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Canadian Institute of Actuaries

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"Recent Legal Developments in Ontario and Quebec"

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This is a very general description of recent court decisions of interest to Canadian actuaries. Please do not rely on the following comments as legal advice.

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Monsanto

In Ontario, surplus must be distributed on the partial wind-up of a pension plan.

Monsanto Canada Inc. et al. v. Superintendent of Financial Services et al. (2002), 62 O.R. (3d) 305 (Ontario Court of Appeal)

Status of the case

In April of 2000 the Ontario Financial Services Tribunal held in a two to one decision that surplus was not required to be distributed on a partial wind-up. That decision was overturned in 2001 when the Ontario

Divisional Court held that surplus must be distributed. The Ontario Court of Appeal agreed with the Divisional Court in late 2002.

Monsanto has requested that the Supreme Court of Canada grant leave to appeal the Court of Appeal decision. If the S.C.C. allows Monsanto to appeal, Monsanto and its allies face an uphill battle in persuading the S.C.C. to overturn two lower court decisions. Many people believe that the Monsanto decision is going to stick, either because the S.C.C. will deny leave to appeal, or because the S.C.C. will hear the appeal and uphold the Court of Appeal.

Facts

In May of 1997 Monsanto filed a partial wind-up report for a plan that had a surplus of \$19.1 million. The report disclosed that \$3.1 million of the surplus was attributable to the partial wind-up group. Monsanto did not suggest that there be any distribution of the surplus on the partial wind-up, to anyone.

Several legal issues were dealt with along the judicial trail, including the "standard of review" of decisions of the Tribunal, and "legitimate expectations". The issues most interesting for actuaries are of course the question of whether surplus must be distributed, and annuities purchased, on a partial wind-up.

Ever since January 1, 1988 subsection 70(6) of the Ontario Pension Benefits Act has stated:

"70(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up."

For many years prior to the Monsanto case, the Superintendent had approved of partial wind-up reports that did not provide for distribution of surplus. In a number of cases the Superintendent accepted partial wind-up reports that stated that the administrator would retain records of the terminating members so that consideration could be given to distributing to them any surplus that may exist upon the full wind-up of the plan.

The Superintendent kick-started the Monsanto saga by issuing a Notice of Proposal to order Monsanto, in effect, to distribute surplus on the partial wind-up. Monsanto requested a hearing to dispute the NOP, and was spectacularly successful at the Financial Services Tribunal level. The Tribunal relied on the 1994 Supreme Court of Canada case of *Schmidt v. Air Products*, in saying that surplus does not exist until a pension plan is fully wound up, and therefore can't be subject to a requirement to be distributed on a partial wind-up. The Tribunal also held that annuities need not be purchased on a partial wind-up to satisfy the obligations to the members affected by the partial wind up who choose a pension. The annuities issue was not appealed to the Divisional Court, so the Tribunal's decision stands on that point.

At both the Divisional Court and Court of Appeal levels, however, the Tribunal was firmly overturned on the surplus issue.

Legal reasoning

The Court of Appeal did not make any ruling on "who owns the surplus". It said:

"...the issue of who owns the surplus -- the employer, the members or both -- is not before us. If distribution of a part of the surplus is required by law, the ownership question would have to be answered to determine the proper recipients."

The Court of Appeal said that "[I]t is clear that the legislature has chosen to treat full wind up and partial wind up in parallel throughout the winding up provisions of the Act." So it's obvious that surplus must be distributed on a partial wind up. The Court rejected Monsanto's argument that it was difficult to determine how much surplus should be allocated to the partial wind up group: "It is clearly possible to calculate the portion of surplus attributable to that part of the pension plan which is being wound up. The actuaries of the plan did so in this case."

