

Court of King's Bench of Alberta

Citation: United Brotherhood of Carpenters and Joiners of America, Local Union 2103 v Provencher, 2024 ABKB 291

Date: 20240521
Docket: 2303 02643
Registry: Edmonton

Between:

United Brotherhood of Carpenters and Joiners of America, Local Union 2103; United Brotherhood of Carpenters and Joiners of America, Local Union 2010; Carpenters' Regional Council of the United Brotherhood of Carpenters and Joiners of America; Luke Theriault

Plaintiffs

- and -

Robert Provencher, Brett Horan, Gary Loroff, Moe Rahime, Daniel Mikitka, Glenn Chanut, Darcy Sanderson

Defendants

**Reasons for Decision
of the
Honourable Justice G.S. Dunlop**

1. Overview

[1] The plaintiffs apply for summary judgment in the form of declarations:

- that amendments made in 2021 and 2022 to trust agreements relating to a pension trust and a health trust are null and void and of no force and effect; and
- that the governance and administration of those two trusts are subject to the terms of the trust agreements in effect prior to those amendments.

[2] The two trusts were set up in 1975 to provide pension benefits and health benefits to members of Local Union 1325 of the United Brotherhood of Carpenters and Joiners of America (“**Local 1325**”) and to others who were permitted to participate in the pension plan or the health plan. The trust agreements have been amended several times since 1975 but only the 2021 and 2022 amendments are directly at issue in this case. Those amendments were made by the trustees.

[3] The 1975 trust agreements contemplate members of other union locals in addition to Local 1325 participating in the plans, which occurred.

[4] There are four plaintiffs:

- United Brotherhood of Carpenters and Joiners of America, Local Union 2103 (“**Local 2103**”)
- United Brotherhood of Carpenters and Joiners of America, Local Union 2010 (“**Local 2010**”);
- Luke Theriault; and
- Carpenters’ Regional Council of the United Brotherhood of Carpenters and Joiners of America (the “**Carpenters’ Regional Council**”).

[5] The local union involved in the creation of the trusts in 1975, Local 1325, is not a party to this action. Two other local unions are plaintiffs: Local 2103 and Local 2010. Both of those local unions have members who participate in the pension plan and the health plan. Luke Theriault is a member of Local 2103 and a participant in the pension plan and the health plan.

[6] The fourth plaintiff, the Carpenters’ Regional Council, oversees the local unions.

[7] Each of the seven defendants has acted as a trustee of the pension trust, the health trust, or both.

[8] Paragraph 46 of the statement of claim lists ten aspects of the 2021 and 2022 amendments which the plaintiffs claim are not permitted by the trust agreements and demonstrate a change from control of the trusts by the parties that created the trusts to control by the trustees. These ten points were the focus of the plaintiffs’ written and oral submissions. I address them in sections 9 to 17 of these reasons.

[9] The statement of claim also challenges the change from no compensation for the trustees to whatever compensation the trustees agree upon. During oral submissions the plaintiffs advised they are not seeking a declaration on that point in this summary judgment application, but they intend to pursue that issue in the future. I did not hear any other submissions on this point from either party. Consequently, I make no finding or declaration about whether the change regarding trustee compensation is valid.

[10] Before turning to the substantive issues raised by the plaintiffs, I will address some preliminary matters:

- the procedural history of this action (section 2 of these reasons);
- the evidence before me (section 3);
- the test for summary judgment (section 4);
- the plaintiffs' standing to bring this action (section 5);
- what hearsay evidence is before me (section 6);
- the factual matrix relevant to the issues before me (section 7); and
- approval of a merger involving the pension trust (section 8).

[11] I address the validity of trust agreement amendments challenged by the plaintiffs in sections 9-17. Sections 18 and 19 cover the limited involvement of the Superintendent and Deputy Superintendent of Pensions, and whether the trustees construed the trust agreements themselves.

[12] As set out in greater detail below, I find that many of the amendments challenged by the plaintiffs are invalid because they exceed the trustees' authority to amend the trust agreements. I grant the plaintiffs a declaration on that point, but I deny their claim for a declaration that the trusts are governed by the trust agreements as amended up to 2019, because not all amendments were addressed before me and some of the amendments I find are invalid were first made in 2019 and earlier. Furthermore, the trust agreements include a severance provision which may preserve the amended agreements with the invalid amendments removed.

2. Procedural History

[13] The plaintiffs filed an originating application and supporting affidavit of Luke Theriault on February 10, 2023. The application was scheduled for morning chambers on March 2, 2023. Bourque, J issued a procedural order directing that the action proceed to a r 4.10 procedural hearing, without prejudice to the parties' rights to seek case management.

[14] The defendants wrote to Nielsen, ACJ on March 15, 2023 seeking the appointment of a case management Justice and the plaintiffs responded by letter on March 17, 2023 seeking a r 4.10 case conference rather than the appointment of a case management Justice. On March 20, 2023 Nielsen, ACJ appointed me to conduct a r 4.10 case conference.

[15] On March 14, 2023 the defendants filed an application seeking adjournment of the hearing of the originating application until after questioning on affidavits was complete, appointment of a case management Justice, and determination by the case management Justice of:

all issues being put before the Court including but not limited to:

- a. decide the jurisdiction of the United Brotherhood of Carpenters and Joiners of America ("UBCJA") or any of its subordinate bodies to direct the management of the ACAW Pension Trust Fund and the ACAW Health and Wellness Trust Fund;

- b. determine whether or not the ACAW Pension Trust Fund and the ACAW Health and Wellness Trust Fund are subordinate bodies of the UBCJA;
- c. determine the “settlers” of the two Trust Funds;
- d. determine the rights of the “settlers” of the two Trust Funds;
- e. determine what the proper jurisdiction is of this Honourable Court or an arbitrator appointed under the auspices of a collective agreement or the office of the Superintendent of Pensions under the provisions of the Employment Pension Plans Act of Alberta, to hear any or part(s) of this complex matter; and
- f. determine such other matters as this Court may deem necessary.

[16] The defendants’ application was returnable in morning chambers on April 11, 2023. It was not heard then and the defendants did not seek to have it heard by me after I was appointed case management Justice in May 2023.

[17] At the case conference on May 2, 2023, I issued a procedural order that the plaintiffs file a statement of claim replacing their originating application and that the defendants file a statement of defence. Those pleadings were filed on May 8 and May 25, 2023. I also recommended to Nielsen, ACJ that he appoint a case management Justice for this action, which he did, appointing me to that role on May 23, 2023.

[18] My recommendation for case management is set out in a memorandum to Nielsen, ACJ which was copied to counsel for the parties. That memorandum includes the following description of this case as I understood it following the case conference on May 2, 2023:

The parties are participants in a pension plan and a health and welfare plan. The applicants are two union locals, a regional council, and an individual beneficiary of the plans. The respondents are the trustees of the plans. The applicants seek a declaration that certain amendments to the trust documents that govern those plans are null and void. The amendments are alleged to have been made in 2021 and 2022. The applicants filed an originating application and supporting affidavit on February 24, 2023 seeking a declaration. The supporting affidavit attaches the original and amended trust documents. As set out in Mr. McGown’s letter to you dated March 15, 2023, the respondents are of the view that numerous facts beyond the original and amended trust documents are relevant. Mr. Gall, on behalf of the applicants, submitted during the case conference that before questioning on the supporting affidavit, the respondents should be required to file a response pleading, so that the issues are defined, and so that the applicants can take issue with which facts are relevant. I made a procedural order requiring the applicants to file a statement of claim replacing their originating application by May 8, 2023 and requiring the respondents to file a statement of defence by May 31, 2023. I also ordered that either party may apply to vary the usual rules of discovery.

I expect the parties will not agree on relevance for the purposes of questioning and document production, which will lead to applications. The respondents may seek relief of their own, particularly for what they allege was an illegal takeover of the Edmonton offices of the plans in November 2022. (This is referred to on

page 2 of Mr. McGown's March 15, 2023 letter.) That may lead to an application by the applicants to strike the respondents' claims or sever them from the applicants' claim for a declaration. I also expect the parties will not agree on the appropriate mode of hearing of the action, with the applicants proposing a chambers hearing on affidavits and transcripts and the respondents proposing a longer trial with witnesses giving oral testimony. That will probably lead to at least one application.

[19] My prediction regarding the course of this action turned out to be wrong. The defendants did not file a counterclaim and filed no applications seeking any relief, other than the application filed on March 14, 2023 which they never rescheduled after adjourning it sine die on April 11, 2023. After I was appointed case management Justice on May 23, 2023, the defendants could have asked me to hear that application, but they did not.

