

## LABOUR &amp; EMPLOYMENT

# Burke strengthens employers' grip on pension surpluses

The Ontario Court of Appeal recently gave a significant victory to pension plan sponsors.

In *Burke v. Hudson's Bay Company*, [2008] O.J. No. 1945, the Hudson's Bay Company sponsored a defined benefit pension plan. The plan's fund was subject to a trust. The original plan limited members' entitlement on the plan's termination to the present value of their defined benefits.

The plan's text was amended in 1980 to give the Bay entitlement to surplus. The original trust agreement required the Bay to pay management expenses and prohibited amendments that allowed the fund to be used for purposes other than those specified in the plan. In 1971 and 1984, amendments to the trust agreement authorized the payment of all administrative expenses from the fund. The 1984 amendment also limited the use of the fund to purposes for the members' exclusive benefit. Until 1984, pension booklets stated that the Bay was paying all plan expenses. The booklets contained two disclaimers: (i) that they were a summary, referring employees to the plan documenta-



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tion; and (ii) that the Bay could modify the plan in any way.

Since 1982, the fund has been in a surplus position. Some employees believed the surplus would be used to improve their pension and benefits. However, the Bay used it to take contribution holidays and pay plan expenses.

In 1987, the Bay sold the assets of its Northern Stores Division (NSD) to the North West Company (NWC), which offered to employ all NSD employees and to provide a plan with equivalent pension and benefits and recognition of prior years of service. The Bay transferred the plan assets attributable to the transferred employees to the NWC plan, but did not transfer a proportionate share of the surplus.

The two main issues before the court were (i) whether the Bay was required to transfer a portion of the plan's surplus to the NWC plan; and

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(ii) whether plan expenses could be paid from the fund.

### Surplus

The court held that the Bay was not required to transfer part of the surplus unless the plan members were entitled to the surplus when NSD was sold. According to the Supreme Court of Canada's decision in *Schmidt v. Air Products Canada Ltd.*, [1994] S.C.J. No. 48, members' entitlement to surplus is governed

by the plan documentation.

Although the trust agreement was amended in 1984 to require that the fund be used for the members' exclusive benefit, the court noted that the plan text was the dominant document. Since the plan text limited members' entitlement on plan termination to the value of their defined benefits and entitled the Bay to surplus, the court held that members had no right to surplus. Since plan members were not entitled to surplus, the Bay was not required to transfer part of the surplus.

### Expenses

Citing its decision in *Kerry (Canada) Inc. v. DCA Employees Pension Committee*, [2007] O.J. No. 3321 (*Kerry*), the court affirmed that the ability to pay plan expenses from the fund turns on the plan documentation and that silence does not oblige the sponsor to pay.

To determine whether the amendments to the trust agreement were valid, the court had to ascertain the plan's purpose. The court found that the purpose was to meet the promises made to its members,

which required that the plan continue. And to continue, the plan had to be properly administered and the fund properly managed. Thus, the 1971 and 1984 amendments were valid because administrative expenses were incurred to ensure proper administration and management of the plan.

Although the pension booklets indicated that the Bay was paying plan expenses when they were actually being paid from the fund, the disclaimers prevented a misrepresentation. Specifically, the plan documentation showed that expenses were being paid from the fund and the Bay's broad amending power was a signal not to rely on the booklets.

When transferring pension assets on the sale of a business, *Burke* allows a plan sponsor to retain surplus where it can demonstrate entitlement to surplus on plan termination. However, where plan members are entitled to surplus on plan termination, the result may be different.

With respect to the payment of plan expenses, *Burke* strengthens *Kerry*, providing that where the plan text is silent but the trust agreement requires that the sponsor pay plan expenses, an amendment to the plan text permitting the payment of plan expenses from the fund is valid.

*Burke* reinforces the importance of plan documentation and provides that disclaimers in employee communications can ensure that plan texts supersede employee communications. In a broader sense, *Burke* and *Kerry* are the court's attempts to preserve the defined benefit system by allowing plan sponsors more control over surplus. ■

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