The Court also rejected Monsanto's argument that it would be unfair to the remaining members to distribute surplus, because they could be left with an ultimate deficit while the departing partial wind up members enjoy the lottery results of a surplus which happened to exist at the date of the partial wind up. Tough, said the Court. The Act clearly says there must be a distribution of surplus on a partial wind up,

and any assertions that there would be "serious consequences" for the remaining members is "speculation". The Court said, "...whether those employees who stay until full wind up will fare better or worse than the Affected Members will depend entirely on unpredictable future events. Their *pro rata* share of surplus could be smaller or larger than that received by the Affected Members on partial wind up."

Monsanto urged the Court to follow the *Schmidt* reasoning that surplus in a pension plan doesn't legally exist until the entire plan is wound up. On that basis, said Monsanto, surplus can't legally exist and can't be distributed, on a partial wind up. The Court disagreed. First, it said, *Schmidt* wasn't dealing with a partial wind-up. The Supreme Court of Canada in *Schmidt* didn't consider subsection 70(6) of the Ontario Pension Benefits Act, which clearly requires surplus to be distributed on a partial wind up. Second, even if *Schmidt* stands for the proposition that surplus doesn't exist until there's a full wind up, it's overridden by subsection 70(6) (in Ontario, at least).

Legal and actuarial headaches

Here are some of the uncertainties created by the Monsanto case:

(1) *Which methodology should be used to deal with the surplus?*

Should the actuary measure the surplus as at the date of the partial wind-up, and in effect "freeze" that amount to be distributed? Should it have rate of interest or return allocated to increase or decrease it pending distribution?

The other possibility is to treat the plan as having been split into two plans as at the date of the partial wind-up, and roll forward the partially wound-up piece of the plan as if it were an ongoing plan, subject to investment return and expenses allocable to it.

The "plan split" method has its own set of unanswered questions. What happens with the plans where the administrator didn't actually segregate the assets allocable to the partial wind up piece? Is it fair to the partial wind up members to apply the poor rate of investment return in the ongoing active plan, to the partial wind up assets? Won't those people argue that the administrator had a duty to act prudently in investing the partial wind up assets on the basis of a short term strategy? Actuaries will have to somehow "roll forward" the assets in the split-out plan, making decisions on which expenses, and what rate of return, should be applied to them from the date of the partial wind up to the date of distribution. There are approximately 150 cases in the "partial wind up queue" at FSCO where assets may or many not have been segregated pending a resolution of the surplus issue.

(2) *How do you calculate the amount of surplus?*

Annuities do not have to be purchased on a partial wind up, according to the Tribunal decision in Monsanto (that issue wasn't appealed). How should the actuary deal with the potential annuity purchase when he values the liabilities for the purposes of determining how much surplus exists at the date of the partial wind-up, and how it is to be allocated between the ongoing portion of the plan and the partially wound up portion? One could argue that for valuation purposes, the liabilities should be treated as if they were annuitized, even though they don't have to be, and may not be.

(3) *If annuities aren't purchased, where does the liability rest?*

Assume that an administrator follows Monsanto, somehow calculates and distributes surplus, and is left with partial wind up members of the plan whose liabilities are not annuitized. Do those members have a right to share in a subsequent distribution of surplus when the plan is wound up in full, in future? If not, why not? Are they not members of the ongoing plan with benefit entitlements, following the partial wind up, even though they were also members of the partial wind up group?

(4) *How should contribution holidays be handled?*

It's likely that contribution holidays have been taken in many of the 150 partial wind up cases in the FSCO queue of cases waiting to have the partial wind up surplus issue resolved. If you treat a pension plan as having been notionally split as at the partial wind up date, should the subsequent contribution holidays relating to the benefits for the remaining active members be applied to the partial wind up piece? If one argues that the surplus as at the partial wind up date should be increased/decreased by the rate of return

of the ongoing plan, then it makes some sense to apply the contribution holiday to the partial wind up piece as well. On the other hand, it seems unfair for the partially wound up members to "give up" surplus allocable to their part of the plan, for the benefit of the remaining active members.

(5) *How should the surplus be divided among the partial wind up members?*

Monsanto gives no guidance on how the surplus should be allocated within the partial wind up group. The Court of Appeal said that the legal issue of the case is the distribution of surplus that is "attributable to the members". It also said that members get "that part of the surplus that relates to them". Is there any meaning to "attributable" and "relates to them", that an actuary should consider? What should an actuary recommend to an administrator who is prepared to give all of the surplus away to members on a partial wind up?