[20] At the first case management meeting on September 14, 2023, I set deadlines for affidavits of records and dates for questioning of Luke Theriault. I also asked counsel to schedule a half-day hearing before me in November to address the issue of what evidence is material and relevant to the plaintiffs' then anticipated summary judgment application and I asked them to schedule two days in 2024 for me to hear that application.

[21] At a hearing on November 9, 2023 I issued a procedural order with the following terms:

1. The Defendants in this action shall file an affidavit attaching authentic versions of the trust documents by November 30, 2023.
2. The Defendants may argue at the summary judgement application hearing in February 2024 whether or not the Plaintiffs have standing to bring the action.
3. The Plaintiffs must file responses to the undertakings given at the Luke Theriault cross-examination by November 30, 2023.
4. The parties may tender evidence of facts relating to events prior to December 31, 2019 that are material and relevant for the Plaintiffs' summary judgement application.
5. The Defendants may not adduce oral evidence at the summary judgement application hearing in February 2024.
6. Costs are to be determined at the summary judgement application hearing.
7. Parties will send electronic copies of all filed affidavits.

[22] The context for paragraph 1 of that order, requiring the defendants to file an affidavit attaching authentic trust documents, is the following exchange between the defendants' counsel and me at the hearing on November 9, 2023:

THE COURT: So, how do you suggest I get the authentic trust documents, Mr. McGown?

MR. MCGOWN: Well, I -- here -- here -- here's my position and I want to make sure everybody understands it clearly. In terms of the application for summary judgement, I am of the view that the affidavit that was filed is insufficient to support that.

That is not to say that in the statement of claim and statement of defence matter that they might not be the accurate document but for the purposes of the – the present application which is what your letter is about it says, The plaintiff's summary judgment application.

We're not talking about what the statement of claim is where -- which has been filed and served and the statement of defence which has been filed and served. We're talking about that application and in my assessment of the law, it is clear that this affidavit is insufficient to support that application. And I think therefore, on this -- on the application for summary judgement it should be denied. It can -- and I agree that that doesn't mean it's not going to become part of a trial but for the summary application.

THE COURT: So, Mr. McGown, you are saying I should not get the authentic trust documents for that summary judgement application. Is that what you are saying?

MR. MCGOWN: I don't know what's the -- the -- no, I'm not saying that. I'm saying, the evidence is insufficient for the summary -- but I'm not saying that these aren't the right documents. I don't want to say that because I don't know. There, the documents that are -- appear to be okay. But for the summary judgment application, it's insufficient.

THE COURT: So --

MR. MCGOWN: And I think that therefore, is for grounds to follow up on the -- on the proposition that you have previously ordered which is a statement of claim, statement of defence and then let's do it.

THE COURT: Oh, goodness, Mr. McGown. I ordered a statement of claim, a statement of defence and they were filed. They are at the pleadings in this action.

MR. MCGOWN: Yes.

THE COURT: Your friend, Mr. Gall, on behalf of his clients is seeking summary judgment of the action. He is seeking summary judgment in the matter that was started by the statement of claim and which was defended. He has put -- his client has put in trust documents attached to his affidavit. The trust documents are obviously central to this action. I expect you would agree but who knows.

Your friend has repeatedly asked you whether you dispute the authenticity of the trust documents that are attached to the affidavit, you refuse to say. My question to you is, how

do you suggest I get those trust documents in front of me in evidence for the summary judgment application?

MR. MCGOWN: Well, we'll have to -- I'll have to go to my clients and have them produce.

THE COURT: When?

MR. MCGOWN: I don't know, whenever I'm directed to do it. At this point, all I'm concerned about is I think it's insufficient for the summary judgment application.

THE COURT: Yes, well we are going to solve that problem because these are trust documents that presumably the parties can determine -- can figure out which ones are authentic and we can get them before the Court somehow.

MR. MCGOWN: I agree.

THE COURT: If you are going to continue to dance around the question of whether the ones that are attached to Mr. Theriault affidavit are authentic or not, I am going to direct your client to produce them.

MR. MCGOWN: Well, that's fine. You can direct me to do that, My Lord, but my position is very clear. I don't want that summary judgment, I want -- I want a case where I can present evidence to say that whatever it is that they're after, they're not entitled to. The summary judgment, they're just saying that these documents are the documents that they have and do they support an application to find that the documents are illegal and I'm saying they don't have sufficient evidence to be able to do that and I would like the Court to make a decision on that summary judgement application. Then once we get to the statement of claim, we can deal with it.

[23] In breach of paragraph 1 of my November 9, 2023 order, the defendants did not file an affidavit attaching authentic versions of the trust documents by November 30, 2023. Instead, their lawyer wrote to the plaintiffs' lawyer and me on November 27, 2023 as follows:

In lieu of filing a further Affidavit attaching authentic versions of relevant trust documents by November 30, 2023 (since there are already sworn copies of over 500 pages produced thus far) I will affirm that Exhibits "B" through "Q" inclusive in the Affidavit of the Plaintiffs dated February 3, 2023 are, to the best of my knowledge, authentic versions of what they are represented to be.

But I make this affirmation without an admission the Affidavits themselves are in compliance with the required Rules of Court or the requirements of Court decisions for proper support of any Application for Summary Judgment.

[24] I confirmed with the defendants' counsel at the beginning of the hearing on February 27, 2024 that the trust agreements attached to Luke Theriault's affidavit are properly in evidence before me. The defendants have admitted that those documents are authentic.

3. Evidence

[25] The following affidavits were filed in this action prior to the hearing on February 27 and 28, 2024:

- Luke Theriault sworn February 3, 2023, filed February 24, 2023
- Robert Provencher sworn March 2, 2023, filed March 9, 2023
- Mitra Taef sworn March 9, 2023, filed March 14, 2023
- Robert Provencher sworn March 9, 2023, filed March 14, 2023 (3 pages)
- Robert Provencher sworn March 9, 2023, filed March 14, 2023 (9 pages)
- Robert Provencher sworn August 9, 2023, filed August 14, 2023
- Mitra Taef sworn August 30, 2023, filed September 1, 2023
- Robert Provencher sworn December 11, 2023, filed December 21, 2023
- Deborah Sheppard sworn December 19, 2023, filed December 21, 2023
- Priya Thind sworn January 8, 2024, filed January 23, 2024
- Brent Twist sworn January 9, 2024, filed January 23, 2024

[26] I have also read the transcript of the questioning of Luke Theriault on October 23, 2023 which was not filed at the time of the February 2024 hearing. During the February 2024 hearing the defendants' counsel handed me an unfiled compressed transcript in which each page contains four pages of transcript. I asked the defendants' counsel to file the transcript and to provide me with a full-size copy, and he undertook to do so. I received a full-size copy from the defendants' counsel on May 9, 2024. It has yet to be filed.

[27] Based on submissions during the hearing and in a subsequent email, the defendants' counsel appears to believe that the Luke Theriault transcript should not be filed, pursuant to r 5.32. I disagree. That rule applies to questioning under Part 1, Division 5 of the Rules. Mr. Theriault was questioned under Part 6 of the Rules which requires the questioning party to file the transcript: r 6.7(b) and 6.20(5)(b).

[28] While the affidavits and the transcript are in evidence on this application, apart from the trust documents attached to Luke Theriault's affidavit, none of that evidence is relevant and material, as I explain in sections 6 and 7 of these reasons.

[29] The most important items of evidence are the original trust agreements and the amendments. The full title of these documents is "Agreement and Declaration of Trust". For brevity I will refer to them as trust agreements in these reasons. Some of the trust agreements and amendments are attached as exhibits B through Q to Luke Theriault's affidavit. Based on those documents, it appears that the trust agreements were entered into and amended as of the following dates.

