

Blakes Bulletin

Pension & Employee Benefits

The Supreme Court of Canada decision in the Kerry Canada Case – Payment of Plan Expenses, DB and DC Contribution Holidays and Cost Issues

In a welcome decision for pension plan sponsors, the Supreme Court of Canada (“SCC”) has dismissed the appeal in *Elaine Nolan et al. v. Kerry (Canada) Inc.* A link to the Supreme Court’s decision and additional background information can be found on the Blakes website at <http://www.blakes.com/english/TheKerryDecision.html>.

Blakes acted for the Association of Canadian Pension Management in its intervention in the SCC.

EXECUTIVE SUMMARY

In its decision, the SCC provided important guidance to plan administrators, plan sponsors and their advisers on the use of surplus to take contribution holidays and the payment of pension plan expenses as follows:

DC Contributions out of DB Surplus – The majority of the Supreme Court found that the employer could use surplus in the defined benefit (DB) component of the plan to satisfy its contribution obligations under the defined contribution (DC) component, provided that the plan was properly structured so as to make the members of the DC component beneficiaries of the trust fund. In this regard, the majority of the Court found that there was no legislative restriction prohibiting a single plan and trust which provides both DB and DC components or the taking of DC contribution holidays. Similarly, the majority of the Court found that there was no legislative restriction prohibiting the employer’s retroactive amendment designating DC members as beneficiaries of the DB trust fund.

Contribution Holidays – While it has always been clear that an employer may take a contribution holiday in circumstances where the plan documents provide that funding requirements will be determined by actuarial practice and such contribution holiday is not otherwise prohibited by other plan wording or legislation, the SCC decision clarifies that an employer may also take a contribution holiday in circumstances where the plan text does not specifically reference an actuary but the use of actuarial discretion is required to determine the contribution obligation.

Plan Expenses – The Supreme Court held that plan administration expenses could be paid from the pension fund, as plan amendments enabling such payment were not inconsistent with prior plan and trust documentation in this case. Whether the plan expenses were incurred for services of third parties or the employer itself was found to be immaterial by the Supreme Court as long as the expenses charged are reasonable and the services necessary.

Costs – The Tribunal’s jurisdiction to award costs is limited to a party before it. In terms of the court’s jurisdiction, while cost awards are discretionary, costs will only be awarded from the pension trust fund where the proceedings are necessary for the due administration of the Trust. In adversarial proceedings, courts are more likely to approach costs as in an ordinary lawsuit, i.e. payable by the unsuccessful party to the successful party.

Background

The Kerry pension plan was established in 1954 (the “Plan”) as a defined benefit plan.

Starting in 1985, the employer began to take contribution holidays in respect to its funding obligations and by 2001 had taken contribution holidays of approximately \$1.5 million. In addition, beginning in 1985, the Company began having third party plan expenses paid from the relevant pension fund (the “Fund”).

In 2000, the Plan was amended to provide an optional conversion to defined contribution benefits and to provide that all new members would receive defined contribution benefits. After the 2000 amendments were introduced, the DCA Employees Pension Committee (the “Committee”) asked the Superintendent of Financial Services to investigate alleged irregularities in the administration of the Plan including payments of expenses from the Fund and the employer’s contribution holidays. The Superintendent issued a Notice of Proposal to make an order requiring Kerry to reimburse the Fund for expenses paid from the Fund after January 1, 1988 that had not been incurred for the exclusive benefit of Plan members but proposed to refuse to order Kerry to repay the amounts that had been taken by way of contribution holidays. Kerry sought a hearing before the Financial Services Tribunal on the Superintendent’s proposed order in respect of plan expenses and the Committee sought a hearing on the Superintendent’s proposed order in respect of contribution holidays. Separate Tribunal hearings were conducted.

