

## PENSIONS

### GOOD NEWS FROM THE SUPREME COURT OF CANADA

BY GUY LEMAY, CIRC

The decision in *KERRY* - August 7, 2009<sup>1</sup>

In this decision, the Supreme Court of Canada has confirmed, *inter alia*, that the company:

- May oblige the pension fund to pay the Plan expenses, that is the expenses associated with the employment of actuaries, accountants, counsel and other service providers required for the administration of the Plan;
- May combine the defined benefit (“DB”) and the defined contribution (“DC”) components in one pension plan and use the actuarial surplus for contribution holidays concerning the DC component.

The factual background of this case is as follows:

In 1954, Kerry established a DB pension plan and until 1984, paid all Plan expenses directly. In 1985, following amendments to the Plan documents, these expenses were paid by the pension fund directly. Also as of 1985, Kerry started taking contribution holidays from its funding obligations.

In 2000, the Plan text was amended again in order to introduce a DC component. The DB component continued for existing employees who were also given the option to transfer to the DC component. New employees could not participate in the DB component of the Plan, but only in its DC component.

In summary, the majority decision of the Supreme Court is as follows:

#### With respect to Plan expenses

The Court concluded that even if the trust agreement provided that the company had undertaken to pay the expenses and fees of the trustees, this did not entail that the company pay the other expenses of the Plan.

Also, even if the trust agreement forbade the use of the trust funds for any purpose other than for the exclusive benefit of the employees, this language could not be relied upon to force the company to take on other obligations than those that it had already explicitly assumed. Moreover, because the payment of Plan expenses is necessary for the continued existence of the Plan, these expenses constitute a benefit for the employees.

#### With respect to contribution holidays

The Court was of the opinion that the amendments made in 2000, which added a DC component to the Plan, did not create two distinct plans. On the contrary, the purpose of the amendments was to create one pension plan and to expressly authorise contribution holidays for both components of the Plan.

Finally, the Court reiterated that when plan documents provide that funding requirements will be determined by actuarial practice, the company may take a contribution holiday unless other wording or legislation prohibits such action.

In conclusion, this judgment of the Supreme Court is a landmark decision. It gives clear answers to several longstanding questions. It is now established that two components (DB & DC) may constitute one single pension plan, and that in such a case, the company may use the actuarial surpluses generated in the DB component to fund its DC contributions. Finally, the judgment establishes in what circumstances the Plan expenses may be assumed by the pension fund.

A warning however: the Court clearly points out that each case must be reviewed in regard to the "text and context" of the pension plan and we must remember that the judgment is rendered under Ontario law.

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1. *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39.

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