Consider the situation where surplus accumulated while a pension plan was entirely DB. A DC component was added, and thereafter there was a partial wind up that included members with DB, and members with DC benefits only. Should the surplus be allocated only to the members with DB accruals? What about plans with both contributory and non-contributory members? Won't the contributory members argue that the surplus is more "attributable" to them, than to the non-contributory members?

Administrators should think carefully about this possible area of dispute, before they roll out member communications that promise to distribute surplus on a certain basis of distribution. FSCO should also brace itself for attacks if it approves of partial wind up reports where some of the partial wind up members are dissatisfied.

There shouldn't have to be expensive negotiations, and/or court approval, to determine how the surplus will be divided among members. But there may have to be, even where the employer is getting none of the surplus.

I've described this issue as being relevant to division of surplus among the partial wind up group. But of course it's also relevant to the actuary's determination of how much of the whole plan's surplus should be allocated to the partial wind up piece of the plan. If, for example, the piece of the plan being wound up is entirely DC, and has always been DC, then perhaps none of the surplus should be allocated to the partial wind up. One can imagine other fact situations where the actuary will need guidance as to how to allocate surplus between the ongoing piece, and the wound up piece. It's not correct to brush off this issue by saying that you deal with it the same way you deal with surplus issues on a full wind up. In the context of a partial wind up, there will always be remaining members who will care about how much surplus you allocate to the partially wound up component of the plan. Those remaining members may correctly criticize the actuary's determination.

(6) *How should actuaries handle ongoing valuation reports?*

No actuary should be filing a regular annual or triennial valuation report in Ontario, without taking into account the impact of Monsanto. Consider a situation where there was a partial wind up in the past, with no distribution of surplus. Shouldn't the actuary go back and re-do all valuations since the partial wind up date, on the basis that surplus should have been distributed?

Transamerica v. ING

This case is a worry for anyone who is merging pension plans and wants to apply surplus from one of the merging plans to fund benefit obligations in the merged plan as a whole.

It is also a warning to pension consultants: don't advise clients on the accuracy of representations and warranties in a sale agreement regarding contribution holidays or other legal entitlement issues.

Aegon Canada Inc. and Transamerica Life Canada v. ING Canada Inc. (Ontario Superior Court of Justice, January 23, 2003)

When ING Canada sold NN Life to Transamerica in 2000, ING made representations and warranties in the sale agreement to the effect that the contribution holidays it had taken from 1990 to 2000 were permitted. Those contribution holidays were taken in a pension plan that had been created by the 1990 merger of one pension plan that was in deficit, and one that was in surplus.

After it bought NN, Transamerica sued ING on the basis that the contribution holidays were a breach of a 1969 trust agreement relating to the plan that was in surplus, and that the financial statements of NN Life were misleading because they didn't disclose the true funded status of the merged plan.

Transamerica won. The Court said that the terms of the 1969 trust agreement of the pension plan that had surplus could not be validly amended to permit that surplus to be used to fund the benefits of the other pension plan into which it merged.

There was a unique fact that may distinguish this case from other mergers: when it merged the plans in 1990, the plan sponsor had promised the PCO that it would keep the assets and liabilities of the two merging plans separate. It did so. However, when the actuary determined what contributions were required to the merged plan, he took into account the surplus in the entire merged plan, as a whole.

The difficulty with this case from a legal perspective is that we're not sure what the Court's decision would have been in the absence of the plan sponsor's undertaking to keep the assets of the merging plans separate. The Court was very plain in saying that the terms of the 1969 trust agreement did not permit the surplus to be used in a merged plan for the benefit of the merged plan as a whole. It's possible that the result of the case would have been the same even if there had been no undertaking to keep the assets separate. That's a serious concern for all plan sponsors who have merged plans and treated the surplus from one merging plan as being available within the merged plan as a whole.