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Kerry was largely successful at both Tribunal hearings. In a decision rendered after the hearing with respect to plan expenses, the Tribunal held that all but a very few of the plan expenses could be paid from the Fund. In a second decision, the Tribunal held that Kerry was entitled to take contribution holidays and could do so with respect to its DC obligations as long as the DC members were designated as Fund beneficiaries.

The Committee appealed both decisions to the Divisional Court. The Divisional Court issued a judgment which largely overturned the Tribunal decisions (but upheld the Tribunal's ruling that DB contribution holidays were permitted under the Plan). Kerry appealed the judgment of the Divisional Court and the Committee cross-appealed. The Ontario Court of Appeal largely overturned the Divisional Court decision clarifying when it is acceptable for pension plan expenses to be paid from the pension fund and determining that, after a plan conversion, it is permissible to use surplus assets in the DB part of the pension plan to pay current service costs in respect of the DC part of the plan. Leave to appeal the Court of Appeal decision to the SCC was granted. The Association of Canadian Pension Management intervened on the issues of the payment of expenses from the pension plan fund and the use of actuarial surplus in the plan to fund benefits for members who participate in the Plan on a defined contribution basis. The Canadian Labour Congress intervened on the issue of the utilization of actuarial surplus to fund defined contribution benefits.

Important Findings in the SCC Decision

Standard of Review

Reasonableness

Having regard to the purpose of the Tribunal, the nature of the questions raised and the expertise of the Tribunal, the SCC found that the appropriate standard of review for the issues of plan expenses, contribution holidays and

cost was reasonableness. (This was the same standard as found by the Ontario Court of Appeal except that the Ontario Court of Appeal had required the higher correctness standard with respect to the issue of costs.)

The granting of a deferential standard of review to the Tribunal's decision may be seen by some as a change by the SCC from its earlier decision in *Monsanto* [2004] 3 S.C.R. 152. While distinctions can be made between the cases, e.g., statutory analysis versus questions which involve not just question of law but also the interpretation of pension plans and related texts, the important point going forward is that given the deference accorded to the Tribunal's decisions in this case, hearings before the Tribunal will take on heightened importance.

Payment of Plan Expenses

The SCC found to the extent that expenses at issue are bona fide expenses necessary for the administration of the pension plan, it should not matter whether expenses are owed to a third party or are an employer expense. There is no reason that expenses should be prohibited from being paid from the Plan fund unless prohibited by the Plan documents.

The Ontario Court of Appeal found nothing in the Pension Benefits Act (the "PBA") or the common law that would impose a requirement on an employer to pay plan expenses. That Court then focussed on the Plan documents and found nothing in the Kerry situation that would require the employer to pay the Plan expenses. The SCC held that they were "in substantial agreement with [the] analysis and conclusion" of the Ontario Court of Appeal. Other than a requirement to pay trustee fees and expenses¹, the Plan documentation in Kerry was silent on the payment of Plan expenses from the Fund.

The Committee argued that because the original Plan documentation did not expressly permit Plan expenses to be paid from the Fund, expenses must be paid by the

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¹ Paragraph 44 "Sections 5 and 19 of the 1958 Trust Agreement provide that the employer undertook to pay Trustee fees and Trustee expenses."

[5] The expenses incurred by the Trustee in the performance of its duties, including fees for expert assistants employed by the Trustee with the consent of the Company and fees of legal counsel, and such compensation to the Trustee as may be agreed upon in writing from time to time between the Company and the Trustee, and all other proper charges and disbursements of the Trustee shall be paid by the Company, and until paid shall constitute a charge upon the Fund.

[19] The Trustee shall be entitled to compensation in accordance with the Schedule of Fees on pension and profit-sharing trusts of National Trust Company, Limited now in effect, which compensation may be adjusted from time to time based upon experience hereunder, as and when agreeable to the Company and the Trustee. Compensation payable to any successor trustee shall be agreed to by the Company and such successor trustee at the time of its designation. Such compensation shall constitute a charge upon the Fund unless it shall be paid by the Company. The Company expressly agrees to pay all expenses incurred by it or by any Trustee in the execution of this Trust and to pay all compensation which may become due to any Trustee under the provisions of this Agreement." [Emphasis added.]

