

October 8, 2009

Pension and Benefits Law Briefing Note

Changes to Post-Retirement Healthcare Benefits A Case Comment on *Bennett v. British Columbia*

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In recent times, the issue of post-retirement healthcare benefits has taken on a heightened significance for employers and sponsors of pension and health and welfare plans. Factors such as an increasing number of retirees, rising drug and healthcare costs and government cutbacks to universal healthcare programs are causing organizations to re-evaluate the extent to which they can or are willing to continue to provide post-retirement healthcare benefits.

The recent decision of the British Columbia Supreme Court in *Bennett v. British Columbia* 2009 BCSC 1358 provides helpful guidance to employers and plan sponsors who may be considering changes to their retiree benefit programs. In that case, the court dismissed a class proceeding brought on behalf of retired members of the British Columbia Public Service Pension Plan (the “**Pension Plan**”) concerning changes to post-retirement healthcare benefits available through the Pension Plan. The background to the case and the key findings are summarized below.

Background

The Pension Plan is a defined benefit pension plan that provides pension and other benefits to eligible retired employees of the provincial Government and various other designated public sector employers. Historically, the Pension Plan was created by statute and was administered by the Province of British Columbia through the Superannuation Commission. In 2001, the Pension Plan was continued under a Joint Trust Agreement (the “**JTA**”) entered into between the Province, the British Columbia Government and Service Employees Union, the Professional Employees Association and the Union of Psychiatric Nurses under the authority of the *Public Sector Pension Plans Act*, S.B.C. 1999, c. 44. That statute was enacted in 1999 and introduced certain changes to British Columbia’s statutory pension plans, which also include the Municipal Pension Plan, the College Pension Plan and the Teachers’ Pension Plan. Since 2001, the Pension Plan has been administered by the Public Service Pension Board of Trustees (the “**Board of Trustees**”) which is comprised of both employer and employee representatives.

Post-Retirement Healthcare Benefits

Beginning in 1978, retired members of the Pension Plan were eligible to receive premium-free Medical Services Plan (“**MSP**”) benefits similar to the benefits available to active government employees. In 1981, Extended Healthcare (“**EHB**”) benefits were made available to retired

members of the Plan. These retiree benefits were authorized by statute pursuant to the *Public Service Benefit Plans Act* and the costs were paid out of the Province's consolidated revenue fund, rather than out of the Pension Plan. In 1994, retired members of the Pension Plan became eligible to participate in a dental plan. Unlike the MSP and EHB benefits, the dental benefits were funded out of employer contributions to the Pension Plan otherwise intended to pay for inflation protection for retirees' pensions. In 2001, the MSP and EHB benefits began to be funded in a similar manner to the dental benefits.

Changes to the Post-Retirement Healthcare Benefits

In 2002, the Board of Trustees was faced with a significant increase in the cost of providing the post-retirement healthcare benefits, due to a number of factors including a 50% increase in MSP premiums, the elimination of MSP coverage for paramedical services (chiropractic, naturopathy, massage therapy and physiotherapy) and a reduction in Pharmacare coverage for prescription drugs.

In order to address these cost pressures, the Board of Trustees made a number of changes to the post-retirement healthcare benefits available under the Pension Plan. These included:

- eliminating funding for the dental plan;
- increasing the EHB annual deductible from \$25.00 to \$250.00 per family;
- changing the co-payment requirements under the EHB plan;
- eliminating out-of-country coverage; and
- requiring retirees to pay a portion of the MSP premiums.

The Class Action

The changes to the post-retirement healthcare benefits were not well received by retirees and litigation ensued. A class proceeding was commenced and ultimately certified. The claim was brought by a Representative Plaintiff, Frederick Bennett, on behalf of all retired members of the Pension Plan who previously received premium-free MSP and EHB benefits. This general class was then broken down into a subclass of retired members of the Pension Plan who had been directly employed by the Provincial Government.

On behalf of this "Government retiree" subclass, the Representative Plaintiff argued that the changes to the post-retirement healthcare benefits amounted to a breach of contract on the basis that the premium-free MSP and EHB benefits had been promised as part of the contract of employment between the Government retirees and their former employer, the provincial Government. It was further argued that, pursuant to the employment contract, the retirees were guaranteed the level of post-retirement healthcare benefits in place at the date on which they retired. In support of this position, the Representative Plaintiff relied upon numerous documents including retirement letters, benefit brochures, information sheets and materials presented at

retirement seminars, many of which referred to the “premium-free” benefits available to retirees. The Representative Plaintiff argued that these documents reflected key terms of the employment contracts of the Government retirees.