Some commentators say that the Court's analysis is a departure from the 1994 Supreme Court of Canada case of *Schmidt v. Air Products*. That case said that true surplus cannot be determined until a pension plan is entirely wound up. If a merger is approved by a pension regulator (which was the case in the ING situation), then one would expect that surplus should not be isolated within one piece of the merged plan.

Actuaries may be interested in the Court's reprimand of one of the actuaries who gave evidence at the trial. According to the Court, one of the actuaries "stepped over the line between actuarial practice and legal interpretation of the documents". The Court preferred the testimony of another actuary, who gave evidence that the existence of a single plan with two funds of segregated assets was unusual, and that "it would be poor actuarial practice to simply ignore that fact in making funding recommendations".

The decision is under appeal.

Bottom line: Actuaries should not make funding recommendations without legal advice, if there is any question about the legal entitlement to use surplus assets.

Buschau v. Rogers

This is a 2001 case that casts doubt on the ability to use surplus in a merged plan. It's a British Columbia case, so some commentators hoped that it may not be followed in Ontario. That hope has dimmed, since it was cited with approval in the Transamerica v. ING case. It is now part of a two-case trend that should worry plan sponsors across the country.

Buschau v. Rogers Communications Inc. (2001), 83 B.C.L.R. (3d) 261 (British Columbia Court of Appeal)

The employer merged a plan that was in surplus with other plans that were in deficit. The plan that was in surplus had historical surplus entitlement language that suggested that members were entitled to surplus on a wind up. It also had trust agreement language that suggested that assets were for the "exclusive benefit" of the members. The surplus plan had been closed to new members for ten years prior to being merged with the other, deficit plans.

The disgruntled members of the surplus plan argued that the merger was an invalid revocation of the plan's trust, and an unlawful commingling of funds. The B.C. Court of Appeal held that trust law principles preserved the rights of the members to surplus on termination of the trust. The Court said that the fact that the plans were merged did not affect the existence of the pre-merger trusts. The administrator of the merged plan was required to carry out a separate accounting of the trusts on a continuing basis, notwithstanding the merger.

It's not clear from the reasons of the Court whether the existence of separate trusts within a merged plan prohibits the taking of contribution holidays on a whole plan basis (i.e. using surplus in one part to defray

contribution obligations in another part). Ontario administrators were hopeful that if this case could be distinguished on its facts, and some unique aspects of British Columbia trust law.

Markle v. City of Toronto

This case paves the way for claims that administrators should not be charging expenses to pension plan assets unless they are comfortable that there's legal entitlement to do so, based on both current and historical documentation.

Markle et al. v. The City of Toronto and CIBC Mellon Global Securities Services Company (Ontario Court of Appeal, February 3, 2003)

Certain members of the Board of Trustees of the City of Toronto pension plan commenced an application asking for the court's direction as to whether an amendment (by way of by-law) to the plan was lawful. The amendment entitled the City to reimbursement from the pension plan for the City's internal administrative costs in running the plan.

The Court of Appeal upheld the lower court's decision that the amendment was unlawful. The plan was subject to an irrevocable trust, and the surplus was part of that trust. Even though there was no express prohibition in the plan or trust documents concerning the charging of expenses to surplus assets, the amendment was improper. It constituted a purported revocation of the trust. When the City established the trust, it gave control of the trust to the Board of Trustees of the plan. The amendment purported to give control to the City over the trust assets. That was an "improper attempt to fetter the discretion of trustees as it relates to trust property".

This case is a concern to administrators who previously might have thought that in the absence of a prohibition in a plan text or trust agreement, it is permissible to charge reasonable expenses to plan assets on the basis that the administration of the plan is beneficial to the plan. The Court of Appeal has now raised the spectre that even though plan administration is beneficial to members, members could argue that any amendment that purports to permit the charging of administration expenses to plan assets is an unlawful revocation of the trust, or improper fettering of the discretion of the trustee(s) of the plan.

