were in a fiduciary relationship with the plaintiffs "when providing them with a financial analysis relating to their pension entitlement under the PSSP and the possibilities under the Loba RTA".

[83] The trial judge went on to conclude, however, that this factor was overborne by other considerations, including: (1) since the plaintiffs did not have any pre-existing relationship with Mr. Parent, “there was no expectation that he would feel loyalty toward them, *aside from the loyalty inherent in any professional relationship*” (emphasis added); (2) the plaintiffs did not obtain advice from Mr. Parent about what they should do and Mr. Parent made it clear that he was simply providing the plaintiffs with a financial analysis for their use; and (3) none of the plaintiffs gave Mr. Parent discretion to act on his or her behalf. In this fashion, the trial judge discounted the import of Mr. Parent’s and WBP’s professional obligations under the *CIA Rules*. In so doing, the trial judge erred.

[84] We have already discussed the trial judge’s conflicting findings about the scope of the professional services provided by the Loba Parties. To repeat, based on her factual findings as a whole, we are unable to accept that Mr. Parent and WBP played the limited role set out in paragraphs 75 and 85, above. On the totality of the trial judge’s findings, they were not mere passive conduits of financial information in their consultations with the plaintiffs before the plaintiffs resigned from the public service.

[85] Nor does the absence of a specific grant of discretionary agency authority or power to the Loba Parties in respect of the plaintiffs and their interests dispose of the question of whether the Loba Parties’ relationship with the plaintiffs was fiduciary from the outset. As indicated by the Supreme Court in *Galambos*, at paras. 83-84, while “[i]t is fundamental to the existence of any fiduciary obligation that the fiduciary has a discretionary power to affect the other party’s legal or practical interests”, that power

“may be quite broadly defined”. It may arise, for instance, “in particular situations such as the professional advisory relationship addressed in *Hodgkinson*, by the beneficiary entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power: see, *e.g.*, *Lac Minerals* and *Hodgkinson*”. This case involves a professional advisory relationship in which, under conditions of trust, reliance and vulnerability, personal and confidential information was communicated by the plaintiffs for the purpose of obtaining actuarial and pension-related advice on a complex subject matter.

[86] We appreciate that the standards of professional conduct set by a self-regulating body, like the CIA, are not dispositive of whether the professional obligations owed under those standards are fiduciary in nature. However, they “are of guiding importance in determining the nature of the duties flowing from a particular professional relationship”: *Hodgkinson*, at p. 425. As with lawyers and accountants, the standards of responsibility set by the self-regulating body of the actuarial profession are intended to protect the public interest and safeguard the independence of the profession and its credibility with the public: see *Hodgkinson*, at p. 425, in the context of the accounting profession. Viewed in this manner, the CIA standards of conduct for actuaries engage obligations of loyalty, honesty and fair dealing.

[87] In this case, the plaintiffs sought advice from Mr. Parent and WBP in their capacities as consulting actuaries before the plaintiffs resigned from the public service. The AGC argues that in light of Mr. Parent’s and WBP’s positions as consulting

actuaries, their professional obligations under the *CIA Rules*, and the specific circumstances surrounding the relationship between the plaintiffs and the Loba Parties as found by the trial judge, there was an implied undertaking by the Loba Parties that they would act in the plaintiffs' best interests, thereby triggering fiduciary duties: see *Galambos*, at paras. 76-77 and 79.

[88] We agree. Mr. Parent's knowledge of the circumstances under which the Loba Parties' advice was sought, coupled with Mr. Parent's and WBP's inherent duties of loyalty as professional actuaries and the fact that highly personal and confidential information was communicated to the Loba Parties by the plaintiffs, created, at least, an implied undertaking that the Loba Parties would act in the plaintiffs' best interests. The trial judge's findings that the relationship between the parties was imbued with elements of trust, reliance and confidence and that the plaintiffs were vulnerable, reinforce the conclusion that the Loba Parties were fiduciaries from the outset. These considerations are entitled to great weight in determining whether fiduciary obligations were in play prior to the plaintiffs joining the Loba Plan.

