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Changes to Post-Retirement Healthcare Benefits A Case Comment on *B.C. Nurses' Union v. Municipal Pension Board of Trustees*

By Ron A. Skolrood

In recent times, the issue of post-retirement healthcare benefits has taken on new significance for employers and sponsors of pension and health and welfare plans. Factors such as increasing numbers 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.

At the same time, many of these same factors, particularly rising costs combined with government cutbacks, have contributed to a heightened awareness amongst retirees and the organizations that represent them, about the importance of maintaining retiree benefits through programs provided by employers and pension plans. Changes to post-retirement healthcare plans are met with considerable concern and resistance; increasingly, this resistance is taking the form of litigation.

Until recently, there was little judicial guidance as to the principles that will govern changes to post-retirement healthcare benefits. However, the recent decision of the B.C. Supreme Court in *B.C. Nurses Union v Municipal Pension Board of Trustees et al* provides a useful look at the issues that may arise and how the courts will address those issues.

Background

The Municipal Pension Plan (the “**Pension Plan**”) is a contributory defined benefit pension plan that provides pension and other benefits to eligible retired employees of municipalities, hospitals, school districts and other public sector employers in British Columbia. Historically, the Pension Plan was created by statute and was administered by the Province of B.C. through the Superannuation Commission. In 2001, the Pension Plan was continued under a Joint Trust Agreement entered into between the Province, the Union of British Columbia Municipalities, the Health Employers Association of British Columbia and the Municipal Employees

Pension Committee, which is an employee organization comprised of representatives of various public sector unions, including the Plaintiff BCNU. Since 2001, the Pension Plan has been administered by the Municipal Pension Board of Trustees (the “**Board of Trustees**”).

Beginning in 1994, retired members of the Pension Plan became eligible to receive certain post-retirement group benefits including a Medical Services Plan (“**MSP**”) premium subsidy, an Extended Healthcare Benefit Plan and a Dental Plan. These benefit improvements came about as a result of discussions between the Province and employee representatives. At that time, the Province agreed to consider such improvements provided that it was clearly understood by all parties that any improvements would not increase the unfunded liabilities of the Pension Plan and would not require increased employer contributions. The post-retirement healthcare benefits were subsequently implemented on the basis that they would be funded out of employer contributions that would otherwise have gone into the Pension Plan’s Inflation Adjustment Account for the purpose of providing inflation indexation protection to retirees.

Changes to Post-Retirement Group Benefits

In 2001, the Board of Trustees became aware of the significant increase in the costs of providing post-retirement healthcare benefits. This increase in costs was due to a number of factors including rising drug costs, the increasing number of retirees and the increasing costs of claims per member. In addition, the Province in 2002 increased MSP premiums for everyone in British Columbia and made certain changes to paramedical coverage under MSP and to Pharmacare that significantly increased the cost of the Extended Healthcare Plan. In 2002, the Board of Trustees received actuarial advice that the cost of providing post-retirement benefits would exceed the available funding by 2003. Effective November 1, 2002, the Board of Trustees therefore made changes to the MSP premium subsidies available to retirees and, effective January 1, 2004, the Trustees reduced the Extended Healthcare and Dental benefits. These changes were implemented not simply for future retirees but for existing retirees as well.

The BCNU Challenge

In October 2003, the BCNU commenced a representative action on behalf of retired nurses who were members of the Pension Plan challenging the validity of the changes made to the post-retirement benefits. The BCNU’s central claim was that the benefits vested upon retirement and, as such, retirees were entitled to continue to receive the same level of benefits, and the same premium subsidies, as existed at the date they retired.

In response, the Board of Trustees and the Province took the position that the post-retirement benefits in issue were contingent benefits and therefore subject to change from time to time. They pointed to the fact that the Province had originally only agreed to provide the benefits on the understanding of all parties that there would be no increase in employer contributions and no increase in the Pension Plan’s unfunded liabilities. They also relied upon the fact that the legislation pursuant to which the benefits were implemented did not evidence a clear intention to vest the benefits and that the benefits were to be funded from a limited and identifiable source of funds, namely employer contributions otherwise intended to pay for inflation protection.



The Court's Decision

The case was heard in B.C. Supreme Court in November 2005 by Mr. Justice Romilly. In his Reasons for Judgment issued on January 26, 2006, he upheld the changes to the benefits and dismissed the Plaintiff's claim. Justice Romilly's key findings may be summarized as follows:

1. Justice Romilly considered the 1993 decision of the Supreme Court of Canada in *Dayco Canada Ltd. v. C.A.W.-Canada* in which the Court had held that while post-retirement benefits are capable of vesting, whether or not they in fact do so depends upon the intention of the contracting parties as reflected in their underlying agreement. While *Dayco* involved a collective agreement, Justice Romilly applied the same reasoning to the statutory benefits in issue here and found that the language of the relevant statutes did not support an intention to vest the benefits. He also found support for this conclusion in the discussions leading to the implementation of the benefits when the Province made it clear that there were restrictions on the funding of the benefits.
2. Justice Romilly noted that the costs of providing post-retirement healthcare benefits are unpredictable and difficult to control and he held that the fact that the benefits were to be funded out of a defined source was inconsistent with a finding that they were intended to vest. On this point, he rejected the BCNU's argument that because the benefits were provided under a defined benefit pension plan, the plan sponsor was obliged to provide the benefits regardless of cost.
3. It was also significant to Justice Romilly that the benefits were provided through contracts with third party insurers, and that those contracts contained clauses stipulating that they were subject to amendment or termination by the insurer. Again, in his view, this arrangement was inconsistent with any notion that the benefits were vested or guaranteed entitlements.
4. Justice Romilly accepted the Defendants' argument that the concept of inter-generational equity militated against a conclusion that the post-retirement group benefits vested. In his view, the Court should not lightly find that benefits vested for a particular group of Plan members when the result might well be that other members, specifically active members of the Pension Plan, would have to pay significantly higher premiums without any hope of receiving benefits themselves.
5. Lastly, Justice Romilly declined to place any legal weight on communications to Plan members that did not state clearly that post-retirement healthcare benefits were contingent. The language used to describe the benefits had varied over time and at no time had it ever been stated that the benefits were guaranteed or immune to modification. In Justice Romilly's view, the Plan brochures and other communications were simply descriptions of the content of the benefit plans as they existed from time to time and were not intended to have, nor did they in fact have, contractual force.

A Notice of Appeal was filed by the BCNU on February 22, 2006.



Commentary

The decision in *BCNU v Municipal Pension Board of Trustees* confirms the Supreme Court of Canada's previous analysis in *Dayco* that the question of whether post-retirement benefits are vested or guaranteed will turn upon the intention of the parties. Thus, when considering benefit changes, it is important to look closely at the language used in the documents pursuant to which the benefits are implemented and administered, whether that be a statute, collective agreement or other contract, to determine whether changes can properly be made. Only if it can be established that the benefits are guaranteed or were intended to vest will they be immune from change. On this point, it should be noted that it is generally open to an employer to make changes to post-retirement benefits on a prospective basis; however whether such changes can also apply to current retirees again depends upon the original intention.

Employers and plan administrators and sponsors should also be aware of how post-retirement healthcare benefits are described in the communications issued to plan members and should ensure that current communications accurately describe the nature and content of the benefits. While in the *BCNU* case the Court place little weight on the communications, in other cases it has been held that statements made in brochures and plan outlines may in fact be binding.

Lawson Lundell LLP acts for the Municipal Pension Board of Trustees in the *BCNU* matter. For more information please contact Ron A. Skolrood at 604.631.9134 or rskolrood@lawsonlundell.com.

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