This case may be distinguished, however, on the basis that in many cases there is no board of trustees that exercises control over the plan assets. Where there is a corporate trustee who simply takes direction from the administrator as to what payouts to make from the pension fund, it's hard to see how an amendment that permits payment of plan expenses somehow fetters that corporate trustee's discretion to control the plan assets.

Burke v. Hudson's Bay

The employer was not entitled to charge expenses to the plan because it had told members in employee information booklets that it would pay all administrative costs. That representation to members prohibited the employer from amending the plan to permit the charging of expenses to plan assets.

Burke v. Hudson's Bay Co. (2002), 32 C.C.P.B. 40 (Ontario Superior Court of Justices)

Prior to 1982 the employer had paid all administrative costs and expenses of the pension plan. The employer's position was that it had done so only because there was no surplus at that time. When surplus arose, the employer started to charge expenses of administration to the assets of the plan. The plan was amended, at the time, to permit the charging of expenses. A 1961 trust agreement contained the typical provision that no amendment could authorize or permit any part of the trust fund to be used for or diverted to purposes other than those specified in the plan.

The employees argued that the amendment that permitted the charging of expenses was invalid. They pointed to pension booklets that were given to members in 1961 and 1980, that said, "The entire cost of administering the plan will be borne by the Company".

The Court said that the booklets could not be ignored. They constituted, in effect, part of the plan provisions. The employer was not entitled to charge expenses to the plan.

This case is under appeal. It is scheduled to be heard by the Ontario Court of Appeal at the end of May, 2003.

Consumers Packaging

When you file a pension plan amendment with FSCO, it can never be withdrawn, even if it's stated to be conditional on approval of a wind-up, or a merger, or some other event. It becomes legally binding even if it's not registered.

Consumers Packaging Inc., by its monitor, KPMG Inc., on behalf of O-I Canada Corp., and the Superintendent of Financial Services, and the United Steelworkers of America, Local 203G (Financial Services Tribunal of Ontario, November 29, 2002)

Consumers filed a partial wind-up report and related plan amendment. The amendment provided the usual partial wind-up enhancements required by law (vesting, grow-in). The amendment also provided a voluntary enhancement that Consumers decided to grant to the terminated members even though it wasn't required by law or the collective agreement. The amendment said that it was conditional on registration. The text of the pension plan said that any amendments could be revoked or withdrawn if they were not registered.

FSCO rejected the partial wind-up report, on the grounds that it didn't correctly deal with "grow in" benefits and it didn't provide benefits to a group of "call in" employees that should have been included in the partial wind-up group. Although Consumers initially resisted FSCO's position, Consumers eventually gave in and agreed to do what FSCO wanted regarding the "grow in" and "call in" issues. However, Consumers also decided to withdraw the enhanced benefit that it had voluntarily provided in the partial wind-up report and related amendment. The Board of Directors of Consumers passed a resolution in accordance with the pension plan provision that said that any amendment that wasn't accepted for registration could be withdrawn or revoked. The Board revoked the first amendment, and passed an entirely new amendment that included all of the required vesting and grow-in provisions, but did not provide the voluntary enhanced benefit (which was an enhanced bridge benefit).

FSCO and the union took exception to this. They argued that as soon as the first amendment was filed, it became permanently legally effective, and could not be withdrawn or modified. They said that it didn't matter that the amendment was never registered. They didn't much care that the amendment power in the pension plan text, and the terms of the amendment itself, expressly permitted Consumers to withdraw the amendment if it wasn't accepted for registration.

Consumers argued that when FSCO rejected the partial wind-up report, and took exception to parts of the related amendment that dealt with "grow in" and the "call in" employees, FSCO was rejecting the entire amendment and couldn't take the position that part of it was binding. Consumers relied on the power of the directors, according to the pension plan text, to withdraw an amendment if it wasn't registered.

