



By Mitch Frazer

The Supreme Court of Canada (SCC) recently released its decision in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39. *Kerry* considers a number of significant pension issues and provides much-needed guidance regarding the payment of pension plan expenses and the use of surplus pension funds to pay contribution obligations in respect of both the defined benefit and the defined contribution components of a single pension plan.

In 1954, a defined benefit (DB) pension plan was established, with the plan terms set out in a pension plan text. The plan text required contributions from both the employer and the employees. The assets in the plan were held in a trust pursuant to a trust agreement. In 1985, the plan was amended to permit plan expenses to be paid from the fund, and the employer began taking contribution holidays. In 2000, the plan was amended to add a defined contribution (DC) component, and the employer also used surplus in the DB component to meet its DC funding obligations.

After the 2000 amendments were introduced, a committee of former employees asked the Ontario Superintendent of Financial Services to make a number of orders related to the payment of plan expenses and contribution obligations. After investigating the matter, the Superintendent ordered the employer to reimburse the pension fund for expenses that had not been incurred for the exclusive benefit of the members but refused to order the employer to reimburse the pension fund for the contribution holidays it had taken.

Through a series of appeals, the Financial Services Tribunal, the Ontario Divisional Court and the Ontario Court of Appeal, each considered a number of key issues, including (1) whether the employer was responsible for paying plan expenses or whether such expenses were payable from the pension trust fund; and (2) whether the employer could use surplus pension funds to pay its contribution obligations in respect of both the defined benefit and the defined contribution components of the pension plan.

Plan Expenses

The SCC held that there is no statutory or common law authority that requires an employer to pay the expenses of a pension plan and that such obligation is subject to plan documentation. More specifically, the SCC held that in the absence of an obligation requiring an employer to pay plan expenses, assets in the pension fund can be used to pay “reasonable and bona fide expenses” to the extent that the funds are paying expenses required for a pension plan’s “integrity and existence,” since the existence of a pension plan benefits the employees.

Contribution Holidays and Cross-subsidization

The SCC held that contribution holidays are permitted for DB arrangements when plan documents provide that funding requirements will be determined by actuarial practice unless prohibited by other wording or legislation. The SCC also held that DB plan members had no vested interest in the surplus of the ongoing plan in *Kerry* and that the employer was entitled to apply the surplus in the DB component to its DC contribution obligations once the plan had been amended to permit such use of surplus. Finally, the SCC held that there is no legislative restriction prohibiting a retroactive amendment designating DC

members as beneficiaries of a pension trust, creating a single plan and trust, and allowing such DB to DC cross-subsidization.

Implications of *Kerry*

The SCC's decision in *Kerry* clarifies a plan sponsor's right to pay plan expenses from the pension fund and use DB surplus to take contribution holidays in a DB arrangement, as well as to fund employer contributions under the DC component of a single plan.

The SCC made it clear that plan documentation is a key determinant for plan sponsors considering paying plan expenses from the pension fund and taking contribution holidays. And since the decision provides that an employer may use the pension fund assets to pay all reasonable bona fide expenses that are required for a pension plan's integrity and existence, expenses for services required for the administration of the plan, such as employing actuaries, accountants and counsel, are expenses of the plan. However, not all expenses can be charged to the fund. Specifically, all expenses incurred by the employer in its capacity as "employer" should not be charged to the fund. For example, the SCC held that payment for advice regarding the addition of a DC component was for the employer's own benefit and could not be paid from the fund.

Kerry also permits employers to use the DB surplus to fund contributions under a DC component. This form of cross-subsidization turns on the structure of the plan. Therefore, employers must be careful when converting their plan to ensure that members are beneficiaries under both the DB and the DC components.

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