June 1, 1975	pension trust entered into (exhibit J)
August 1, 1975	health trust entered into (exhibit B)
August 2, 1980	health trust amended (exhibit C)
June 1, 1981	both trusts amended (exhibits C and J)
February 1, 1983	pension trust amended (exhibit J)
September 1, 1983	both trusts amended (exhibits C and J)
February 1, 1986	health trust amended (exhibit C)
August 31, 1987	both trusts amended (exhibits C and J)
September 1, 1988	both trusts amended (exhibits C and J)
May 1, 1989	pension trust amended (exhibit J)
February 4, 1994	pension trust amended (exhibit J)
December 5, 1997	pension trust amended (exhibit J)
October 9, 1998	health trust amended (exhibit D)
April 9, 1999	revised health trust agreement (exhibit D)
July 21, 2003	revised agreements for both trusts (exhibits E and K)
December 16, 2005	revised pension trust agreement (exhibit L)
October 30, 2009	revised pension trust agreement (exhibit M)
December 14, 2009	revised health trust agreement (exhibit F)
January 1, 2016	revised pension trust agreement (exhibit N)
March 13, 2019	revised pension trust agreement (exhibit O)
March 14, 2019	revised health trust agreement (exhibit G)
September 16, 2021	revised agreements for both trusts (exhibits H and P)
September 15, 2022	revised agreements for both trusts (exhibits I and Q)

[30] As set out in the previous section of these reasons, the defendants admit those trust agreements and amendments are authentic. The original 1975 agreements are executed by the parties (Local 1325 and the employers) and acknowledged by the trustees. None of the subsequent amendments and revised agreements has been executed by the unions or the employers.

[31] The original 1975 pension trust agreement is not in evidence. The earliest version in evidence is exhibit J, an office consolidation dated December 1997, which includes notes regarding which articles were amended and when. That document, together with the original health trust agreement, which is exhibit B, allow me to ascertain the wording of original 1975 pension trust agreement.

[32] Generally, the language in the health trust agreement mirrors the language in the pension trust agreement, modified to reflect the different purposes of each trust. This is true for the

amendments as well. With some exceptions, which I will detail below, the language relevant to this action is the same in both sets of trust agreements and amendments.

[33] Mitra Taef's affidavit filed September 1, 2023 attaches an amended pension trust agreement dated January 24, 2023. The defendants' counsel also referred to amendments made in 2024. Any amendments made in 2023 or 2024 are not directly at issue in this action because the Statement of Claim and the summary judgment application seek relief with respect to the 2021 and 2022 amendments only.

4. Summary Judgment

[34] Both sides cite *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd* 2017 ABCA 354. The majority at paragraph 47 in that decision concludes as follows regarding the test for summary judgment:

The proper approach to summary dispositions, based on the *Hryniak v. Mauldin* test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:

- a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- b) Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

[35] The sole issue in this summary judgment application is the validity of amendments to the trust agreements, which turns on wording of the original 1975 trust agreements: *Schmidt v Air Products of Canada Ltd.* [1994] 2 SCR 611 at para 113. As discussed in section 7 of these reasons, below, there is no evidence of the factual matrix when then 1975 trust agreements were entered into, so the only evidence relevant to the interpretation of the 1975 trust agreements is the agreements themselves. The outcome of the application and the action turns entirely on the wording of those documents. Consequently, this case is particularly suitable for summary judgment: *Weir-Jones* at para 21.

[36] The facts in this case are not disputed; they are admitted. The defendants admit that the trust agreements in evidence are authentic. The plaintiffs have met their burden of proof of the facts and the defendants have not raised a defence requiring a trial. I am confident that the record before me is a sound basis for summary resolution of the claim. If this action were to proceed to trial, the relevant and material record would likely be the same: the original 1975 trust agreements and the subsequent amendments.

5. Standing

[37] The defendants submit that Local 2103, Local 2010 and the Carpenters' Regional Council do not have standing to bring this action because each of them is not a settlor, trustee or beneficiary of the trusts. The defendants concede that Luke Theriault has standing to bring this application because he is a beneficiary of both trusts. I agree: *Burke v Hudson's Bay Co.* 2010 SCC 34 at para 87.

[38] The defendants confirmed at the beginning of the hearing on February 27, 2024 that they are not seeking dismissal of the action based on lack of standing. Consequently, it is not necessary for me to determine whether Local 2103, Local 2010 and the Carpenters' Regional Council have standing. One of the plaintiffs, Luke Theriault, has standing and all the plaintiffs are jointly represented by counsel. It makes no difference to the outcome of this action, which is limited to declaratory relief, whether the other three plaintiffs have standing.

[39] The defendants also submit that Luke Theriault has not been authorized by the other plaintiffs to bring this action on their behalf and that the Carpenters' Regional Council has no authority to bring this action pursuant to the constitutions of the various union entities. The defendants submit that these points are important context. I disagree. This case turns on the interpretation of trust documents. Internal relationships among the plaintiffs are irrelevant.

6. Hearsay

[40] The defendants submit that hearsay is inadmissible in support of this application because the plaintiffs are seeking final relief. In general, I agree: r 13.18(3). There may be some exceptions to that general rule, but none was argued in this case. There is hearsay in some of the affidavits, including Luke Theriault's affidavit. In my reasons which follow I have not relied on any hearsay evidence.

[41] The trust documents attached as exhibits to Luke Theriault's affidavit are not hearsay. They are original evidence, which the defendants have admitted is authentic. Admissions and evidence other than affidavits are admissible on an application for summary judgment: rr 7.1 and 7.2. My decision in this case is based on the trust documents and, with respect to the factual matrix and approval of amendments by the parties, the absence of evidence.

7. Factual Matrix

[42] The defendants submit that I must interpret the trust agreements in the factual matrix, citing *Sattva Capital Corp v Creston Moly Corp* [2014] 2 SCR 633, *Stankovic v 1536679 Alberta Ltd* 2019 ABCA 187 and some other cases. I agree that the factual matrix in place at the time of the original 1975 trust agreements is relevant. I have no evidence on that point. I do not agree with the defendants' submission that the factual matrix at the time of the amendments is

relevant to interpreting the original 1975 trust agreements. The cases cited by the defendants do not stand for that proposition.

[43] I agree that the factual context in which the amendments were made could be relevant to interpreting the amendments, but there is no ambiguity in the amendments. The defendants submit that the removal provision introduced in article 2.07 in 2021 implies that the party who appointed a trustee can remove that trustee. I disagree for the reasons set out in section 15 below. Apart from that point, there is no issue in this case about what the amendments purport to do. Furthermore, the limited evidence I have regarding the circumstances in which the amendments were made, such as the minutes of meetings of the board of trustees, attached to Robert Provencher's December 21, 2023 affidavit, do not assist in interpreting the amendments.

[44] The central issue in this action is whether the amendments are valid. That turns on interpreting the original 1975 trust documents. The context in which the amendments were made does not assist in interpreting the original trust agreements, entered into more than 40 years earlier: *Hole v Hole* 2016 ABCA 34 at paras 35-37.

[45] The parties have adduced a large volume of evidence of things that happened after September 15, 2022, the date of the most recent amendment at issue. All of that evidence is irrelevant to this action and this application for summary judgment because none of it forms part of the factual matrix at the time of the original trust agreements or subsequent amendments.

[46] I agree with and adopt the submissions of the plaintiffs in paragraph 101 of their brief filed February 7, 2024 and paragraphs 10-16 of their reply brief filed February 20, 2024, that the following facts and issues raised by the defendants are irrelevant to this action:

- i. name changes to the Trusts and the asserted justification for those name changes (Defence, e.g. paras 3-5);
- ii. the Defendant's responses to accusations not made in the Claim, e.g. that the trustees have not breached their fiduciary responsibilities or have not engaged in misconduct or neglect (Defence, e.g. paras 6, 47, 102);
- iii. allegations that are irrelevant to the Claim, and only intended to denigrate the Plaintiffs (Defence, e.g. para 10);
- iv. the termination of the Defendant Provencher following the Purported Amendments (Defence, e.g. paras 20-29, 37-39);
- v. the powers of the United Brotherhood of Carpenters and Joiners under the Carpenters' Constitution, and actions taken against the Defendant Provencher under the Carpenters' Constitution (Defence, e.g. paras 30-36, 40-44, 57);
- vi. who are currently the proper trustees, how and by whom they were allegedly appointed as trustees, and the alleged views of the Superintendent of Pensions in relation to who are the proper trustees (e.g. Defence, paras 45- 53, 57, 70);
- vii. why the Trustees believed that they had a good reason to undertake the Purported Amendments (Defence, e.g. paras 71-74, 100);
- viii. the financial status of the Trusts (Defence, e.g. paras 7-8, 77-86); and

- ix. actions taken by the Trustees to further increase the size of the Board (Defence, e.g. paras 87-99).

(as set out in the plaintiffs' February 7, 2024 brief at para 101)

[47] Some of those issues may be affected by the validity of the amendments, which is the subject of this action, but they have no impact on whether the amendments are valid.