The Financial Services Tribunal rejected Consumers' arguments. It said that once an amendment is filed, it's forever effective and binding, regardless of whether part of it is not in compliance with laws. According to the Tribunal, "there's no magic in registration". It didn't matter whether the amendment was registered. It didn't matter that the amendment was part of a larger package (the partial wind-up report) that was rejected. Even though the partial wind-up report and parts of the amendment were wrong, according to FSCO, the part of the amendment that provided a voluntary enhancement was irrevocable.

The Tribunal may have been influenced by the fact that Consumers began to pay out the voluntary enhancement to some of the affected members. Perhaps the Tribunal's decision would have been different if Consumers had decided to hold back on paying out any benefits until the partial wind-up report was approved and the amendment was registered.

The lesson here is that plan sponsors should be certain that they can live with an amendment before they file it. Based on this case, if a sponsor applies to FSCO to merge plans, and files a merger application along with amendments to the merging plans with improvements to provide consistency in the merged plans, the amendments could be binding even if the merger application is rejected. It seems that sponsors are not entitled to file an amendment that is conditional on approval of the entire amendment, or approval of an action such as a wind-up or merger. It seems that the wording of an amendment regarding its binding effect, and the wording of the amendment power within the plan text, is not determinative of the legal effect of filing an amendment. Once it's filed, it can never be withdrawn.

Hinds

When the Superintendent (Ontario) is considering whether to approve an application to transfer pension assets and liabilities triggered by a sale of a business, he does not have to simultaneously consider the impact that the transfer will have on the importing plan. He can only consider the interests of the members of the exporting plan. He can consider the interests of the members of the importing plan at a later date, i.e. when he considers the amendment that will invariably have to be submitted by the administrator of the importing plan, to incorporate the transferred assets and liabilities.

Hinds v. Ontario (Superintendent of Pensions) (2002), 58 O.R. (3d) 367 (Ontario Court of Appeal)

Colgate-Palmolive Cnaada Inc. bought the Javex business of Bristol-Myers Squibb Canada Inc. The parties agreed to transfer the accrued pension liabilities of the Javex employees, which were approximately \$4 million. The Superintendent consented to the transfer.

Mr. Hinds was a member of the receiving plan (the Colgate plan). He learned of the transfer after it happened. He asserted that the liabilities of the Javex pension benefits were \$6 million (within the Colgate plan). He claimed that the Superintendent illegally failed to consider the interests of the members of the Colgate plan when he approved of the transfer.

The Court of Appeal said that it wasn't unreasonable for the Superintendent to consider only the circumstances of the exporting plan, when deciding whether or not to approve of a transfer application. Section 80 of the Pension Benefits Act (Ontario), which addresses the transfer of plan assets, does not require the Superintendent to consider the interests of the members of the importing plan. The Court said that those interests would be considered by the Superintendent when he receives the application for registration of the amendment to the receiving plan, which the administrator of the receiving plan will no doubt file in order to incorporate the transfer of liabilities. The Pension Benefits Act, said the Court, gives the members of the receiving plan protection because it provides that they will get notice of such an amendment.

The Court did not wade into the issue of what the pension liabilities of the Javex members were, or should have been. The Court dealt with the issue on a purely procedural basis. The decision was not appealed.

It may be wise for pension advisors to ensure that the administrator of a receiving plan prepares and gives notice of an amendment to incorporate any transfer of pension assets, so that discontented members of the receiving plan can be dealt with before, rather than after, a transfer of assets. There may also be a suggestion for FSCO here: to reduce the possibility of procedural confusion and disputes, consider an application for transfer of assets at the same time you consider the related application to amend the plan that will be receiving the assets.

Maple Leaf Foods

This is a good case for employers and their pension consultants who are negotiating surplus sharing deals. It suggests that the employer does not have to ensure that the members/union on the other side of the table are aware of and correctly considering financial and actuarial issues that affect the surplus deal. The Court says that in surplus negotiations, the employer does NOT owe a "fiduciary duty" to the members/union.