[89] All these factors are powerful markers of a fiduciary relationship. In all the circumstances, we conclude that, on the trial judge's own findings, the relationship between the plaintiffs and the Loba Parties prior to the plaintiffs joining the Loba Plan fell within the rubric of the fiduciary obligation.

(c) Breaches of fiduciary duties

[90] It remains to consider whether the Loba Parties breached the fiduciary duties that they owed to the plaintiffs prior to the plaintiffs joining the Loba Plan. Accepting the trial judge's findings, this clearly occurred. The trial judge found that the Loba Parties breached their duty of care to the plaintiffs when they failed to share the CRA's concerns about the Loba pension arrangements with the plaintiffs as soon as they became aware of them. Knowledge of those concerns was brought home to the Loba Parties on their receipt of the TBS and Parent Letters in September 2000.

[91] The trial judge further found that Mr. Parent consciously decided not to share this information with the plaintiffs "in order to protect his 'pension portability business'". In other words, he deliberately put his own personal and financial interests ahead of those of the plaintiffs in order to profit financially. This conduct is antithetical to the duties of a fiduciary.

[92] Mr. Parent's non-disclosure did not end there. The trial judge also held that he failed to tell the plaintiffs of the Loba Parties' personal financial interests in the Loba pension arrangements, including in particular, Mr. Parent's intent to ultimately arrange for the balance of the surplus in the Loba Plan to be paid out for the benefit of persons other than the plaintiffs. In addition, the Loba Parties were to be paid substantial fees from the Loba Plan itself. Not surprisingly, Mr. Parent was unable to say that these intended fees would constitute a prudent use of the trust funds comprising the Loba Plan.

[93] Thus, the Loba Parties failed to disclose information to the plaintiffs that was material to the plaintiffs' decisions whether to resign from the public service and transfer their pension monies to the Loba Plan, at the precise time when the information would have been most relevant and valuable to the plaintiffs. This was a serious and obvious breach by the Loba Parties of their fiduciary duties to the plaintiffs.

(d) Conclusion regarding fiduciary duties

[94] In apportioning liability between the AGC and the Loba Parties, the trial judge was mindful of certain of the Loba Parties' blameworthy conduct prior to the date on which the plaintiffs resigned from the public service and joined the Loba Plan. However, the trial judge evaluated the significance of that conduct for apportionment purposes on the basis that the Loba Parties' offending conduct constituted breaches of their ordinary tort law, rather than fiduciary, duties owed to the plaintiffs.

[95] But the distinction in the nature of the Loba Parties' duties is significant. It is not merely a question of appropriate nomenclature. In contrast to the wrongs involved in the breaches of their tort law duties, the wrongs occasioned by the Loba Parties' breaches of their fiduciary duties involved damage to the relationships of trust and confidence established with the plaintiffs.

[96] It was therefore essential that the trial judge factor "the full and fair consequences" of the Loba Parties' breaches of their fiduciary duties into her apportionment analysis: see *Norberg*, at p. 274, *per* L'Heureux-Dubé and McLachlin JJ., (in dissent but not on

this point). This did not occur. Instead, by failing to do so, the trial judge undertook an unduly narrow assessment of the Loba Parties' culpability.

(e) Nature and extent of the parties' blameworthy acts

[97] The AGC contends that the trial judge's 80:20 apportionment of liability does not properly reflect her own description of the nature and extent of the Loba Parties' blameworthy acts with respect to the plaintiffs.

[98] We agree. In her reasons on the apportionment issue, the trial judge carefully set out the culpable acts and omissions of both the AGC and the Loba Parties. In our view, there is a real parity, both quantitatively and qualitatively, in her two lists of factors. It is true that, with respect to some factors, the trial judge finds certain ameliorating circumstances that "soften" the Loba Parties' culpability. However, read as a whole, the trial judge's reasons on apportionment support a very modest differentiation in the apportionment of liability in favour of the Loba Parties. In this context, her ultimate apportionment at 80:20 favouring the Loba Parties comes as a jarring conclusion at the end of reasons documenting similar misconduct by the AGC and the Loba Parties, both in number and in nature.

