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on

Pensions and Benefits

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Pension Plan Mergers - A Ray of Hope?

The recent Ontario Divisional Court decision, *Baxter v. Ontario Superintendent of Financial Services* (“Baxter”), if followed by other courts, may provide relief from the paralysis that affects plan mergers in most jurisdictions in Canada, apart from Quebec. The case itself deals with relatively narrow issues but the comments of the court provide some encouragement after a series of cases that have applied strict trust law principles so as to make plan mergers practically impossible in most instances.

The facts can be briefly summarized. National Steel Car originally maintained one pension plan that was subsequently split into two plans - one for salaried employees and one for hourly employees. The company subsequently decided to merge the plans so that there would be one pension plan again rather than two. The merger was to be accomplished by transferring the assets and liabilities of the salaried plan (in “surplus”) into the hourly plan (in “deficit”).

After inviting and receiving submissions from affected parties, the Superintendent of Financial Services of Ontario approved the merger. Members of the salaried plan objected to the merger because “surplus” in their plan would be used to satisfy liabilities of the hourly plan. Specifically they argued that “surplus” comes under the heading of “other benefits” under subsection 81 (5) of the Ontario *Pension Benefits Act*. Section 81 provides that the Superintendent should not consent

to a transfer of assets from one pension plan to another unless benefits, including “other benefits,” of members of the transferring plan are protected. The Superintendent’s decision was appealed to the Financial Services Tribunal. The Tribunal concluded it did not have jurisdiction to hear the appeal but stated that if it were wrong in that regard it would affirm the Superintendent’s decision.

The case dealt with three issues. Two of the issues dealt with the jurisdiction of the Tribunal to hear the appeal and the standard of review to be applied by the court in considering the Tribunal’s decision. We won’t comment on these issues except to say that the court ruled that the Tribunal did have jurisdiction to hear the appeal and that the proper standard of review was reasonableness rather than correctness, giving some deference to the Tribunal. It was the consideration of whether “surplus” constituted “other benefits” that we’ll focus on here.

The court agreed with the Superintendent and the Tribunal and concluded that possible rights to surplus in the future did not constitute “other benefits.” In so doing it cited the Supreme Court of Canada decision in *Schmidt* in which it was stated that there is no surplus while a plan continues. Surplus can only arise on a wind-up, or after *Monsanto*, a partial wind-up. It cited with approval the Ontario Court of Appeal decision *Re Heilig and Dominion Securities Pitfield Ltd.* (dating back to

1989) in which the court found that a merger did not cause a wind-up *per se* and that there is nothing inherently wrong in the assets of one plan of an employer being used to meet the liabilities of another plan of the employer if they are merged. The court in Baxter stated that this principle applied whether the plan's assets were subject to a trust or not. It also stated that the favourable rules established in *Schmidt* concerning the availability of contribution holidays continued to apply in a merged pension plan.

In the course of its reasons the court distinguished decisions restricting or effectively prohibiting mergers because of their particular facts. It recognized that almost insoluble problems have been introduced by the restrictive decisions. A few examples (by no means exhaustive) demonstrate the problems. If there is separate trust accounting in the new plan where do new hires go? Is it necessary to create new sub-accounts each time a member joins or leaves? What if a plant is expanded or a new plant built? Does an employer have to create a new plan or a new sub-trust with an existing plan in those circumstances?

Refreshingly, the court recognized the unique nature of pension funding and rights rather than reverting to black letter trust law which seems to have been favoured by courts of late. It is frustrating to employers that courts have applied the law of trusts in unique ways when considering relationship breakdowns and have refused to move from strict construction approaches on pension cases. The Baxter decision provides a welcome approach in light of the recent restrictive decisions.

It should be noted that the comments in Baxter went beyond those necessary to determine the appeal. Such comments are referred to as *obiter* or "not necessary for the decision" in legal parlance and consequently are persuasive but not binding. In Baxter the authority to merge existed from the outset and the original plan was governed by contract not trust. Consequently, it will be open to the Ontario Court of Appeal or other courts to effectively ignore, read down or expressly contradict such comments in Baxter should they choose to do so and either overrule the decision or limit it to its particular facts.

A motion for leave to appeal the Baxter decision to the Ontario Court of Appeal has been filed. We will have to wait and see if the ray of hope is expanded or dimmed.

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