[48] The plaintiffs dispute some of the facts asserted by the defendants on these points. Those disputes have no bearing on this summary judgment application because the disputed facts are irrelevant to the issues on this application: *Rotzang v CIBC World Markets Inc* 2017 ABQB 354 at para 67 (affd 2018 ABCA 153); *Singh v Noce* 2019 ABCA 55 at para 13; *Weir-Jones* at para 38.

8. Pension Merger Approval

[49] The December 16, 2005 pension trust agreement begins with the following:

WHEREAS the Carpenters' Local Union 1325 Pension Trust Fund (Northern Fund) and the Carpentry Workers' Pension Plan of Alberta (Southern Fund) have each created and maintained separate Pension Funds and Plans under separate Trust Deeds;

AND WHEREAS the Trustees of both the Northern Fund and the Southern Fund agreed to merge the said Funds and Plans;

AND WHEREAS approval of the merger was sought and obtained from the Superintendent of Pensions of Alberta, Canada Revenue Agency and the Court of Queen's Bench of Alberta;

[50] That wording is repeated in all subsequent pension trust agreements and very similar wording is included in the March 14, 2019 and subsequent health trust agreements.

[51] The wording quoted above refers to approval of mergers of trust funds. It is silent regarding approval of amendments to trust agreements. The evidence before me does not include any approvals of any of amendments to the trust agreements by the Superintendent of Pensions of Alberta, the Canada Revenue Agency or this Court. Neither the plaintiffs nor the defendants submit that approvals of the mergers of the pension trust funds having any bearing on the issues before me.

9. Schmidt v Air Products of Canada

[52] *Schmidt v Air Products of Canada Ltd.* [1994] 2 SCR 611 addressed the distribution of surpluses in pension trusts. The reasons of the majority in that case include the following comments relevant to the case before me:

62 The settlor of a trust can reserve any power to itself that it wishes provided the reservation is made at the time the trust is created. A settlor may choose to maintain the right to appoint trustees, to change the beneficiaries of the trust, or to withdraw the trust property. Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it.

...

69 The judgment of the B.C. Court of Appeal in *Hockin*, if followed to its logical conclusion, would mean that the presence of an unlimited power of amendment in a trust agreement entitles a settlor to maintain complete control over the administration of the trust and the trust property. That result is inconsistent with the fundamental concept of a trust, and cannot, in my opinion, be sustained without extremely clear and explicit language. A general amending power should not endow a settlor with the ability to revoke the trust. This is especially so when it is remembered that consideration was given by the employee beneficiaries in exchange for the creation of the trust. In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour. The wording of the pension plan and trust instrument are usually drawn up by the employer. The employees as a rule must rely upon the good faith of the employer to ensure that the terms of the specific trust arrangement will be fair. It would, I think, be inequitable to accept the proposition that a broad amending power inserted unilaterally by the employer carries with it the right to revoke the trust. The employer who wishes to undertake a restricted transfer of assets must make those restrictions explicit. Moreover, amendment means change not cancellation which the word revocation connotes.

...

71 As a result I find that, at least in the context of pension trusts, the reservation by the settlor of an unlimited power of amendment does not include a power to revoke the trust. A revocation power must be explicitly reserved in order to be valid.

...

113 The validity of these amended provisions depends upon the original 1959 documents. Article XXII.2 of the pension plan prohibited any amendment which would operate to reduce the benefits which had accrued to the employees prior to the date of the amendment. The Trust Agreement contained the following provision:

Article V Modification and Termination

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided ... that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time ...

114 The company therefore reserved a general amending power subject to the provisos that no amendments could reduce accrued benefits or allow the trust fund to be used in any way other than for the employees' exclusive benefit. The company did not expressly reserve for itself the power to revoke the trust. Such a power cannot be implied under the broad general amendment power.

...

116 In the result, the 1978 amendment purporting to give the company the power to distribute surplus to itself, as well as the reversion clause of the 1983 plan, are invalid. Both represent attempts to revoke partially a trust in favour of the employees which was established in 1959. Neither is within the scope of the control which the company reserved to itself at that time.

(underlining added)

[53] I understand the majority decision in *Schmidt* to stand for this proposition: the original trust documents govern subsequent amendments; if the original documents do not authorize an amendment, the amendment is invalid.

10. Amendment Provisions in 1975 Agreements

[54] The 1975 trust agreements each contain the following amendment provisions:

ARTICLE 8: AMENDMENTS

- 8.01 This AGREEMENT may be amended by the parties agreeing in writing so to do.
- 8.02 This AGREEMENT may also be amended by the TRUSTEES provided that:
- a) Notice is given by any TRUSTEE proposing an amendment to the other TRUSTEES and that the notice sets out the proposed amendments;
 - b) That at least thirty days intervene between the date notice is given and any meeting of the TRUSTEES considering the amendment;
 - c) That at least 75% of the TRUSTEES vote in favour of the amendment.
- 8.03 No amendment, whether by the parties or by the TRUSTEES shall vary the object of the TRUST or divert the FUND or any part of it for purposes other than provided in this AGREEMENT, or authorize or permit the return of payments or contributions, or eliminate the annual audit, or restrict the availability of information to interested parties and no amendment by the TRUSTEES shall provide for the administration of the TRUST FUND other than by an equal number of EMPLOYER TRUSTEES and UNION TRUSTEES with equal voting privileges.

(underlining added)

[55] The “object of the TRUST” referred to in article 8.03 is not defined in article 1 which contains definitions of other terms, but article 5.02 of the 1975 health trust agreement has typed beside it in the margin the words “Object of Trust”. Article 5.02 reads:

5.02 The TRUST FUND is created for and the TRUSTEES may only receive, hold, and administer it for the purpose of providing Health and Welfare benefits for MEMBERS of the PLAN and their families and dependents, which benefits without restricting the generality of the foregoing may include:

- a) Life Insurance;
- b) Accidental Death and Dismemberment benefits; .
- c) Disability Benefits;
- d) Hospitalization, Surgical, Medical (including X-Ray, Laboratory and Nursing) benefits;
- e) Dental, Optical, Chiropractic, Pediatric; and Osteopathic benefits;
- f) Drugs;

provided, however, that the TRUSTEES are not obligated to institute benefits under the PLAN for all of the above specifically named benefits.

[56] The 1975 pension trust has very similar wording in article 5.02:

5.02 The Trust Fund is created for and the Trustees may only receive, hold and administer it for, the purpose of providing retirement benefits, disability benefits, death benefits, and termination benefits for Members of the Plan, their families and designated beneficiaries, however, the Trustees shall not be obligated to provide for other than retirement benefits for Members and may exercise their discretion whether to also provide for Members, or their families, or designated beneficiaries, any of the benefits set out in this Article.

[57] The plaintiffs submit that amendments to the trust agreements made in 2021 and 2022 exceed the trustees’ amendment power because they result in the trusts being administered by a board which is not made up of an equal number of employer trustees and union trustees with equal voting privileges. The plaintiffs also assert invalidity for several other reasons.

11. Changes to the Parties

[58] The plaintiffs submit that changes to the parties to the trust agreements made in 2022 are invalid because the trustees did not have authority to make that change. This is potentially significant because the parties have a wider authority to amend the trust agreements than the trustees have, as set out in article 8 of the trust agreements, quoted in the preceding section of these reasons.

[59] “Party” and “parties” are not defined terms in any of the versions of the trust agreements before me, but the parties to the original 1975 health trust agreement are listed on the first page as:

LOCAL UNION 1325 of The United Brotherhood of Carpenters and Joiners of America (hereinafter referred to as “the UNION”)

OF THE FIRST PART

AND

THOSE EMPLOYERS SIGNATORY TO A COLLECTIVE AGREEMENT providing for contributions to be paid to “the Local Union 1325, Health and Welfare Plan” (hereinafter referred to as “the EMPLOYER”)

OF THE SECOND PART

[60] The parties listed on the first page of the original 1975 pension trust agreement are the same with the reference changed in the party of the second part to “Pension Plan” instead of “Health and Welfare Plan”.

[61] The definition of “union” in the original 1975 trust agreements contemplates other local unions becoming parties:

1.01 The term "UNION" shall mean Local Union 1325 of the United Brotherhood of Carpenters and Joiners of America and such other Local Unions of the United Brotherhood of Carpenters and Joiners of America as may become party to this Agreement.

