

focus

on

Pensions and Benefits

The logo for Fraser Milner Casgrain LLP, consisting of the letters 'FMC' in white on a blue square background, with a thin blue line underneath.

FRASER MILNER CASGRAIN LLP

December 2003

SUPREME COURT OF CANADA DISMISSES APPLICATION FOR LEAVE TO APPEAL PENSION PLAN EXPENSES CASE

On November 6, 2003, the Supreme Court of Canada dismissed the City of Toronto's application for leave to appeal the Ontario Court of Appeal's decision in *City of Toronto v. John Markle, Michel Jory, Wes Rowe and Jack Walford, Trustees of the Metropolitan Toronto Pension Plan*.¹

At trial, the Ontario Superior Court of Justice (the "Court") reviewed the validity of an amendment to permit the payment of internal administration expenses from the Metropolitan Toronto pension plan fund. The Court concluded that the amendment was invalid. The Court found that although there was a broad power of amendment in the plan, the plan fund was impressed with a trust in favour of plan members. Since there was no express power of revocation reserved by the City of Toronto at the time the trust was created, the internal expenses amendment was invalid as it purported to partially revoke the trust.

In affirming the Court's decision, the Court of Appeal agreed that a trust was created for the benefit of plan members. The Court of Appeal noted that the question raised was whether the amendment lawfully *required* the plan administrator to pay the employer's costs of administering the plan out of the plan fund. In other words, the Court of Appeal focussed on the mandatory wording of the internal expenses amendment and seemed to suggest that if the internal expenses amendment had permitted the plan administrator discretion in paying expenses, the amendment might not have been invalid.

Although this case dealt with a public pension plan created by by-law, the reasoning could be applied to a private sector pension plan if the pension plan has been established pursuant to an irrevocable trust. Specifically, the reasoning could apply to the authority to amend such pension plan to permit the payment of administrative expenses from the plan fund. This case will be of interest to registered pension plan sponsors who have amended, or are considering amending, their pension plan to permit the payment of administrative expenses.

ONTARIO PENSION REGULATOR RECENTLY SET UP A "PENSION PLAN WEB LINK" ON ITS WEBSITE

The Financial Services Commission of Ontario ("FSCO") has introduced a "pension plan web link" to enhance access to information. Pension stakeholders may now access contact information and other details related to most registered pension plans. No confidential information about plan members is available. The link allows users to review various plan details such as:

- plan name and registration;
- number of members;
- type of plan; and
- selected transactions including plan amendments and filing-related information.

¹ (2002), 30 C.C.P.B. 231 (S.C.J.), affirmed February 3, 2003 (Ont. C.A.).

Information regarding “individual pension plans” and plans with less than five active members is not available due to privacy concerns.

The pension plan web link can be accessed through the website of the Financial Services Commission of Ontario at <http://www.fSCO.gov.on.ca>, clicking on “Pensions” and then “Pension Plan Web Link”.

ONTARIO PENSION REGULATOR INTRODUCES POLICY ON THE EARLY FILING OF ACTUARIAL VALUATION REPORTS

In general, depending on the solvency of a defined benefit pension plan, an actuarial valuation report must be filed with FSCO on an annual or triennial basis. On July 15, 2003, FSCO released policy D050-802 entitled “Deadline for Early Filing of Actuarial Funding Valuation Reports”.

The FSCO policy provides that a plan administrator can choose to file an actuarial valuation report earlier than required. In doing so, the report must be filed within 9 months of the chosen valuation date. No extensions to filing an early report will be granted.

The policy can be viewed on FSCO’s website address as noted above. Click on “Pensions”, then “Pension Policies”, then “Link to Active Pension Policies” and “Deadlines”.

FEDERAL PENSION REGULATOR’S POSITION ON THE LATE FILING OF ACTUARIAL VALUATION REPORTS

On September 12, 2003, the Office of the Superintendent of Financial Institutions (“OSFI”) issued a letter to administrators of federally regulated defined benefit pension plans regarding its policy on the late filing of actuarial valuation reports.

