August 7, 2009

Pension and Benefits Law Briefing Note
Nolan v. Kerry (Canada) Inc.

by Lisa Chamzuk

On August 7, 2009, the Supreme Court of Canada released its much anticipated decision of *Nolan v. Kerry (Canada) Inc.*, a decision that concerns the ability of a plan sponsor to charge pension plan administrative expenses to the pension fund and the ability of a sponsor to use the actuarial surplus in the defined benefit portion of a pension plan to fund a contribution holiday in respect of the defined contribution portion of the plan. Despite the long wait for the decision, it is somewhat anti-climatic as the Court confirmed the Ontario Court of Appeal's decision In all material respects.

As you may recall, the respondent company administered a pension plan funded using a trust. From the plan's creation in the 1950s until 1985 the company paid the plan administrative expenses, but in 1985 the company amended the plan to provide that the fund would be used to pay those expenses. Until 2000 the plan was a defined benefit plan. In 2000 the plan was amended to introduce a defined contribution component and the DB portion was closed to new employees. Because the DB portion had an actuarial surplus the company declared that it was taking a contribution holiday in respect of its obligations under the DC portion of the plan.

The plaintiffs took issue with the company's use of the actuarial surplus to satisfy its obligations for the DC portion of the plan and also took issue with the company's use of the fund to pay for the plan's administrative expenses. The plaintiffs pointed to the plan text which stated that the trust funds could not be used for any purpose other than for the "exclusive benefit" of the employees, language common among many Canadian pension plans. The Supreme Court agreed with the Ontario Court of Appeal that the "exclusive benefit" language does not mean that only the employees may benefit from the trust funds. Further, the continued existence of the plan benefited the employees, and payment of the plan expenses was necessary to ensure the plan's continued integrity and existence. The Court confirmed the Court of Appeal's ruling that paying administrative expenses from the fund does not constitute a revocation of trust funds *unless* the plan expressly requires the employer to pay the funds.

The only dissent in the case is in respect of the question of whether the plan sponsor could use the actuarial surplus from the DB portion of the plan to fund its contribution holiday in respect of the DC portion of the plan. While the two judges in dissent held that those two portions constituted separate trusts and that funds from one could not be used in respect of the other, the majority of the Supreme Court of Canada held that the DB and DC arrangements were two components of a single plan and that retroactive amendments could be made to create a single trust. The Court states that "there is nothing repugnant in principle to the existence of a single plan whose members receive different benefits, funded in different ways, depending on which of the various parts of the plan they participate in".

Finally, the Supreme Court upheld the Ontario Court of Appeal's ruling that costs were not payable from the fund and therefore, had to be borne by the unsuccessful plaintiffs. Generally, costs of litigation are borne by the unsuccessful party. However, in trust litigation there are a number of cases that set out when even the unsuccessful party should be able to have his or her costs paid from the fund notwithstanding the verdict in the case. Plan sponsors across Canada, but particularly in B.C., have had some difficulty persuading our courts that the pension fund should not bear the costs of the unsuccessful litigation. The Supreme Court clarified the situation somewhat by stating that "where litigation involves issues, such as in the present case, of a dispute between a settlor of a trust fund and some or all of its beneficiaries, the ordering of costs payable from the fund to the unsuccessful party may ultimately have to be paid by the successful party. In these types of cases, a court will be more likely to approach costs as in an ordinary lawsuit, i.e., payable by the unsuccessful party to the successful party."

We hope that this summary is of assistance. To read the full text of the Kerry decision, please visit http://scc.lexum.umontreal.ca/en/2009/2009scc39/2009scc39.html.

Please contact **Lisa Chamzuk** if you have any questions about the implications of this decision at lchamzuk@lawsonlundell.com or 604.631.6732.

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