Attard v. Maple Leaf Foods (2002), 32 C.C.P.B. 222 (Ontario Superior Court of Justice)

Maple Leaf Foods administered several pension plans. It struck a surplus sharing deal with a member group. The surplus sharing agreement was approved by the Ontario Superior Court of Justice. Following that approval, the parties communicated about the prospective effect of including in the surplus distribution a provision for a minimum distribution of \$2,500 to members. The parties agreed to provide for that minimum, and revised the surplus sharing agreement to reflect that.

When the member group saw the final distribution numbers, however, it was surprised to see how significant the effect was of providing for this minimum distribution. The member group suggested that the effect was to reduce the surplus entitlement of the average member by more than 11%. The member

group went back to court, complaining that the employer misrepresented the effect of the minimum distribution. The member group also argued that there was a "mutual mistake" about the effect of the minimum distribution.

The Court didn't buy the member group's arguments. It said that the employer didn't owe any "fiduciary duty" to ensure that the member group understood the financial implications of the provision about the minimum distribution. The Court said that there was no "mutual mistake" because there was no evidence that the employer made a mistake about the effect of the minimum distribution.

The effect of this case is that there's now caselaw that suggests that it's up to members and their advisors to ensure that they independently analyze the financial implications of details of surplus sharing deals. It's now obvious that in the context of surplus sharing deals, members can't rely on the caselaw that says that employers owe a legal duty to plan members to ensure that they have and correctly consider all relevant information in making decisions about their pension benefits.

BICC Cables

Technical, narrow interpretations of plan provisions probably won't avoid the regulator's conclusion that an enhancement is a "consent benefit", if it looks and smells like one.

BICC Cables Canada Inc. and Superintendent of Financial Services, decision of the Financial Services Tribunal dated November 16, 2000 (FST File No. P0092-1999)

BICC Cables filed a partial wind-up report that didn't treat as a "consent benefit" under subsection 74(7) of the Pension Benefits Act (Ontario) the following provision of the pension plan:

"If the Continuous Service of a Member terminates before normal retirement date under special circumstances as consented by the Company,

(a) the Member will be considered to have retired early for the purposes of the Plan on his special early retirement date which is the first day of the month coincident with or next following the month in which the Member's Continuous Service terminates, and

(b) the Member will be entitled to receive a special early retirement pension."
[emphasis added]

Subsection 74(7) of the Act says, "...where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent".

BICC Cables argued that the pension plan provision wasn't a consent benefit, because it was intended to provide special early retirement benefits to members if they were terminated in a situation involving special circumstances determined by BICC Cables to exist. In other words, the "consent" was relevant to determining whether or not the "special circumstances" existed. The provision did not refer to employer's consent to individual members receiving the enhancement, and therefore was not subject to subsection 74(7). BICC Cables also argued that the provision was not an "ancillary benefit", because it didn't confer benefits "in excess of" those provided by section 41 of the Act.

The Financial Services Tribunal disagreed. In the event of any ambiguity, the interpretation must be made in favour of the plan members. The Tribunal said that any circumstance where the member wouldn't be entitled to an early retirement pension under any other provision of the plan was "special". It was obvious, said the Tribunal, that the element of employer consent applied here to the enhancement. Subsection 74(7) applied.

The lesson here is that it's probably futile for an employer to urge a strict reading of a provision that has the word "consent" in it, in the hopes of avoiding the application of subsection 74(7).

Allison v. Noranda

Employers who offer terminated employees a choice of severance arrangements must be sure to provide clear, complete information about the pension implications of those choices.

Noranda was found liable for "negligent misrepresentation", by failing to explain the pension consequences of severance pay options that it offered to a terminating employee.

Mr. Allison was terminated by Noranda at age 53. Noranda gave him a letter informing him of two typical separation pay options. One option was a lump sum severance amount, that did not provide for continuation of accrual in the pension plan. The other option was a "salary continuance" arrangement, that would allow Mr. Allison to continue to accrue benefits in the pension plan. If he had picked the "salary continuance" arrangement, he would have attained entitlement to a valuable early retirement benefit (age 55).