(underlining added)

[62] On or before April 9, 1999 the parties to the health trust agreement were changed to: LOCAL UNION 1325, or Local Union 2103, or Local Union 2010 of The United Brotherhood of Carpenters and Joiners of America (hereinafter referred to as “the UNION”)

OF THE FIRST PART

AND

THOSE EMPLOYERS SIGNATORY TO A COLLECTIVE AGREEMENT providing for contributions to be paid to “the Alberta Carpenters’ Health and Welfare Plan” (hereinafter referred to as “the EMPLOYER”)

OF THE SECOND PART

(underlining added)

[63] There is no evidence of Local 1325, Local 2103, Local 2010 or any employer approving the addition of Locals 2103 and 2010 as parties to the health trust agreement.

[64] Based on the documents in evidence, Local 2103 and Local 2010 were never added as parties to the pension trust agreement.

[65] On December 16, 2005 the parties to the pension trust agreement were changed to:

THE BOARD OF TRUSTEES OF THE ALBERTA CARPENTERS AND ALLIED WORKERS PENSION PLAN (Trust Fund)

and

THOSE EMPLOYERS SIGNATORY TO OR BOUND BY A COLLECTIVE AGREEMENT OR OTHER DOCUMENT PROVIDING FOR CONTRIBUTIONS TO BE PAID TO THE ALBERTA CARPENTERS AND ALLIED WORKERS PENSION PLAN (the Employers)

(underlining added)

[66] On December 14, 2009 the parties to the health trust agreement were changed to:

THE BOARD OF TRUSTEES OF THE ALBERTA CARPENTERS AND ALLIED WORKERS HEALTH & WELLNESS TRUST FUND (Trust Fund)

and

THOSE EMPLOYERS SIGNATORY TO OR BOUND BY A COLLECTIVE AGREEMENT OR OTHER DOCUMENT PROVIDING FOR CONTRIBUTIONS TO BE PAID TO THE ALBERTA CARPENTERS AND ALLIED WORKERS HEALTH & WELLNESS TRUST FUND (the Participating Employers)

(underlining added)

[67] On September 15, 2022 the parties to the health trust agreement were changed to:

ACAW HEALTH & WELLNESS TRUST FUND (the Trust Fund)

and

THE BOARD OF TRUSTEES OF THE ACAW HEALTH & WELLNESS TRUST FUND (the Board of Trustees)

(underlining added)

[68] The same change was made to the parties to the pension trust agreement on September 15, 2022:

ACAW PENSION TRUST FUND (the Trust Fund)

and

THE BOARD OF TRUSTEES OF THE ACAW PENSION TRUST FUND (the Board of Trustees)

(underlining added)

[69] The 1975 health trust agreement is signed by Allan Heidebrecht and William M MacKenzie on behalf of Local 1325 and by Allan K McCagherty and Gary M Johanson on behalf of the employers. On the following page those individuals signed a second time, each acknowledging and accepting the position of trustee, with Mr. Heidebrecht and Mr. MacKenzie signing as Union Trustees and Mr. McCagherty and Mr. Johanson signing as Employer Trustees.

[70] The 1975 health trust agreement is the only trust document in evidence signed on behalf of the unions or the employers. Some of the amendments and revised trust agreements are signed by the secretary of the board of trustees, some are signed by the chair and the secretary, and some are signed by the entire board. Some are not signed by anyone.

[71] The December 16, 2005 pension trust agreement is unclear regarding who authorized the amendments incorporated in that document, which include removing the unions as parties to the trust agreement. That agreement is signed by six trustees below the following text:

IN WITNESS WHEREOF, the persons appointed by the Parties hereto have in accordance with the authority granted to them, duly executed this Agreement in the City of Edmonton, this 16th day of December, 2005.

BOARD OF TRUSTEES OF THE ALBERTA CARPENTERS AND
ALLIED WORKERS PENSION PLAN

(underlining added)

[72] That phrasing is ambiguous regarding whether the persons were “appointed by the Parties” to act as trustees, or to execute the new trust agreement. If they were appointed by the parties to execute the trust agreement, one would expect each person to indicate which party they were signing for, as was done in the 1975 health trust agreement. The fact that they all signed under the heading “board of trustees” implies that they were signing as trustees, and not on behalf of the parties.

[73] Based on the requirement that amendments by the parties be in writing (as set out in article 8.01 of the 1975 agreements), together with the fact that the trust documents after 1975 are signed, if at all, by trustees as trustees and not on behalf of the parties, I conclude that the amendments to the trust agreements in evidence before me were all made by the trustees and not by the parties.

[74] The plaintiffs submit that the trustees do not have the authority to change the parties to the trust agreements, which they did several times: first adding Local 2103 and Local 2010 as parties to the health trust agreement on April 9, 1999, then removing the unions as parties and substituting the board of trustees on December 16, 2005 for the pension trust and on December 14, 2009 for the health trust, and finally removing the employers as parties and substituting the trust fund itself on September 15, 2022. I address validity of changes to the parties in section 13 of these reasons.

12. Amendments to the Amendment Provisions

[75] Article 8 sets out the powers to amend each trust agreement. The original wording, set out in section 10 of these reasons above, was left unchanged until December 16, 2005, when the unions were removed as parties to the pension trust agreement. On the same date article 8.01 was deleted, removing the power of the parties to amend the agreement. Articles 8.02 and 8.03 were unchanged other than renumbering them 8.01 and 8.02 respectively. Somewhat incongruously, renumbered article 8.02 retained the original wording referring to amendments “by the parties”. The same changes were made to the health trust agreement on December 14, 2009.

[76] In the 1975 trust agreements and all subsequent trust agreements up to 2021, an amendment by the trustees required 75% approval. This changed in September 2021 when article 8.01 (c) was reworded as follows:

8.01 This Agreement may be amended by the Trustees provided that:

...

c) at least half plus one of the Trustees vote in favour of the amendment.

[77] The September 15, 2022 amended trust agreements for both trusts reword article 8.02 as follows:

8.02 No amendment, whether by the parties or by the Trustees shall vary the object of the trust or divert the Fund or any part of it for purposes other than provided in this agreement or authorize or permit the return of payments or contributions unless such payments or contributions were made in error, or eliminate the annual audit, or restrict the availability of information to interested parties and no amendment by the Trustees shall provide for the administration of the Trust Fund other than by an equal number of Trustees representing Members of Participating Employers or other employers and / or Trustees representing Members coming from Unions having collective agreements or other agreements requiring contributions to the Fund.

(underlining added)

[78] The 2022 amendments eliminate the reference to “Union Trustees” and “Employer Trustees” from article 8.02.

[79] The plaintiffs submit that the changes to the amendment provisions made in 2021 and 2022 exceeded the trustees’ authority to amend the trust agreements. I address that issue in the next section.

13. Validity of Changes to the Parties and to the Amendment Provisions

[80] When the trusts were created in 1975, the parties, being Local 1325 and the employers who were in collective agreements with Local 1325, could amend the trust agreements by mutual agreement in writing pursuant to article 8.01. The trustees, though the amendments to the parties and to the amending powers, described in the preceding two sections of these reasons, purported to remove that power to amend from the parties, while retaining the power to amend for themselves.

[81] The 1975 trust agreements do not expressly prohibit, nor do they permit, the trustees to change the parties and the amendment provisions. In my view changing the parties and removing the parties’ power to amend the agreements is not included in a general amendment provision. Like the power to revoke the trust, addressed in *Schmidt*, changing the parties and removing their amendment power is a fundamental change to the trusts. For the trustees to have the power to make such a fundamental change, they would have to be explicitly given that power in the original trust agreements.

[82] I find that the trustees did not have the power to change the parties to the trust agreements and remove the parties’ power to amend the trust agreements. This has implications for all amended trust agreements from April 9, 1999 onward.

[83] The September 2021 change in the vote required for the trustees to amend the trust agreements from 75% to half plus one is not as fundamental a change as changing the parties and removing the parties’ power to amend but it does make a substantial change. If the size of each board is six trustees, which it was in 2021 and 2022, 75% is 4.5 trustees, so five votes would be

required to amend, a higher threshold than half plus one, which would be four. This change is close to the line, but in my view, it is not so fundamental as to be outside the general power to amend given to the trustees in the 1975 trust agreements.