The policy provides that if a report is not filed on time, OSFI will contact the plan administrator and will generally require that:

- the administrator inform plan members of the late filing, and
- the administrator provide OSFI with reasons for the delay and an action plan that addresses the issues that led to the late filing.

The letter can be accessed at: http://www.osfi-bsif.gc.ca/eng/publications/practices/index_supervisorypract.asp?id03-09-12.

FEDERAL PENSION REGULATOR AS “ACTIVIST AND INTERVENTIONIST”

OSFI has indicated its intention to continue to be an “activist and interventionist” regulator. In 2002, OSFI started conducting annual stress testing of federally regulated defined benefit plans. This estimation of the impact of changes in key variables such as investment returns and interest rates has allowed OSFI to identify problems early and work with administrators to solve those problems.

According to OSFI, in December 2002, stress testing revealed 177 plans that were not fully funded and 12 of those plans were taking contribution holidays (based on the last filed actuarial valuation report). OSFI sent letters to the 12 plan administrators asking them to resume making contributions. The basis for such a requirement under the federal *Pension Benefits Standards Act, 1985* is not clear. Further, as federally regulated pension plans are also registered under the *Income Tax Act* (the “ITA”) the provisions of the ITA with respect to contributions are also relevant. Under the ITA, contributions are to be made in accordance with the most recently filed and approved actuarial valuation report.

RECOMMENDATIONS FOR AMENDMENTS TO MANITOBA PENSION LEGISLATION

The Pension Commission of Manitoba has issued a report recommending reforms to the *Pension Benefits Act* (the “Act”). The recommendations follow stakeholder comments to a consultation paper issued in December 2002. The Pension Commission of Manitoba is seeking further stakeholder comments by March 31, 2004.

Some of the recommended amendments to the Act include:

- immediate and retroactive vesting;
- revising the joint and survivor pension from 66% to 60% to harmonize with other jurisdictions;
- revising the definition of spouse to provide that a spouse must be living with the member at retirement in order to become entitled to a joint and survivor pension;
- immediate locking-in;
- permitting unlocking of funds in cases of non-residency; and
- requiring, with certain exceptions (such as plans with 25 or fewer members), that plans be administered by a pension committee.

PROPOSED AMENDMENTS TO THE NOVA SCOTIA *LABOUR STANDARDS CODE*

The Compassionate Care Leave Bill proposes to amend the *Labour Standards Code* (the “Code”). If passed, certain employees who wish to provide palliative care to a parent, child or spouse would be entitled to up to 8 weeks of unpaid leave.

If an employee were granted such an unpaid leave, the employer would be obliged to notify the employee of the option of continuing to participate in employer benefit plans during the leave period. An employer could require the employee to pay the full cost (including the employer’s share) of participation in the benefit plans during such leave. However, an employer could choose to continue paying its contributions to the benefit plan in respect of the employee on leave.

The amendment complements the changes to the federal *Employment Insurance Act* that will come into force on January 4, 2004 to provide benefits for compassionate care for up to 6 weeks following a 2 week waiting period. Similar amendments will also come into force in January 2004 under the *Canada Labour Code* which will require federally regulated employers to provide employees with an 8-week unpaid leave of absence for compassionate care so that they can access the paid compassionate care benefits under the federal *Employment Insurance Act*.

TORONTO PENSIONS AND BENEFITS GROUP CONTACTS

Paul Baston (416) 863-4622 paul.baston@fmc-law.com

Mary Picard (416) 863-4469 mary.picard@fmc-law.com

Audrey Mak (416) 361-2322 audrey.mak@fmc-law.com

Mark Rowbotham (416) 367-6757 mark.rowbotham@fmc-law.com

Janice Clugston (416) 361-2355 janice.clugston@fmc-law.com