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employer. It argued as well that paying Plan expenses from the Fund would not be for the exclusive benefit of the employees and would be a partial revocation of trust. The Committee further argued that the execution of the Trust meant operating a pension plan.

The SCC noted that while a Trust was indeed part of the Plan, it was not all of the Plan. Rather it played a role in the working of the two; *i.e.*, the "Trust is an element of the Plan that holds the contributions and from which benefits are paid. The Plan itself is a broader document which sets out things such as eligibility requirements, contribution requirements, the form of benefits and what happens on termination."

The SCC held that expenses associated with the administration of the Plan are not fees or expenses incurred in connection with the execution of the Trust. They therefore felt that the requirement in the 1958 Trust Agreement to pay trustee fees and expenses did not oblige the Plan sponsor to pay Plan administration expenses.

The SCC went on then to consider that if the Plan and Trust documentation were silent on the payment of expenses, could the documents be amended to permit the payment of expenses from the Trust Fund? The SCC first considered the trust amendment clause which provides as follows:

"[11] This Agreement may be amended in whole or in part or be terminated any time and from time to time by an instrument in writing executed by the Company and the then Trustee; provided however that unless approved by 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 employees, or their beneficiaries or personal representatives as from time to time may be included under the Plan, and for the payment of taxes, assessments or other charges as provided in Section 5 and Section 19 herein, provided, it being understood that this proviso is not to be construed to enlarge the obligations of the Company beyond those assumed by it under the Plan. [Emphasis added.]"

The SCC noted that this amendment clause, while forbidding trust funds from being used other than for the exclusive benefit of such employees and beneficiaries, also said that the restriction could not be construed so as to enlarge the obligations of the Company beyond those assumed under the Plan. The Court went on to discuss

exclusive benefit language and noted, interestingly, at paragraph 54 that while an employer may benefit from the use of pension funds, such indirect or incidental benefits do not mean that funds are being used for a purpose other than the exclusive benefit of trust beneficiaries:

"[54] An employer might also benefit in a number of ways. The U.S. Supreme Court, in dealing with an employer's introduction of an early retirement plan, recognized that an employer can legitimately receive a number of incidental benefits from a pension plan even though the plan is subject to legislation containing exclusive benefit language. These incidental benefits include "attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily": *Lockheed Corp. v. Spink*, 517 U.S. 882 (1998), at pp. 893-94. Such indirect or incidental benefits from the use of pension funds do not mean that the funds are being used for a purpose other than the exclusive benefit of the Trust beneficiaries."

The SCC ultimately found that the existence of the Plan was of benefit to the employees and the payment of expenses is necessary to ensure the Plan's continued existence. On this basis, the SCC held that it was therefore to the exclusive benefit of the employees, within the meaning of Section 11, that expenses for the continued existence of the Plan are paid out of the Fund.²

The SCC also noted that paying the Plan expenses from the Fund was not a revocation of the Trust so long as nothing in the Plan text requires the paying of expenses by the employer. In this regard, the Court noted that paying plan expenses out of the trust fund is not a matter of the settlor (in this case the employer) exercising a power of control over property it had transferred to the trust.

The SCC went on to clarify that it was immaterial whether expenses were those of third parties or the employer itself. That did not affect whether they could be charged against the Fund; the issue was rather whether they were bona fide expenses necessary to the administration of the Plan. The SCC stated that there was "no reason in principle why an employer should be obliged to contract out such services."³

Given that the employer had not made any promise other than the commitment to pay trustee expenses, given that

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² Paragraph 55

³ Paragraph 65

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the Kerry documentation was otherwise silent on Plan expenses, and given the broad power of amendment, the Court permitted the amendment which allowed the charging of expenses to the Fund.