14. Union Trustees and Employer Trustees

[84] Articles 1.01, 1.02, 1.04 and 1.05 in each 1975 trust agreement define “Union”, “Employer”, “Trustee”, “Union Trustee” and “Employer Trustee”:

- 1.01 The term "UNION" shall mean Local Union 1325 of the United Brotherhood of Carpenters and Joiners of America and such other Local Unions of the United Brotherhood of Carpenters and Joiners of America as may become party to this Agreement.
- 1.02 The term "EMPLOYER" shall mean an Employer bound through membership in an Employers' organization or who is otherwise bound to a Collective Agreement with the UNION which provides for contributions to be made by that Employer on behalf of his employees to the Trust Fund or Plan; and

Pursuant to Article 3.02, the term "EMPLOYER" shall also mean an Employer bound to an Agreement with the Trustees which provides for contributions to be made by that Employer on behalf of certain of his employees to the Trust Fund or Plan.
- ...
- 1.04 The term “TRUSTEE” shall mean a person appointed as a Trustee pursuant to this Agreement and includes the initial Trustees, and where the context so requires, means the Trustees acting as a Board of Trustees.
- 1.05 The terms “UNION TRUSTEE” and “EMPLOYER TRUSTEE” shall respectively mean a Trustee appointed by the Union and a Trustee appointed by the Employer.

(underlining added)

[85] The definition of employer was changed slightly on September 1, 1988 in both trust agreements. The change is to the second paragraph of article 1.02 which was changed to read:

The term "EMPLOYER" shall also mean an employer bound by another agreement with the UNION or a Participation Agreement with the TRUSTEES which provides for contributions to be made by that employer on behalf of certain of his EMPLOYEES to the TRUST FUND or PLAN.

[86] On October 9, 1998 the definition of “Union” was revised in the health trust agreement to the following:

- 1.01 The term "UNION" shall mean Local Union 1325, Local Union 1325 and Local Union 2103 of the United Brotherhood of Carpenters and Joiners of America and such other Local Unions of the United Brotherhood of Carpenters and Joiners of America as may become party to this Agreement. The term “UNION” may also include the Northwest

Territories (District of MacKenzie) Regional Council of Carpenters and Allied Workers.

[87] On December 16, 2005 the definitions in the pension trust agreement were rearranged and reworded, as follows:

1.04 The term “Employer” shall mean an employer bound through membership in an Employers’ organization or who is otherwise bound to a Collective Agreement with the Union which provides for contributions to be made by that employer on behalf of his Employees to the Trust Fund or Plan; and

The term “Employer” shall also mean an employer bound by another agreement with the Union or a Participation Agreement with the Trustees which provides for contributions to be made by that employer on behalf of certain of his Employees to the Trust Fund or Plan.

...

1.08 The term “Trustee” shall mean a person appointed as a trustee pursuant to this Agreement and where the context so requires, means the trustees acting as a Board of Trustees.

...

1.10 The term “Union” shall mean the Local Unions 1325, 2010 and 2103 of the United Brotherhood of Carpenters and Joiners of America and such other Local Unions of the United Brotherhood of Carpenters and Joiners of America as may become party to this Agreement.

1.11 The terms “Union Trustee” and “Employer Trustee” shall respectively mean a Trustee appointed in accordance with the terms contained herein.

(underlining added)

[88] On October 30, 2009 the definitions in the pension trust agreement were changed including eliminating the definition of “employer” and adding a definition of “participating employer”:

1.03 The term “Participating Employer(s)” shall mean a Participating Employer as set out in the Alberta Carpenters and Allied Workers Pension Plan created pursuant to this Agreement.

...

1.07 The term “Trustee” shall mean a person appointed or elected as a Trustee pursuant to this Agreement and where the context so requires, means the trustees acting as a “Board of Trustees”

...

1.09 The term “Union” shall mean a Union as set out in the Alberta Carpenters and Allied Workers Pension Plan created pursuant to the Agreement, subject to the approval of the Trustees such other local unions of the *United Brotherhood of Carpenters and Joiners of America* as may become participants under this Agreement.

- 1.10 The terms “Union Trustee” and “Employer Trustee” shall respectively mean a Trustee appointed or elected in accordance with the terms contained herein.

(underlining added)

[89] The same changes to the definitions were made in the health trust agreement on December 14, 2009, except that the phrase “or elected” was not included in article 1.07.

[90] The amendments to both agreements made on September 16, 2021 did not change the definition of “Participating Employer” but changed the definitions of “Trustee”, “Union”, “Union Trustee” and “Employer Trustee” to the following:

- 1.07 The term “Trustee” shall mean a person approved as a Trustee pursuant to this Agreement or by law and where the context so requires, means the trustees acting as a “Board of Trustees”.

...

- 1.09 The term “Union” shall mean a Union as set out in the Alberta Carpenters and Allied Workers Pension Plan [or Health and Wellness Plan] created pursuant to the Agreement, and subject to the approval of the Trustees such other local unions of the United Brotherhood of Carpenters and Joiners of America as may become participants under this Agreement and may include other unions outside of the geographic areas and work jurisdictions as the Trustees in their sole discretion decide.

- 1.10 The terms “Union Trustee” and “Employer Trustee” shall respectively mean a Trustee approved in accordance with the terms contained herein or by law.

(underlining added)

[91] In the September 15, 2022 amendments, the definition of “Participating Employer” did not change from the 2021 version, but the definitions of “Union Trustee” and “Employer Trustee” were removed entirely and “Trustee” is defined twice as follows:

pension trust agreement

- 1.07 The term “Trustee” shall mean a person approved and appointed as a Trustee pursuant to this Agreement or by law and where the context so requires, means the trustees acting as a “Board of Trustees”.

- 1.10 The terms “Trustee” shall mean a Trustee accepted and approved in accordance with the terms contained herein or by law.

health trust agreement

- 1.07 The term “Trustee” shall mean a person approved and appointed as a Trustee pursuant to this Agreement and where the context so requires, means the trustees acting as a “Board of Trustees”.

- 1.10 The terms “Trustee” shall mean a Trustee approved and appointed in accordance with the terms contained herein or by law.

(underlining added)

[92] The 1975 trust agreements and all subsequent agreements up to 2021 include the following in article 2.02:

A Union Trustee must be a member in good standing of the Union.

[93] This changed in the 2021 trust agreements to:

A Union Trustee, other than the Chair or Vice Chair, must be a member in good standing of a Union.

[94] In the 2022 trust agreements the reference to membership in a union was removed completely.

[95] The 1975 trust agreements in article 2.15 require that the offices of chair and secretary of the board of trustees be divided, with one of those being a Union Trustee and the other being an Employer Trustee. That requirement carried forward into all subsequent agreements until 2022 when reference to the secretary was removed and the following provision was inserted in article 2.11 of each agreement:

Notwithstanding anything to the contrary stipulated herein the Trustees may hire or appoint to the position of Chair or Vice Chair any person regardless of Union or Employer affiliation.

[96] I address the validity of the changes to the definitions and the changes to the trustee appointment and removal provisions together in section 16 of these reasons.

15. Appointment and Removal of Trustees

[97] The 1975 trust agreements contain the following provisions regarding the appointment and removal of trustees:

2.01 The TRUST FUND shall be administered by a Board of TRUSTEES consisting of two TRUSTEES appointed by the UNION and two TRUSTEES appointed by the EMPLOYER. By unanimous resolution of the TRUSTEES, the Board of TRUSTEES may be constituted at six or eight TRUSTEES. However, the Board shall at all times be comprised of a number of TRUSTEES appointed by the UNION equal to the number of TRUSTEES appointed by the EMPLOYER.

...

2.08 Any TRUSTEE may be removed from office at any time for just cause by the party appointing him.

2.09 A TRUSTEE may be appointed for a stated term, but in the absence of such stated term shall serve until his death, incapacity, disqualification, resignation or removal.

...

2.11 In the event that a UNION TRUSTEE should die, become incapable of acting, resign or be removed, a Successor TRUSTEE shall be immediately appointed by the UNION.

(underlining added)

[98] Those provisions remained the same until October 9, 1998 when the following was added to article 2.01 in the health trust agreement:

Where the Board of Trustees is constituted at six members, two UNION TRUSTEES shall be members of the Carpenters Local Union 1325 of the United Brotherhood of Carpenters and Joiners of America and one shall be a member of the Carpenters Local Union 2103 of the United Brotherhood of Carpenters and Joiner of America.

[99] In the December 16, 2005 pension trust agreement the provisions regarding appointment and removal of trustees were changed to the following:

2.01 The Trust Fund shall be administered by a Board of Trustees composed of:

- (a) two Union Trustees appointed by the Executive Board of Local Union 1325 of the United Brotherhood of Carpenters and Joiners of America;
- (b) one Union Trustee appointed by the Executive Board of Local Union 2103 of the United Brotherhood of Carpenters and Joiners of America;
- (c) two Employer Trustees elected from and by the Employers having a collective agreement relationship with Local Union 1325 of the United Brotherhood of Carpenters and Joiners of America;
- (d) one Employer Trustee elected from and by the Employers having a collective agreement relationship with Local Union 2103 of the United Brotherhood of Carpenters and Joiners of America;

The Board shall at all times be comprised of an equal number of Trustees appointed by Employers and Unions.

