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Supreme Court of Canada confirms an employer's right to contribution holidays and to charge pension plan expenses to Pension Trust

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The Supreme Court of Canada's decision in *Nolan v. Kerry (Canada) Inc.* ("**Kerry**") released August 7, 2009 has been a welcome decision in the pension arena. The case decided a number of issues but the two most interesting relate to an employer's ability to charge expenses to the pension plan and to take a contribution holiday for a Defined Benefit ("**DB**") Plan that had been frozen and which now contained a Defined Contribution ("**DC**") component.

Expenses

The payment of Plan expenses is always an area of tension between employers and employees, as many pension plans are silent on the issue of who pays these expenses.

The Court of Appeal noted that there was nothing in either the *Pension Benefits Act* or the common law that would require the employer to fund Plan expenses. There was also nothing in the Plan documents that requires the employer to fund those expenses. The Supreme Court of Canada agreed, stating that the obligations of the employer would be determined by the text and the context of the Plan documents.

As long as nothing in the Plan text requires the paying of expenses by the employer, funds in the Pension Trust can be used to pay reasonable and bona fide expenses for services required by the Plan. The only other consideration is the legitimacy and reasonableness of the costs incurred.

Contribution Holiday for DB Plans

The second issue considered was the ability of the employer to take contribution holidays. The Court cited the leading case of *Schmidt v. Air Products* which held that an employer may take contribution holidays if permitted by the terms of the plan. When the plan is silent on the issue, the right to take a contribution holiday is not objectionable so long as actuaries continue to accept the application of existing surplus to current service costs as a standard practice.

In the *Kerry* case the Court held that nothing prevented the Company from taking a contribution holiday where the actuary certified that no further contributions were necessary to provide the required retirement income to members.

Contribution Holidays for DC Portion

In 2002, Kerry (Canada) Inc. introduced a DC component to its Plan and closed the DB component to new employees, who became DC members on being hired. Existing members of the DB Plan could convert to the DC component. The employees were therefore divided into Part I members, governed by the Plan's DB provisions and Part II members, governed by the DC part of the Plan. CIBC Melon Trust held the original DB Fund and Standard Life held the DC Fund. However, both parts of the Plan were registered as a single plan.

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The Company intended to meet its obligations for contributions to the DC Plan by using the surplus from the original DB component to satisfy the premiums owing to the DC component.

The Court of Appeal noted that under the *Pension Benefits Act* Regulations, on conversion of the DB Plan to a DC Plan, a surplus can be used to offset contributions to the DC Plan. The Court suggested that a surplus accumulated under a DB component of a Plan can be applied to a DC component of a Plan.

The Court noted that so long as the DC component is part of the same Plan as the DB component, those Regulations permitted any surplus in the Plan to be applied to DC contribution obligations.

Conclusion

In practice, many employers have been using actuarial surplus to take contribution holidays even where an employer would not be entitled to surplus on a wind-up. Additionally, many employers have also converted their DB plans or frozen DB plans in order to replace these with DC plans. The practice of employers has been to use that surplus to fund the DC contributions. The Supreme Court of Canada adopted almost entirely the position of the Ontario Court of Appeal. As a practical matter, it will be some time before many pension plans have surpluses again and are in the position of being able to consider contribution holidays. However, the decision regarding expenses is the more important aspect of this decision and may cause some employers to review their plans in an effort to allocate expenses where possible to the Pension Fund.

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