Accordingly, for other pension plan sponsors, it is helpful to know that silence in pension plan documentation does not create an obligation for the plan sponsor to pay plan expenses. There are then two issues to consider: Firstly, if the pension language is silent on the payment of plan expenses does the relevant amendment power permit the addition of the right to charge expenses against the fund? The SCC has assisted in this analysis by finding that the payment of expenses out of the fund is to the exclusive benefit of the employees. Secondly, if the plan contains a positive obligation on the employer to pay plan expenses it is then necessary to determine whether the amendment power is broad enough to permit such an amendment, noting how exclusive benefit has been viewed. (In this light, the SCC spent considerable time distinguishing the decision in *Markle v. Toronto* (City) (2003) 63 O.R. (3rd 321), where the City had made a promise to pay these expenses, holding that amending the promise retroactively was inconsistent with the terms of the Fund; and prospectively, was prohibited as it fettered the discretion of the Trustees and was therefore a partial revocation. The interpretation of the right to amend pension plans with expense language that imposes a positive or express obligation on the employer to pay plan expenses will therefore continue to require careful analysis.)

DB Contribution Holidays

The SCC found that if the contribution formula in a pension plan requires the discretion of an actuary, regardless of whether there is an express reference to the actuary's involvement in determining the amount of each contribution, then the actuary's discretion enables the employer to follow the accepted actuarial practice of using fund surpluses to offset employer contributions.

The question in this case was whether the employer was permitted to take contribution holidays based on the Plan documentation. The Plan was amended in 1965 to more expressly permit the taking of contribution holidays:

"The Company shall contribute from time to time but not less frequently than annually such amounts as are not less than those certified by the Actuary as

necessary to provide the retirement income accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued as required by the Pension Benefits Act, after taking into account the assets of the Trust Fund, the contributions of Members during the year and such other factors as may be deemed relevant. [Emphasis added.]"

The SCC held that contribution holidays are permitted under this clause because the Company's contributions are determined by actuarial calculations. The Committee argued however, that the 1965 amendment was invalid as the 1954 Plan text prohibited contribution holidays and that amendments to that provision were invalid.

The relevant provision of the 1954 Plan was as follows:

(b) Contributions by the Company

In addition to contributing the full cost of providing the Past Service retirement incomes referred to in Section 13 (a) of this Plan, the Company shall also contribute, in respect of Future Service benefits, such amounts as will provide, when added to the Member's own required contributions, the Future Service retirement incomes referred to in Section 13 (b) of the Plan.

The SCC agreed with the Ontario Court of Appeal that even the 1954 provision permitted the taking of contribution holidays was unlike the earlier cases which prohibited contribution holidays,⁴ the 1954 provision "requires the exercise of actuarial discretion, as it does not fix annual contributions and therefore does not preclude contribution holidays",⁵ and found that given actuarial discretion was required, that the contribution holiday language was sufficient and, therefore, DB contribution holidays were permitted.

DC Contribution Holidays

The SCC determined that if there was one Trust in which all DB and DC members are beneficiaries surplus which had accrued in the DB Plan could be used to fund contribution holidays with respect to DC benefits.

Rothstein J. writing for five of the seven members of the Court (the "Majority") began the analysis of whether plan surplus could be utilized to take contribution holidays for both DB and DC plan beneficiaries by saying:

"... pension plans are private arrangements subject to

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⁴ Paragraph 74-*C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro* (1989), 68 O.R. (2d) 620 (C.A.); *Trent University Faculty Assn. v. Trent University* (1997), 35 O.R. (3d) 375 (C.A.); *Hockin and Châteauneuf v. TSCO of Canada Ltd.* (1995), 124 D.L.R. (4th) 308 (Que. C.A.).

⁵ Paragraph 76.