[99] Quantitatively, by our count the trial judge found that there were 12 factors that pointed to the blameworthiness of the AGC:

- The AGC put into place the RTA option for departing public servants.

- The AGC advertised the availability of the RTA option to the Compensation Community in the run-up to the October 15, 2000 deadline.
- The AGC issued no warnings to the Compensation Community regarding factors that could limit a public servant's access to a RTA or regarding potential risks associated with relying on a RTA.
- At all times, the AGC identified Loba as an approved employer even though, as of May 2000, it had serious concerns about the validity of the Loba RTA.
- By early October 2000, the AGC knew that the RCMP was collecting undercover evidence for the purpose of laying criminal charges.
- By August 30, 2000, the AGC understood that Loba was receiving a 10 per cent commission for processing a transfer under the Loba RTA, which called into question its validity.
- The AGC's culpability was augmented by its status as the plaintiffs' long-term employer.
- The AGC's culpability was augmented by its status as the plaintiffs' long-term pension administrator.
- The various actors within the AGC colluded by keeping highly relevant information from the plaintiffs.
- The various actors within the AGC colluded by keeping highly relevant information from the Loba Parties.
- After November 16, 2000, the AGC consciously withheld relevant information from the plaintiffs that might have assisted them in mitigating their losses.
- When the plaintiffs finally asked to revoke their applications for a transfer to the Loba RTA, the AGC

tried to impose a totally unreasonable Release and Indemnification Agreement.

[100] Turning to the Loba Parties, by our count the trial judge found that there were 13 factors that pointed to the blameworthiness of the Loba Parties:

- The Loba Parties conceptualized the Loba RTA.
- The Loba Parties aggressively advertised and marketed the Loba RTA.
- The Loba Parties received a 10 per cent commission for processing a transfer under the Loba RTA, which called into question its validity.
- The Loba Parties knew that the AGC did not approve of the way the RTAs were being used by consulting companies.
- The Loba Parties knew that the AGC had cancelled similar RTAs due to policy concerns on the part of the AGC.
- The Loba Parties knew that the AGC was highly skeptical about its arrangement and was keeping a close eye on them.
- The Loba Parties did not adequately convey to the plaintiffs the fragility of the Loba employer/employee relationship, which was a critical pre-condition of transferring funds into the Loba RTA.
- The Loba Parties did not adequately explain to the plaintiffs the chain of events that resulted in a hold being placed on transfers under the Loba RTA in the summer of 2000.
- The Loba Parties did not inform the plaintiffs that the letter they would receive from the AGC in the summer of 2000 was an extraordinary measure on its part in monitoring RTAs.

- The Loba Parties' culpability was augmented by its status as a pension plan administrator.
- The Loba Parties' culpability was augmented by Mr. Parent's status as an actuary, with a professional duty to disclose relevant information.
- The Loba Parties' culpability was augmented by Mr. Parent putting his personal financial interests and the Loba Parties' financial interests ahead of those of the plaintiffs.
- After October 15, 2000, the Loba Parties did not advise the plaintiffs about the hold the AGC had placed on transfers under the Loba RTA.

[101] These lists from the trial judge's description of the blameworthy acts of the AGC and the Loba Parties lead to an obvious conclusion – there is an almost exact quantitative parity in those acts.

[102] Qualitatively, it strikes us that there is also a genuine parity in the trial judge's description of the misconduct of both parties. Put simply, she was highly critical of both the AGC and the Loba Parties. For example, the trial judge castigated the AGC for engaging in an "intentional deception" that was "particularly egregious". However, she also criticized Mr. Parent who "put the financial interests of himself, Loba and WBP ahead of those of the plaintiffs." We do not see a qualitative difference in these descriptions of the parties' blameworthy acts.

[103] There is, however, one difference in the trial judge's treatment of the AGC and the Loba Parties in the apportionment of liability section of her reasons. In the case of the Loba Parties, the trial judge went on to address several considerations that she regarded

as ameliorating their degree of culpability, ultimately concluding that their blameworthiness was lessened because they had a “reduced appreciation of the risks” associated with the Loba pension arrangements. In our view, these factors justified the reduction of the Loba Parties’ degree of fault below 50 per cent. However, in light of the quantitative and qualitative parity in her description of the blameworthy acts of both parties set out above, the ameliorating factors favouring the Loba Parties are far removed from supporting a reduction of their liability to only 20 per cent.

