

Surplus Battle Concludes

By: Priscilla H. Healy

The Supreme Court of Canada issued its ruling on October 7, 2010, in what is surely the concluding chapter in the surplus dispute between Hudson's Bay and those of its employees who were transferred to the North West Company (NWC) on the sale of Hudson's Bay's northern stores to the NWC in 1987.

On the sale, it was agreed that NWC would establish a pension plan for the transferring employees providing for benefits at least equal to those that had been earned in the Hudson's Bay pension plan and Hudson's Bay would transfer assets sufficient to fund those benefits from the Hudson's Bay plan, which was in surplus. The pension plan was funded pursuant to a trust agreement.

Pro Rata Share

The transferred employees claimed that a pro rata share of the surplus should also have been transferred. The members also objected to the payment of expenses from the plan. The Supreme Court of Canada did not agree.

Gleaned from the court's decision:

- ❖ Legal entitlement to the surplus on plan wind up is key as to whether plan members have an equitable interest in the surplus in the plan while it is ongoing. If the members do not have legal entitlement, their equitable interest in the assets of the plan is restricted to the assets in the plan that are sufficient to fund the promised defined benefits. In this case, since the members did not have legal entitlement, they did not have an equitable interest in the surplus that would have called for a transfer of a share of surplus.
- ❖ Where the plan text and the trust agreement are inconsistent, the language will determine which is the dominant document. In this case, had there been an inconsistency, the plan text would have been the dominant document.
- ❖ Language in the plan text and the trust agreement should be interpreted in the context of the provisions in which it appears.
- ❖ Member booklets will be considered relevant as interpretive aids only if there is an ambiguity in the plan. The court noted, however, that a binding promise or estoppel was not argued.
- ❖ Plan members have no right to compel surplus to provide a cushion against insolvency.
- ❖ Silence in pension plan documents as to the payment of expenses from the plan does not mean that the payment of expenses from the plan is prohibited. That expenses of administering a trust are payable from the trust funds is implicit in a trust agreement.

One element of the decision that may give concern in the future is the lack of a clear distinction between the role of the employer as sponsor and that of plan administrator. The court stated that Hudson's Bay had a fiduciary duty to the plan members as plan administrator and indicated that if the members had had legal entitlement to surplus on wind up, that duty would have required Hudson's Bay to transfer a pro rata share of surplus. One wonders as to how exactly that duty could have been fulfilled if the vendor and purchaser could not have agreed as to the purchase price, as was the case in this instance.

Condition Of The Consent

However, the discussion as to the surplus transfers in the decision will become moot if the relevant provisions of Ontario's Bill 236 are proclaimed in force. That bill requires the transfer of a share of the surplus as a condition of the consent of the Superintendent to an asset transfer. This requirement will no doubt become a factor in how an agreement of purchase and sale of a business is structured. ■

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