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government regulation. Absent regulation prohibiting the combining of DB and DC components in a single plan or prohibiting the taking of contribution holidays in respect of either component of the Plan, whether such actions are permitted will be determined with reference to the plan documentation and contract and trust law. In this case, there is no government regulation that prevents the retroactive amendment, a single plan and trust and the DC contribution holidays.⁶

The Majority stated that it was the job of the legislature and not the courts to attempt to balance the interests of plan sponsors and plan members:

LeBel J. [in dissent] expresses concern that the use of a DB surplus for DC purposes disrupts the careful balance between providing incentives for employers to provide pension schemes and the need to protect pensioners' rights (para. 149). In my respectful view, it is not the role of the courts to find the appropriate balance between the interests of employers and employees. That is a task for the legislature. Indeed, as Deschamps J. noted, at para. 14 of *Monsanto*: "[P]ension standards legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system". The role of the courts is to ascertain and uphold the rights of the parties in accordance with the applicable statutory and common law and the terms of the relevant documentation."⁷

With this background, the Majority then proceeded to consider if there was any reason why DC and DB arrangements cannot be included in a single Plan and Trust.

The Majority considered the UK case of *Kemble v. Hicks* [1989] EWHC 301 (CH) and found that the prohibition in that case against putting the DB and the DC components in one Plan was that it was never properly implemented,

i.e., the main trust deed was never amended to properly make the DC members beneficiaries of the plan. But the SCC concluded: "There is no reason why a single plan could not have DB and DC components whose members were beneficiaries of the same trust, provided that the Plan documents and legislation do not prohibit this."⁸

In response to the Committee's arguments that some of the merger cases such as *Schmidt* and *Aegon* appeared to come to results restricting a cross-subsidization, the Court held that resulted because the plans and trusts in those cases had different beneficiaries to which different employers had undertaken different obligations.⁹

The SCC also noted that using plan surplus to take contribution holidays in connection with a newly established DC section had been permitted in the *Sutherland* decision.¹⁰

The Majority also noted the permissibility of a single plan involving DB/DC components was confirmed by the English Chancery decision in *Barclays Bank Plc v. Holmes*, [2000] EWHC 457(Ch) (BAILII).

The Majority went on to then consider whether the Plan documents or legislation prohibited having DC and DB components in the same Plan or prohibited the Company from taking contribution holidays in the DC part of the plan.

The Majority found that the Ontario legislation was silent on the specific point and absent restriction, the permissibility of contribution holidays must be determined by reference to contractual and trust law.¹¹

The Majority held that there was nothing in the Plan or Trust documents which prevented combining the two components of the Plan. In this regard the Majority noted that the Trust in the Kerry plan contemplated a broad category of beneficiaries, i.e., "it has always applied to

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⁶ Paragraph 85.

⁷ Paragraph 86.

⁸ Paragraph 91.

⁹ Paragraph 95.

¹⁰ [96] This is because there is nothing inherently wrong with a pension plan being structured in the way the Company proposes — provided the plan documents or legislation do not forbid it. This was Gillese J.A.'s conclusion (para. 111). Siegel J. came to this same conclusion in a decision released shortly after Gillese J.A.'s judgment (though he seemingly reached this conclusion independently — see para. 236): *Sutherland v. Hudson's Bay Co.* (2007), 60 C.C.E.L. (3d) 64 (Ont. S.C.J.). Siegel J. concluded, at para. 219, that

(1) there is no support in the case law for the plaintiffs' proposition that the assets of an "exclusive benefit trust" may not be used for the benefit of members of a defined contribution section added to a pension plan previously structured solely as a defined benefit plan, and (2) more generally, there is judicial support for, and no legal principle prohibiting, amendments to a pension plan that establish a defined contribution section that exists together with a defined benefit section, with the same trust fund supporting the payment of benefits under each section of the plan.

¹¹ Paragraph 112.

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employees of the Company"¹² and; therefore, it was not unreasonable, for the Tribunal to conclude that the Plan allowed for the designation of DC members who are Company employees as beneficiaries of the Trust.