Noranda's letter describing these two options did not explain the pension repercussions. Mr. Allison was unaware of the significant value of remaining in the pension plan throughout the "salary continuance" period. Noranda's letter did, however, urge Mr. Allison to seek independent advice in considering which option to choose. Mr. Allison did so -- he consulted an insurance agent who also sold mutual funds. On the advice of that person, Mr. Allison selected the lump sum severance option, and invested the money in mutual funds.

When he attained age 55 and applied for an early pension, Mr. Allison became aware of the value of pension accrual during the "salary continuance" period, and the negative pension repercussions of picking the lump sum option. He sued Noranda. At the trial level, Mr. Allison lost. He appealed, and won at the Ontario Court of Appeal.

The Court of Appeal held that Noranda owed Mr. Allison a duty to ensure that he understood the pension implications of his severance options. The Court said:

"Surely, an employer is under an obligation to make sufficient disclosure to enable an employee to make an informed decision in cases where the employer asks an employee to make an election with respect to separation pay options that impact significantly on pension benefits. I say this because pension information is of a specialized nature and, in the present case, within the control of Noranda as administrator of the pension scheme."

This case is not surprising. It's consistent with developing caselaw that says that employers/administrators are responsible for communicating pension issues clearly and well. Employees are entitled to say "I didn't understand, so I'm not responsible for what I selected". It's a noteworthy case because it reminds pension advisors that human resource representatives who prepare severance packages often don't include sufficient, or any, information about the pension implications of severance choices. This case proves that in order for a severance letter to be effective, it should spell out the pension implications as clearly as possible.

N.A.I.T.

This case is about "who owns the demutualization proceeds". It applied to a group insurance policy for LTD and life insurance, not a pension plan.

Pursuant to a collective agreement promise, the employer obtained a group policy for LTD and life insurance from Mutual Life (now Clarica). The employees contributed to the premiums. When Mutual Life converted to a shareholder-owned company ("demutualized"), the employer received under the policy the shares of the company. It sold the shares for \$1.3 million. It did not share the proceeds with the employees.

The employees sued the employer, demanding the value of the shares that were attributable to the premiums paid directly by them.

The employees won. The Court held that although the employer was the policyholder, that did not entitle it to receive all of the demutualization proceeds, because the employer had "obtained" the insurance policy in order to fulfill its obligations under the collective agreement. The claim by the employer that it owned the policy was "simplistic" and ignored the equitable rights of the employees. The Court also said that the employer was acting as a deemed agent for the employees in securing the policy, and was in a fiduciary position. As an agent, the employer could not expect to make a profit from its agency relationship.

This case is not about pension plans. There are several cases in Canada where contributory pension plans have received demutualization proceeds, without allocating those proceeds to current or former members. Pension advisors should not take this case as establishing any precedent in the pension world, since there are significant arguments that can be made to distinguish this case from the circumstances of pension plans.

Prosecutions for late filings

Pension plan administrators must get their financial statements and AIR's filed in time. If they're going to be late, they should comply with FSCO Policy D050-801 (March 1, 2002), to request an extension. The Ontario Ministry of the Attorney General has prosecuted many administrators for late filings, in the last couple of years.

The Ontario Pension Benefits Act includes prosecution provisions that were little-used and little-known until recently. Prosecutions were typically laid against egregious offenders. That has changed. Over the last two years, dozens of small and large administrators have received provincial summonses to appear before provincial court judges, or justices of the peace, in connection with charges under the Provincial Offences Act due to alleged breaches of the Pension Benefits Act. The breaches have been the failure to file annual information returns, financial statements and actuarial valuation reports. In many cases the charges have been laid against both the registered administrator *and* directors and officers, pursuant to section 110 of the Pension Benefits Act which imposes liability on directors and officers who cause, authorize, permit, acquiesce or participate in the offence.

The Pension Benefits Act allows the Court to levy fines of up to \$100,000 for the first conviction, and \$200,000 for each subsequent conviction. Most fines have been only a few thousand dollars. The embarrassment and inconvenience in being convicted may be more painful than the fine.

Pension advisors should warn their clients to treat the "you are late" warning letters from FSCO seriously.

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