Only one Employer Trustee may be elected from any one entity and all of the divisions or subsidiaries of that entity.

The Board shall be empowered to restructure itself from time to time in accordance with the requirements of Article 8.01 and 8.02.

2.07 Any trustee may be removed from office at any time for just cause by the party appointing him.

2.08 A trustee may be appointed for a stated term, but in the absence of such stated term shall serve until his death, incapacity, disqualification, resignation or removal.

2.10 In the event that a Trustee should die, become incapable of acting, resign or be removed, the Secretary of the Board shall give notice of the necessity to elect a new Trustee to the Employers having a collective agreement relationship with Local Union 1325 or Local Union 2103, as appropriate, of the United Brotherhood of Carpenters and Joiners of America.

(underlining added, irrelevant portions of 2.10 omitted)

[100] Curiously, the 2005 pension trust agreement does not contain any provision requiring a new Union Trustee to be appointed immediately upon a Union Trustee leaving office (such as was set out in article 2.11 prior to 2005).

[101] The October 30, 2009 pension trust agreement and the December 14, 2009 health trust agreement added the following to articles 2.02 and 2.07:

[2.02] All Trustees shall, at the time of appointment or election and thereafter, be and remain qualified as required by governance guidelines and policies approved from time to time by the Board of Trustees.

[2.07] A Trustee may also be removed by a majority vote of the Board of Trustees should a Trustee not be or remain qualified as required in Article 2.02 herein.

[102] Those additions to articles 2.02 and 2.07 in 2009 were the beginning of a campaign by the trustees to usurp for themselves control over the appointment and removal of trustees.

[103] The first part of article 2.10 was also changed in the 2009 trust agreements to the following:

2.10 In the event that a Trustee should die, become incapable of acting, resign or be removed, the secretary of the Board shall give notice of the necessity to appoint or elect a new Trustee to the appointing or electing party.

[104] The amendments in March 2019 further aggregated power in the trustees, and eroded the appointment power of the unions and the employers. This was accomplished through the addition of (e) to clause 2.01:

(e) A new Trustee appointed to the Board must possess a professional designation deemed appropriate by the sitting Trustees or participate as a Trustee in Training for a minimum period of two years. Trustee In Training shall include appropriate education such as International Foundation, etc. Expiry of the training period does not automatically mean appointment to the Board of Trustees, however the term of training may become a consideration as part of the suitability requirements for future appointment to the Board of Trustees. Trustees In Training may be appointed as full Trustees at the discretion of the Board. Trustees In Training shall have voice but no vote on motions or resolutions. Existing Trustees shall be grandfathered.

(underlining added)

[105] The defendants submit that training is necessary because the funds have grown very large and the trustees are called upon to make large financial decisions, in the order of hundreds of millions of dollars. While it may be a good idea for the trustees to have some training, that is a factor the unions and the employers are free to consider when appointing trustees. The trustees are also free to take training and the board of trustees is free to provide training or pay for it. Given the nature of the pension trust which accepts contributions, invests them, and then pays out pensions years after the contributions are made, the parties would have known in 1975 that the pension trust, and to a lesser extent, the health trust, would become large and that the trustees would be called upon to make large financial decisions. The parties chose in 1975 not to require training as a mandatory qualification for trustees.

[106] The trustee appointment and removal provisions were changed in 2021, replacing the power of unions and employers to appoint trustees with a power to recommend, with the appointment power now residing in the board of trustees and its chair. They also changed the trustee in training provision to apply only to union trustees, not employer trustees, and they eliminated the power of the unions and the employers to remove a trustee for just cause, giving that power exclusively to the trustees. The relevant portions of the 2021 revised articles read:

- 2.01 Subject to the provisions of Article 2.02 herein the Trust Fund shall be administered by a Board of Trustees composed of:
- a) two Union Trustees recommended on behalf of Local Union 1325 of the United Brotherhood of Carpenters and Joiners of America;
 - b) one Union Trustee recommended on behalf of Local Union 2103 of the United Brotherhood of Carpenters and Joiners of America;
 - c) two Employer Trustees recommended on behalf of Participating Employers having a collective agreement or other relationship with Local Union 1325 of the United Brotherhood of Carpenters and Joiners of America and I or the Board of Trustees;
 - d) one Employer Trustee recommended on behalf of Participating Employers having a collective agreement or other relationship with Local Union 2103 of the United Brotherhood of Carpenters and Joiners of America and / or the Board of Trustees;
 - e) all Union Trustees duly recommended may, at the discretion of the Board, be required to serve up to two years as a Trustee in Training during which time each shall have voice but no vote on motions or resolutions. As of January 1, 2021 existing Trustees shall be grandfathered;
 - f) all Trustees so recommended must have the approval of the then existing Trustees and the Chair before such recommendation becomes effective;
 - g) the Board of Trustees shall at all times be comprised of an equal number of Trustees approved on behalf of Participating Employers and Unions or otherwise according to law;
 - h) only one Employer Trustee may be approved on behalf of any one entity and all of the divisions or subsidiaries of that entity; ·
 - i) the Board of Trustees shall be empowered to restructure itself from time to time in accordance with the requirements of Article 8.01 and 8.02; and
 - j) notwithstanding any provision of this Trust Deed there shall never be less than two Trustees representing Unions and two Trustees representing Participating Employers.
- ...
- 2.07 Any Trustee may be removed from office at any time for just cause.
Just cause means the Trustee no longer qualifies under Article 2.02 and / or in the opinion of the Board of Trustees expressed in a

majority vote (half plus one) of all Trustees has conducted himself in a manner totally inconsistent with the standards expected in the carrying out of his fiduciary responsibilities.

[107] The defendants submit that under the 2021 wording of article 2.07 the party who appointed a trustee has the power to remove that trustee for just cause, but the board now has the power to determine what just cause is. I disagree. Nothing in the 2021 versions of the trust agreements suggests that the appointers have the power to remove trustees, and the second paragraph of the 2021 version of 2.07 implies that the board of trustees has that power. The defendants adduced no evidence of the factual matrix in 2021 that sheds any light on this point.

[108] The 2022 amendments complete the takeover of trustee appointment and removal by the trustees and the ouster of the unions and the employers from any role in that process. The relevant provisions in the 2022 pension trust agreement are:

2.01 Subject to the provisions of Article 2.02 herein:

- a) the Trust Fund shall be currently administered by a Board of Trustees composed of six Trustees with the proviso all existing Trustees as of January 1, 2022 shall be grandfathered and the term of each shall be three years from that date unless reduced by resignation, death or other disqualification pursuant to the terms of this Trust Deed;
- b) thereafter Board of Trustees shall, unless altered in accord with the terms of the Trust Deed, continue to be comprised of a minimum of six Trustees.

At all time[s] the Board of Trustees shall consist of persons who shall represent equally all members of the Plan whether union members or not and all employees of Participating Employers or other employers or past employers found to be satisfactory as members by the Trustees;

- c) all future and / or replacement Trustees must be approved and appointed by the Trustees and the Chair who are in place prior to the expiration of the term. In the event a candidate is an existing Trustee, that person shall not be entitled to vote and in all such cases the approval and appointment shall be decided by a simple majority of the remaining Board of Trustees. The term of such approval and appointments shall be for three years or such lesser term as the Trustees decides;
- d) the Board of Trustees may establish procedures and qualifications for any future Trustees whether continued or newly approved and appointed;
- e) all Trustees no matter how or why appointed must always act in accord with the principle they are acting only for the benefit of the beneficiaries of the Trust Fund and Plan;
- f) all Trustees must have the approval of the then existing Trustees and the Chair before such appointment becomes effective;
- g) only one Trustee may be appointed to represent members from a Participating Employer or other employer and any and all divisions or subdivisions of that entity and all of the divisions or subsidiaries of that entity;

- h) the Board of Trustees shall be empowered to restructure itself from time to time in accordance with the requirements of Article 8.01 and 8.02; and
- i) notwithstanding any provision of this Trust Deed there shall never be less than two Trustees coming from Unions and two Trustees coming from Participating Employers or other employers or past employers.

..

2.09 In the event that a Trustee should die, become incapable of acting, resign, or be removed, the Board of Trustees shall begin the process of appointing a new Trustee in place of such Trustee.

...