The Majority went on to state that retroactively amending the Plan to add DC members as beneficiaries was not prohibited as it takes no vested property rights from the DB members.¹³

Accordingly, having found the Ontario legislation silent on the right to use the DB surplus to fund DC contributions, and having found no restriction in the Plan documents to making the DC members beneficiaries of the Trust, the Majority held that the Tribunal's decision to allow contribution holidays in respect of the DC component of the pension plan, once appropriate retroactive amendments were made, was not unreasonable. The Majority found that once the DC members could be made beneficiaries of the Trust there was no infringement of the exclusive benefit provision in the amendment power and no partial revocation of the trust as monies were moving within the Trust not from it.¹⁴

Costs

The Tribunal's jurisdiction to award costs is limited to a party before it. In terms of the court's jurisdiction, while cost awards are discretionary, costs will only be awarded from the pension fund where the proceedings are necessary for the due administration of the Trust. In adversarial proceedings, courts are more likely to approach costs as in an ordinary lawsuit, i.e. payable by the unsuccessful party to the successful party.

The appeal before the SCC raised two issues with respect to costs: first, whether the Tribunal had the authority to award costs to the Committee out of the Fund; second, when should a court exercise its discretion to award costs payable out of the Fund.

In terms of the first question, the Court noted that section 24 of the *Financial Services Commission of Ontario Act*, 1997 provides: "The Tribunal may order that a party to a proceeding before it pay the costs of another party or the Tribunal's costs of the proceeding". In this case, the Tribunal held that since the Fund was not a party to the proceeding, it did not have the authority to order costs payable from the Fund. The SCC held that the language in section 24 was unambiguous and given that the Fund

was not a party, the Tribunal could not order costs payable from the Fund.

The Court then went on to consider whether it should exercise its discretion to award costs to the Committee out of the Fund. The Court referred to the early English case of *Buckton v. Buckton* and the more recent Ontario Superior Court decision in *Sutherland* as helpfully defining circumstances in which costs should be awarded from a pension fund. The Court noted that the rules set down in those cases would allow a court to award costs out of the fund where there is a legitimate uncertainty as to how to properly administer the trust and where the dispute is not adversarial. The SCC also referred to the recent Nova Scotia Court of Appeal in *Smith v. Michelin North America (Canada) Inc.*, 2008 N.S.C.A. 107 where the Nova Scotia Court of Appeal, referencing the approach taken by the Ontario Court of Appeal in *Kerry*, agreed that the key question is whether litigation is adversarial rather than aimed at the due administration of the pension trust fund. The Nova Scotia Court of Appeal held that claims that are adversarial amongst beneficiaries will not qualify for a cost award from the fund.

The SCC concluded by agreeing with the conclusion reached by the Ontario Court of Appeal that the litigation in this case was adversarial in nature because it was ultimately about the propriety of the Company's actions and because the Committee sought to have funds paid into the Fund for the benefit of the DB members only. The Court also noted the Ontario Court of Appeal's conclusion that the Committee had not brought the litigation on behalf of all beneficiaries. Accordingly, the Court concluded there was no justification to interfere with the costs rulings of the Ontario Court of Appeal that costs should be payable by the Committee in favour of the Company.

Hopefully the ordering of costs against the Committee will affect the willingness of employee groups to launch these types of cases.

Dissent on the Issue of DC Contribution Holidays Only

The two-person minority of LeBel and Fish dissented only on the issue of funding defined contribution benefits out of defined benefit surplus. While there is some difficulty reconciling all the statements of the minority on the right to use DB surplus for DC contribution holidays it would seem clear that pension plan documentation should be reviewed

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¹² Paragraph 107.

¹³ Paragraph 107.

¹⁴ Paragraph 84.

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to use DB surplus for DC contribution holidays it would seem clear that pension plan documentation should be reviewed to ensure that (i) DC members are beneficiaries of the trust fund, and (ii) that the DC accounts are properly held by the pension plan trustee.

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