

THE SUPREME COURT OF CANADA ISSUES ITS JUDGMENT IN THE BURKE CASE

By JOSÉE DUMOULIN and FRANÇOIS PARENT

ON OCTOBER 7, 2010, THE SUPREME COURT OF CANADA RENDERED ITS JUDGMENT IN THE *BURKE V. HUDSON'S BAY CO.* CASE. THE SUPREME COURT DISMISSED THE APPEAL BROUGHT BY CERTAIN FORMER EMPLOYEES AND CONFIRMED THE JUDGMENT RENDERED BY THE ONTARIO COURT OF APPEAL.

THE FACTS OF THE CASE

In 1987, the Hudson's Bay Company ("HBC") sold one of its divisions to the North West Company ("NWC"). In the context of that transaction, some 1,200 HBC employees were transferred to NWC (the "Transferred Employees").

Within the context of the transaction, HBC and NWC entered into an agreement under which NWC undertook to establish a new pension plan for the Transferred Employees, who until then participated in the HBC pension plan. HBC and NWC also agreed that an amount sufficient to cover the defined benefits of the Transferred Employees in the HBC plan would be transferred to the NWC plan.¹

At the time of the transfer, the HBC plan had a substantial actuarial surplus. No part of such surplus was transferred from the HBC plan to the NWC plan.

The Transferred Employees instituted a class action against HBC, claiming that they had a right to part of the actuarial surplus of the HBC plan at the time of the transfer and, therefore, that part of such surplus should have been transferred to the NWC plan. By failing to transfer part of the surplus, HBC, in its capacity as plan administrator, allegedly breached its obligation

to treat all plan members (including the Transferred Employees) with an even hand. The Transferred Employees also claimed reimbursement of certain administrative expenses of the HBC plan that they alleged had been wrongly charged to that plan's pension fund prior to the transfer to the NWC plan.

THE SUPREME COURT OF CANADA'S DECISION

As regards the claim relating to the payment of certain administrative expenses of the HBC plan out of that plan's pension fund, the Court rejected the Transferred Employees' argument to the effect that such expenses should have been paid directly by HBC. Applying the principles expressed in *Kerry*² to the facts of the case before it, the Court concluded that neither the law nor the documents relating to HBC's pension plan imposed an obligation on HBC to pay the administrative expenses of the plan. In the absence of such an obligation, HBC could charge those expenses to the plan's pension fund.

As regards the issue of whether part of the actuarial surplus of the HBC plan had to be transferred to the NWC plan, the Court answered in the negative.

After analyzing the relevant principles of common law and equity, the Supreme Court stated that if the members of a pension plan have a right to the surplus at the termination of the plan, they then have a "floating equity" in the total assets of the pension fund, including the actuarial surplus, while the plan is in existence.

¹ It should be noted that subsection 80(13) of the *Pension Benefits Act* (Ontario) has required, since May 2010, the transfer of part of the actuarial surplus when there is a transfer of assets from one pension plan to another. However, that subsection was not yet in force when this bulletin was written.

² *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678.

The Court then examined the relevant documents relating to the HBC plan and concluded that, according to the terms of those documents, the members of the HBC plan (including the Transferred Employees) did not have a right to the surplus at the termination of the plan, their interest being limited to their defined benefits. Not having had a right to the actuarial surplus at the termination of the plan, the Transferred Employees therefore could not have a "floating equity" in the actuarial surplus.

The Court added that the obligation to treat all plan members with an even hand does not operate in a vacuum and must be anchored in the terms of the pension plan documentation. Since the Transferred Employees did not have any "floating equity" in the actuarial surplus, one cannot fault HBC for not transferring part of the actuarial surplus to the NWC plan.

COMMENTS

The Supreme Court's judgment is based mainly on the *Pension Benefits Act* (Ontario) and on certain principles of common law and equity.

In the case of a Quebec supplemental pension plan, section 162 of the *Supplemental Pension Plans Act* (the "SPPA") expressly provides that the administrative expenses of a plan shall be borne by the pension fund unless otherwise stipulated in the plan text.

As regards the issue of the transfer of part of the actuarial surplus of a plan in the context of a transaction such as the one entered into between HBC and NWC (where the parties agree that the purchaser will set up a new plan and that there will be a transfer of assets and liabilities from the vendor's plan to the purchaser's plan), section 195 of the SPPA provides that part of the actuarial surplus must actually be transferred in such circumstances and that, failing such a transfer, the proposed transaction, which is referred to as a division under the SPPA, will not receive the approval of the Régie des rentes du Québec.

As regards pension plans subject to the *Pension Benefits Act* (Ontario), it should be noted that the law has recently been amended to provide for the transfer of part of the actuarial surplus in the case of a division of a pension plan. However, the relevant provision of the law was not yet in force at the time of the writing of this bulletin. If this provision is promulgated, it appears that part of the actuarial surplus of a plan shall in the future be transferred in the event of a division, notwithstanding the principles expressed by the Supreme Court in the *Burke* case.

FRANÇOIS PARENT

514 877-3089

fparent@lavery.ca

JOSÉE DUMOULIN

514 877-3088

jdumoulin@lavery.ca

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE PENSION AND BENEFITS GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

JOSÉE DUMOULIN 514 877-3088 jdumoulin@lavery.ca

GUY LEMAY, CRIA 514 877-2929 glemay@lavery.ca

CATHERINE MAHEU 514 877-2912 cmaheu@lavery.ca

FRANÇOIS PARENT 514 877-3089 fparent@lavery.ca

MARIE-CLAUDE PERREAULT, CRIA 514 877-2958 mcperreault@lavery.ca

EVELYNE VERRIER 514 877-3075 everrier@lavery.ca

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