8.02 No amendment, whether by the parties or by the Trustees shall vary the object of the Trust or divert the Fund or any part of it for purposes other than provided in this Agreement or authorize or permit the return of payments or contributions unless such payments or contributions were made in error, or eliminate the annual audit, or restrict the availability of information to interested parties and no amendment by the Trustees shall provide for the administration of the Trust Fund other than by an equal number of Trustees representing Members of Participating Employers or other employers or past employers and / or Trustees representing Members coming from Unions having collective agreements or other agreements requiring contributions to the Fund.

[109] The wording in the 2022 health trust agreement is slightly different than the wording in the pension trust agreement. Most of the differences are not relevant to the issues in this action. One significant difference is in article 2.01 b) which in the 2022 health trust agreement reads:

- b) thereafter the Board of Trustees shall, unless altered in accord with the terms of the Trust Deed, continue to be comprised of a minimum of six Trustees. At all times the Board of Trustees shall consist of an equal number of members who individually have union membership and an equal number of persons who may be employed by Participating Employers or other Employers or past Employers found to be satisfactory by the Trustees;

[110] Both 2022 trust agreements add the following recital not in any of the previous versions:

AND WHEREAS this Trust Fund intends to continue and maintain its complete governance and independence from the United Brotherhood of Carpenters and Joiners of America or any subordinate bodies of any kind;

[111] That is a remarkable statement given Local 1325's central role as a party and an appointer of trustees pursuant to the 1975 trust agreements and all subsequent agreements up to 2005.

16. Validity of Changes to Definitions and to Appointment and Removal Provisions

[112] The validity of amendments to a trust agreement depends on the original trust agreement: *Schmidt* at para 113.

[113] The 1975 pension trust agreement and health trust agreement in article 8.03 prohibit amendments by the trustees that:

provide for the administration of the TRUST FUND other than by an equal number of EMPLOYER TRUSTEES and UNION TRUSTEES with equal voting privileges.

[114] “Employer Trustee” and “Union Trustee” are defined in the 1975 trust agreements as a trustee appointed by the employer and a trustee appointed by the union, respectively, and article 2.03 stipulates that a Union Trustee must be a union member in good standing.

[115] The net effect of the amendments to articles 1 and 2 of the trust agreements made by the trustees between 2009 and 2022 is that the trust funds are not administered by an equal number of trustees appointed by the union and trustees appointed by the employer; instead the funds are administered by trustees appointed by the board. In the case of the health trust there must be an equal number of trustees who are union members and trustees who are employees or former employees of an employer. There is no such requirement in the case of the pension trust, because of the different wording of article 2.01(b).

[116] Up to 2009, the trust agreements, as amended by the trustees, retained the requirement that the trusts be governed by an equal number of trustees appointed by the unions and trustees appointed by the employers. That began to change with the 2009 amendments which permitted the board to impose qualifications for trustees and empowered the board to remove trustees who did not have those qualifications. In the agreements up to 2009 the unions and the employers had an unfettered power to appoint whomever they liked as trustees. As of the 2009 amendments the unions and the employers could only appoint those the board deemed qualified.

[117] The trustees tightened their grip on the appointment of trustees through their amendments in 2019, 2021 and 2022, resulting in complete exclusion of the unions and the employers from the trustee appointment process.

[118] The changes made by the trustees to articles 1 and 2 of the trust agreements between 2009 and 2022 with respect to the appointment of trustees are invalid because they exceed the trustees’ power to amend pursuant to article 8.03 of the 1975 trust agreements.

[119] The 2021 amendments changed the power to remove trustees set out in article 2.07 of each trust agreement. Those amendments eliminated the power of the unions and the employers to remove the trustees they appointed for just cause and gave that power to the board. This provision is not expressly included or excluded from the trustees’ amendment power in article 8.03 of the 1975 trust agreements.

[120] In these trust agreements the equality of trustee appointments by the unions and the employers is a fundamental feature of the trusts. The power to remove is a reciprocal power, also equally held by the unions for their trustees and the employers for theirs in the 1975 trust agreements. The power to change that fundamental feature of these trusts is not implicit in the trustees’ general amendment power in article 8.03 of the 1975 agreements. Consequently, the

changes to article 2.07 with respect to removal of trustees made in 2021 and carried forward into the 2022 trust agreements are invalid.

[121] Similarly, the division of the offices of chair and secretary, with one being a union trustee and the other being an employer trustee is fundamental to the equality between the parties. The trustees did not have the power to change that.

17. Signing Page Wording

[122] In sections 9 – 16 above I have addressed nine of the ten items raised by the plaintiff. The tenth aspect of the amendments objected to by the plaintiffs is set out in paragraph 46 x of the statement of claim:

Tenth, whereas previous versions of the Trust Agreements indicate that the signatory trustees are “the persons *appointed by the Parties*” and are acting “in accordance with the authority granted to them” by the parties (i.e. the Union and Employers), the Purported Amendments state that “the undersigned Trustees” are acting “in accordance *with the authority granted to them by the Board of Trustees*”.

[123] Nothing turns on this wording change. On the evidence before me, all amendments were made by the trustees. None was made by the parties. There is no evidence that the parties to the original 1975 agreements authorized or had any involvement in any of the subsequent amendments and amended trust agreements.

18. Construction by the Trustees

[124] Article 3.06 of the 1975 trust agreements includes the following provision:

The TRUSTEES shall have the power to construe the provisions of this AGREEMENT and the terms used therein. Any such determination and any such construction adopted by the TRUSTEES in good faith shall be binding upon all parties hereto and the beneficiaries hereof.

[125] All subsequent agreements include essentially the same wording. There is no evidence before me of the trustees exercising their power to construe the trust agreements. The defendants’ counsel confirmed this point during oral argument on February 28, 2024. Consequently, this provision has no bearing on the issues in this action.

19. Superintendent of Pensions

[126] The *Employment Pension Plans Act*, SA 2012 c E-8.1 applies to pension plans. It does not apply to health plans. Part 4 of that Act deals with registration and amendment of pension plans. It requires pension plan administrators to submit their plan documents and amendments for registration. Section 22 requires the Superintendent of Pensions to register an amendment, but permits the Superintendent to refuse to register an amendment based on non-compliance with the Act or its regulations. The Act does not require the Superintendent to scrutinize plan documents or amendments for compliance with anything other than the Act and the regulations. Nothing in the Act or its regulations empowers the Superintendent to approve amendments not authorized by the original plan documents.

[127] The defendants adduced into evidence a letter dated August 29, 2023 from the Deputy Superintendent of Pensions indicating that certain amendments to the pension trust had been “accepted”, including the 2021 and 2022 amendments. The letter does not use the word “register” which is the word used in the Act. Even if the letter is evidence that the Superintendent has accepted the 2021 and 2022 amendments for registration, that has no bearing on their validity because the Superintendent has no role in assessing validity beyond compliance with the Act and its regulations.

20. Disposition

[128] I grant summary judgment to the plaintiff in the form of a declaration that the amendments specifically addressed in my reasons above are invalid. Those are:

- changes to the parties;
- removal of the parties’ power to amend;
- removal of the definitions of union trustee and employer trustee and the requirement that the board consist of an equal number of each;
- addition of a requirement that a trustee appointed by a party to be approved by the board;
- removal of the requirement that a union trustee be a member in good standing of a union;
- removal of the division of the offices of chair and secretary with one being a union trustee and the other being an employer trustee;
- removal of each appointing party’s power to remove their trustees for just cause;
- addition of the board’s power to remove trustees for just cause;
- removal of the power of each party to appoint an equal number of trustees;
- addition of a requirement that trustees be qualified as determined by the board;
- addition of trustee in training requirement including disenfranchisement of those trustees;
- giving the board the power to appoint trustees; and
- insertion of a recital asserting independence from the union.

[129] I decline to make a declaration as sought by the plaintiffs that the governance and administration of the trusts is subject to the terms of the trust agreements in place prior to the 2021 and 2022 amendments for three reasons. First, some of the amendments made between 1975 and 2022 were not addressed at all in this action and therefore may or may not be valid. Second, I have found that some amendments made between 1999 and 2019 are invalid. Third, all versions of the trust agreements, including the original 1975 versions include a severability provision in article 9.06. That provision may operate to make the most recent version of each trust agreement operative, but with invalid amendments severed.

[130] If the parties are not able to agree on costs, they may seek a costs hearing before me from the civil seized court coordinator.

Heard on the 27th day of February, 2024 to the 28th day of February, 2024.

Dated at the City of Edmonton, Alberta this 21st day of May, 2024.

G.S. Dunlop
J.C.K.B.A.

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