

The Overturning of *Kerry* – Is it too Soon for Employers to Celebrate? Surplus, Expenses and Contribution Holidays

Stephanie J. Kalinowski
January 30, 2008
Canadian Institute

Non-Expense Issues

- Use of Surplus
 - Employer contribution holidays
 - Use of DB surplus to fund DC contributions after plan conversion
- Adequacy of Conversion Notice

Employer Contribution Holidays

- From 1985, *Kerry* took contribution holidays
- Early plan language: company would contribute full cost of past service and amounts “as will provide...retirement incomes”
- 1965 amendment added explicit right to holiday and reference to advice of an actuary

Employer Contribution Holidays

- FST, Div. Court, and Court of Appeal all confirmed holidays were valid per *Schmidt*
- Silence OK as long as actuarial discretion not excluded
- Explicit 1965 amendment not a revocation of trust
- Not a diversion of assets

So What?

- Exclusive benefit language not a bar
- Most plan contribution language will pass threshold
- Amendments to make right explicit generally valid
- But...review each situation carefully

So What?

- The court stated that “Plan members cannot compel the employer to make additional contributions to preserve or increase the actuarial surplus.”

Cross-Subsidization

- Converted to DC in 2000
- DC provisions set up within existing plan
- DB benefits funded by trust, DC benefits funded through insurance policy
- DB surplus applied towards employer DC contributions after Plan was converted

Cross-Subsidization

- Trust agreement: the beneficiaries of trust were those persons designated under the Plan
- Plan distinguished between Part 1 and Pat 2 members and how benefits were funded

Divisional Court

- Analogous to a plan merger
- At law, two plans, two funds, two classes of members
- Terms of trust prohibited use of DB surplus to fund benefits for DC members (*Buschau* and *Transamerica* reasoning)

Court of Appeal

- Doesn't result in two separate plans
- Merger cases not applicable
- Membership in plan is not static
- DC members can be made beneficiaries of the DB trust fund

So What?

- Widespread practice not inherently wrong
- Subsequent cases:
 - *Sutherland v. HBC* (S.C.)
 - *Lennon v. Superintendent* (Div. Ct.)
- Will turn on relevant trust and plan language

So What?

- Movement away from *Buschau* and *Aegon v. Transamerica*?
- DC members will be entitled to share in surplus on wind up?

Notice of Conversion

- Company gave notice to members
- Superintendent found that it was adequate
- Stated in communications that if DB member elected to join DC portion, would no longer have any entitlement under DB provisions

Notice of Conversion

- Notice of plan conversion, even if optional, is required under s. 26 PBA
- Misleading and incorrect to state that members have no further rights or entitlements under the DB plan
- Notice was not adequate

So What?

- Inadequacies might not prevent registration of amendment
- But registration does not preclude other grounds for member action
- Onus on plan administrators to communicate clearly and accurately

Wrap-Up