The court disagreed. In its view, the retirement information containing references to the post-retirement healthcare benefits were provided to employees well past the date on which they were hired and, in most cases, at a point in time when retirement was either imminent or had already begun. In the circumstances, the past labour of the employees could not constitute good consideration for the subsequent offer of retirement benefits. The court further held that the various communication documents relied on by the Representative Plaintiff simply described the retirement benefits as they existed from time to time but did not have contractual force.

The court also reviewed and relied upon the lengthy and somewhat complex statutory history of the post-retirement healthcare benefits. It found that the applicable legislation had always granted the Government, and later the Board of Trustees, considerable discretion to determine the content of the benefit plans as well as the amount that retirees would be required to contribute towards the cost of the benefits. Such discretion, in the court’s view, was inconsistent with the argument that the benefits were guaranteed.

Lastly, the court relied upon the previous British Columbia Supreme Court decision in *British Columbia Nurses Union v. Municipal Pension Plan Board of Trustees* 2006 BCSC 132 in which the court had upheld the validity of similar changes to post-retirement healthcare benefits offered through the Municipal Pension Plan.

In addition to the breach of contract argument, the Representative Plaintiff argued, on behalf of the class as a whole, that the changes to the post-retirement healthcare benefits constituted a breach of fiduciary duty. According to the court, this issue turned in large part on the reasonable expectations of the parties. Specifically, was it reasonable for the retirees to expect that the Government would act solely in their best interests with respect to retiree benefits potentially to the detriment of the public interest or the interest of other members of the Pension Plan? The court found that it was not. The fact that, as noted above, there was no contractual or statutory guarantee of the benefits was inconsistent with the notion that the Government had a specific fiduciary duty to provide and fund the benefits on a premium-free basis for the life of each class member.

In considering the fiduciary duty issue, the court referred to the comments of the Judge in the *BCNU* decision concerning the concept of “inter-generational equity” where he noted that if the Plaintiffs in *BCNU* were successful in establishing an entitlement to retiree benefits at a level frozen in time as at the date of retirement, the result would be that current active members of the pension plan would bear the substantially higher cost of paying for those benefits with very little likelihood of every receiving post-retirement healthcare benefits themselves. The court endorsed the view expressed in the *BCNU* decision that the court should be reluctant to interpret pension plans in such a way as to confer additional benefits on some members at the expense of others.

In the result, the court dismissed the claim.

Commentary

The Board of Trustees is not alone in having to grapple with the increasing cost of providing healthcare benefits to retirees. These issues are common to virtually all pension and health and welfare plans as a result of which many employers and plan sponsors may be considering changes to their benefit programs. The *Bennett* decision, together with the earlier *BCNU* decision, provide some guidance as to the legal implications of such changes.

In both cases, the court held that whether or not post-retirement healthcare benefits vested in or were guaranteed to retirees depends largely on the intention of the parties and the language of the implementing documents. As noted above, in *Bennett*, a critical factor was the fact that the statutory provisions under which the benefits were administered conferred a discretion on the Government as to the nature and scope of the benefit plans and the manner in which the benefits would be funded. This discretion was held to be inconsistent with an intention to vest the benefits at a particular level at the date of retirement.

When considering changes to post-retirement healthcare benefits, it is therefore important to know the history of the benefits and to look closely at the language used in the documents under which the benefits are implemented, whether that be a statute, a collective agreement or other type of contract.

A second important factor to be aware of is how the benefits have been described to active employees and to retirees in benefit brochures and other types of communications. While the court in both *BCNU* and *Bennett* found that the communications concerning the post-retirement healthcare benefits were merely descriptive of the form and content of the benefit plans as they existed from time to time, depending upon the circumstances, such documents and communications may be found to have contractual effect. Employers and plan sponsors therefore need to be very careful about how the benefits are described and should ensure that the possibility of future benefit changes is clearly spelled out in all communications.

For more information concerning this decision or changes to post-retirement healthcare benefits generally, please contact **Ron A. Skolrood** at (604) 631-9134 or rskolrood@lawsonlundell.com.