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Leading Court Decisions of 2007

By: Greg Winfield

As 2007 drew to a close, it was evident that the maturation of the case law was continuing, particularly in the application of **trust law** principles. There was a trend to a deeper judicial appreciation and understanding of the complex amalgam of principles from the areas of **employment law**, basic **contract law**, and **trust law** that underpins '**benefits law**' and the need to balance them appropriately to produce fair and predictable results.

One case that clearly shows this is the Kerry case. In Kerry (Canada) Inc. v. DCA Employees **Pension** Committee (Kerry), the Ontario Court of Appeal was asked to decide two primary issues. Was the employer entitled to:

- charge plan expenses to the **pension** fund
- take contribution holidays in respect of a

Defined Contribution provision that had been added to a **Defined Benefit** plan

The court undertook a detailed review of plan expenses because the terms of the pension plan (the plan text and the trust agreement as amended) originally were silent on the issue, but had later been amended. The court found that silence does not automatically mean the employer is bound to pay expenses and, in this case, that the employer was permitted to amend the plan terms since doing so did not constitute a partial revocation of trust as none of the pension fund assets were actually returned to the employer.

This is one of only a handful of decisions on plan expenses and it would be imprudent to assume that all plan terms can readily be amended just because the court ruled in this case that the amendments were lawful. The second key element of Kerry was the decision on the ability of an employer to take contribution holidays in respect of the DC element of a plan. In short, the court found that:

- the trust terms were sufficiently broad to include all plan members
- members could be added to the plan
- there was one trust fund in respect of both elements of the plan which, on its terms, did allow contribution holidays

The court found that because both DB and DC plan members were each beneficiaries of the single trust, there was nothing unlawful in applying surplus assets to meet the employer's DC contribution obligation. The court observed that should there be a surplus in the pension fund on its wind-up, the members of the DC provision would be eligible to share in such surplus. This causes one to pause and wonder if there was a deficiency in the DB provision of the plan on its wind-up, would the DC plan members also be required to 'share' the deficiency?

'Loser Pays'

The court also ordered, consistent with usual litigation practice of 'loser pays,' that the DCA group should pay the employer's costs and that this group's own expenses should not be paid from the pension fund. In making this decision, the court commented that, while other decisions have determined that there are real and novel issues at stake in pension litigation and ordered one or even all parties' expenses paid from the pension fund, that was not appropriate in this case since not all plan members shared the same interests as the group at issue here.

Leave to appeal the Kerry decision has been sought from the Supreme Court of Canada.

Sutherland v. Hudson's Bay Company (Ontario Superior Court) is a decision primarily relating to the issue of employer contribution holidays in respect of the DC provision of a combination plan and shows the importance of the issues addressed in Kerry as it involved a claim for an order requiring the employer to repay tens of millions of dollars in allegedly wrongful contribution holidays. Following the reasoning in the Kerry decision, the trial judge ultimately decided that there was no impediment to the employer adding new members to the plan and the pension trust (including a merger of two large DC plans with a historic DB plan in surplus) and then applying assets of the pension trust for their benefit. The court found that the new members were lawfully added as members of the plan as the trust did not have a closed class of beneficiaries and that amending the plan to add such individuals constituted no breach of fiduciary duty or bad faith by the employer.

This case is under appeal.

Cousins et al v. Marine Atlantic Inc. (Federal Court) is the first non-Ontario case to consider whether there is a requirement to distribute surplus on a partial plan wind-up. The court found modest definitional distinctions between the federal and Ontario statutes to be insufficient to yield a different result from Monsanto. In light of this, the question remains as to whether the laws of other provinces (that had not taken steps to specifically deal with surplus distribution on partial wind-up, such as Alberta and B.C.) will be interpreted to require distribution of surplus on partial wind-up.

In this case, the court also ruled that due to limitation periods, there would be no requirement to distribute surplus in certain past partial wind-ups where the actuarial reports had been fully approved. Accordingly, unlike the Monsanto decision which leaves the temporal scope of matters unclear, in this case it is not expected that many past partial wind-ups will be re-opened.

This case is under appeal.

Issue Of Costs

While it allowed a class proceeding to continue, Potter v. Bank of Canada (Ontario Court of Appeal) is also important in that it upholds the notion that in pension class actions (here relating to allegations of improper payment of expenses), the plaintiffs generally cannot seek an order that amounts be paid out of the pension fund to the class members.

In addition, on the issue of costs, the court adopted the normal 'loser pays' approach (here the results on appeal were divided). However, the court determined that by seeking to protect the pension fund from improper expenses, all plan members benefited and so the fees relating to continuing the class proceeding were properly charged to the fund.

Interestingly, the court also ordered that certain costs of the employer were also payable from the pension fund since it succeeded in arguing that any damages ordered be paid to the pension fund and so had 'protect[ed] the fund from the direct distribution claim.'

Authorson (Ontario Court of Appeal) was one of several decisions rendered in litigation over failure to provide interest on disabled veterans pensions. The remedy in such claims is 'restitution' (being placed in the position the plaintiff would otherwise have been in if not for the breach). The court opined that in the determination of the level of damages, it may include hindsight, but it cannot assume perfect knowledge. Thus, it rejected an investment approach which adopted in each year an asset allocation of equity, bonds, and cash which reflected an optimal mix for that year.

Harbert v. General Chemical – There, the Ontario Court of Appeal found that an administrator's lien for delinquent contributions is not enforceable under the federal Bankruptcy and Insolvency Act.

Standard Tests

Laronde v. Workplace Health, Safety and Compensation Commission and N.B. – In this case, the termination of WCB at age 65 (or continuation of compensation for only two years in the case of an injury occurring after attainment of age 65) was found by the New Brunswick Court of Appeal not to constitute discrimination based on age contrary to section 15(1) of the Charter. The court reasoned that the provision did not fail on the standard tests and, in particular, was not disrespectful to human dignity and was premised on the notion, supported by statistical evidence, that most workers retire by age 65.

This may be of interest to Ontario employers grappling with the so-called 'end of mandatory retirement,' in particular, the issue of termination of benefits or coverage at age 65.

Patrick v. Telus – The B.C. Court of Appeal upheld the trial decision finding that a pension committee was within its powers to change approaches on granting or denying 'consent' benefits. Bennett v. British Columbia – This case confirms that, in proper circumstances, unionized employees are not precluded from commencing a class action with respect to employment benefits.

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