(f) Adjusted apportionment of liability

[104] The trial judge’s errors that we have described led to a flawed assessment of the Loba Parties’ blameworthy conduct and, in turn, to an inappropriate reduction in their degree of fault. This necessitates adjustment of the trial judge’s apportionment.

[105] In particular, recalibration of the trial judge’s apportionment is required to properly reflect her own assessment of the nature and extent of the Loba Parties’ culpability. On this ground alone, the trial judge’s 80:20 apportionment must be revisited.

[106] In addition, the apportionment of liability must take full account of the Loba Parties’ serious and ongoing breaches of their fiduciary duties. We recognize that these breaches do not entitle the plaintiffs to greater damages *per se* than those to which they would be entitled for the Loba Parties’ breaches of their ordinary tort duties. However, equity will intervene to supplement common law causes of action where, as here, a defendant’s wrongful conduct evinces breach of trust and the promotion of the

defendant's own or others' interests at the expense of those of the plaintiff: see *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, at paras. 48-49.

[107] In all the circumstances, we conclude that a fair and reasonable adjustment to the trial judge's apportionment of liability results in the assignment of 60 per cent fault to the AGC and 40 per cent fault to the Loba Parties. We trust that the parties are positioned to adjust the damages payable to the plaintiffs, and the Loba Parties' liability to the AGC for contribution and indemnity and for part of the plaintiffs' costs, in light of this adjusted apportionment of fault.

(5) AGC's costs appeal

[108] The AGC argues that the trial judge erred in failing to award the AGC its total partial indemnity costs against the Loba Parties in the third party actions. This argument may be dealt with summarily.

[109] The determination of costs is a matter of judicial discretion. The circumstances in which an appellate court can interfere with a trial judge's exercise of that discretion are strictly limited: absent an error in principle or unless the costs award is plainly wrong, appellate intervention is precluded: see *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, at para. 27; *Martin*, at para. 84.

[110] The trial judge concluded that it was inappropriate to follow the normal rule that 'costs follow the event' in the third party actions. In the result, she held that the Loba

Parties should be liable for \$100,000 of the AGC's \$250,722 partial indemnity costs in those actions. We see no basis for interfering with this costs disposition.

[111] The AGC's relevant pleadings contain allegations that impugn the integrity and honesty of Mr. Parent and assertions of wrongdoing analogous to fraud against the Loba Parties. Given the AGC's pleadings, it was open to the trial judge to consider the issue of unproven fraud allegations in her costs assessment. On her findings, those allegations were not established at trial. Serious allegations of this kind, if unproven, attract serious costs consequences: see *Hamilton*, at para. 26. On this ground alone, the trial judge was justified in departing from the normal 'costs follow the event' rule in the third party actions.

[112] Nor do we see any error in principle in the trial judge's consideration of factors bearing on the role of the AGC in the conduct of the litigation. This, too, was a proper consideration in the determination of costs.

[113] Finally, we are not persuaded that the trial judge's discretionary costs award in the third party actions is plainly wrong.

[114] Accordingly, the AGC's costs challenge in the third party actions fails.

DAVID LUCK'S APPEAL

[115] The trial judge determined that Mr. Luck left his employment with the public service in reliance on the negligent misrepresentations of the AGC. It is accepted that he suffered a loss in salary and benefits. As already noted, the trial judge dismissed Mr.

Luck's claim for damages because he had not led evidence about the possible increase in the value of his pension entitlement arising from his resignation from the public service at a date prior to the date on which he would have resigned or retired had the AGC not made the negligent misrepresentations.

[116] The trial judge noted that Mr. Luck had the onus of proving his damages. She also pointed out that in some situations receipt of a lesser pension for a longer period will yield a greater present value than receipt of a higher pension that starts at a later point in time. She concluded that Mr. Luck may have realized a pension gain from his early resignation and that his failure to lead evidence about his pension situation meant that she could not conclude that he had suffered any net loss as a result of his resignation.

