Tread carefully

The Kerry decision has important implications for the administration of pension plan expenses. Plan sponsors may need to be more diligent.

By Mitch Frazer

THE INCREASING COST OF PENSION PLAN ADMINISTRATION has more employers asking whether pension plan expenses may be paid from the pension fund. The answer remains unclear, despite several high profile court cases, such as Kerry (Canada) Inc. v. Superintendent of Financial Services.

WHO IS RESPONSIBLE?

From the Ontario Pensions Benefits Act (PBA) and the Financial Services Commission of Ontario policy, two related principles may be distilled. First, expenses related to the administration of the fund may be paid from the fund. Secondly, expenses under statute or that are for the benefit of the employer, are clearly the employer's responsibility.

However, some expenses may not be clearly categorized as the responsibility of either the administrator or the employer. This problem is particularly evident upon review of the PBA, which relies upon the employer/administrator distinction to help determine which expenses are chargeable to the plan.

THE KERRY CASE

In the Kerry case, the pension plan was funded by company and employee contributions. Its original trust agreement stipulated that most expenses incurred by the trustee were to be paid by the company. Further, the settlor did not reserve a power of revocation under the terms of the original trust agreement. From the establishment of the plan to December 1984, the company paid all of the plan expenses. However, beginning in 1985, the company began to pay plan expenses from the pension fund.

In 2002, the Ontario Superintendent of Financial Services issued a Notice of Proposal to the company to repay the administrative expenses that were not incurred for the exclusive benefit of the members and beneficiaries of the plan paid out of the fund since Jan. 1, 1985. Additionally, the Notice of Proposal required that amendments be made to the plan and the trust, ensuring that only expenses that were for the exclusive benefit of plan members could be charged to the fund. In response, the company requested a hearing before the Financial Services Tribunal (FST).

The FST held that (a) when a trust agreement provides that the company is required to pay all expenses relating to the plan, this means that the company is responsible for ensuring that the trustee's expenses are paid, but it does not prevent those expenses from being paid from the fund; and (b) the "exclusive benefit" language in a trust agreement means the fund must be used for the "primary benefit" of plan members. Further, the FST concluded that the trustee fees, investment management fees and auditing fees could be charged to the fund.

The FST also found that actuarial and pension consulting fees could be charged to the fund, except those fees incurred in determining the feasibility of adding a defined contribution (DC) component to the plan. Therefore, consulting fees relating to the addition of a DC option to the plan were not properly chargeable to the pension fund, whereas fees relating to the implementation of the option were properly chargeable. Plan sponsors should consider whether certain types of expenses may be only partially allowed.

WHAT EXPENSES ARE PERMITTED?

What constitutes a "reasonable" expense to be paid in respect of the administration of the fund?

Historical plan documents will be carefully scrutinized by courts to determine whether plan expenses may be charged to the fund. Practitioners should understand that certain applications of expenses, while permissible in one context, may not be permissible in another.

Kerry is only one of several important decisions in the pension plan expense area. As plan expense issues gain momentum, it is expected that the case law in this area will be further developed. In the interim, practitioners should tread carefully. **BC**

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