[117] Mr. Luck argues that the trial judge erred in concluding that the amount of any pension gain should be deducted from his salary loss. He argues, in circumstances such as those in this case, a court should make an award for a salary loss without examining whether the conduct triggered by the negligent misrepresentations resulted in a gain in the value of a pension. We do not accept this argument.

[118] Damages in cases of negligent misrepresentation are based on the restitution principle. A successful plaintiff in a negligent misrepresentation case is entitled to be put in the position he or she would have been had the misrepresentation not been made: *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 1 S.C.R. 3. As Professor Fridman notes in his text *The Law of Torts in Canada*, "[a]n award of

compensatory damages is based on the actual loss incurred by the plaintiff as closely as that can be calculated”: 3d ed. (Toronto: Carswell, 2010), at p. 476.

[119] The effect of Mr. Luck’s argument is that the court in awarding damages should take into account only the negative impact of the negligent misrepresentation, but not any benefit or gain flowing from it. In our view, that approach does not make sense on the facts of this case.

[120] Mr. Luck’s reliance on the AGC’s negligent misrepresentations was based on an anticipated gain in the value of his pension. His decision to resign from the public service, which led to his salary and benefit losses, was inextricably linked to his expectation that he would receive a gain in the value of his pension and the belief that the gain would more than offset any loss. Mr. Luck’s expectation of a pension gain was no doubt based in large part on an expectation that his pension funds would be transferred to the Loba Plan under the Loba RTA. That did not happen. However, even though the transaction was not completed as anticipated, there was a possibility that Mr. Luck would realize an increase in the capitalized value of his pension.

[121] In these circumstances, we see no reason why an award of damages in Mr. Luck’s favour should not take into account any pension gain he realized as a result of his early resignation. Indeed, Mr. Luck accepts that had he realized the full amount of the anticipated pension gain, as would have been the case if the funds had been transferred under the Loba RTA, he would have had no claim for loss of salary and other benefits.

[122] In *Gauthier v. Canada* (2000), 185 D.L.R. (4th) 660, the New Brunswick Court of Appeal took a similar approach to the one we adopt in this case. Mr. Gauthier's claim was based on a negligent misrepresentation that led to an early resignation and a loss of salary. As a result of his premature resignation, Mr. Gauthier received a gain in his pension benefits. The New Brunswick Court of Appeal held that the defendant was entitled to a credit for the amount of the pension gain in computing Mr. Gauthier's pecuniary loss. In calculating the loss, the court took into account the "negative financial repercussions" as well as the "positive effects" in his financial situation": p. 672.

[123] Mr. Luck argues that this court should take guidance from the jurisprudence in wrongful dismissal cases. He says that the wrongful dismissal cases hold that when assessing damages, courts should not deduct a pension gain from the salary that would have been paid during the notice period. The AGC disagrees that the wrongful dismissal cases, at least at the appellate level, have gone that far.

[124] We do not find it necessary to resolve the disagreement with respect to the wrongful dismissal jurisprudence. Whatever the situation is in wrongful dismissal cases, we are satisfied that on the facts of this case, the salary loss claim is so factually connected to an anticipated pension gain, that it was entirely appropriate for the judge to decline to award damages without evidence relating to the potential pension gain. Thus, we would dismiss the appeal. In light of this conclusion, it is unnecessary to deal with the AGC's cross appeal.

DISPOSITION

[125] The AGC's appeal is therefore allowed, in part, to accord with these reasons. Mr. Luck's appeal is dismissed, as is the AGC's cross-appeal in that proceeding. In light of our disposition of these appeals, the AGC shall deliver its brief written submissions concerning costs in respect of the main appeal and Mr. Luck's appeal to the Registrar of this court within 14 days from the date hereof. The respondents in the main appeal and the appellant in Mr. Luck's appeal shall deliver their brief written responding costs submissions within 14 days thereafter.

RELEASED: FEB 28 2011 ("D.R.O.")

"Dennis O'Connor A.C.J.O."

"J.C. MacPherson J.A."

"E. A. Cronk J.A."