



EXCLUSIVE INTERVIEW:

Today I'm pleased to be talking to Elizabeth Brown, a pension partner with the law firm of Hicks Morley. She is going to answer some questions about the significance of the October 2010 unanimous decision of the Supreme Court of Canada (SCC) in *Burke v. Hudson's Bay Company* (HBC).

Thanks for joining me today Elizabeth.

Q The original sale by HBC of a division to the North West Company took place in 1987 and the case has been wending its way through the courts ever since.

This decision affirms the Ontario Court of Appeal Decision (OCA) of Madam Justice Gillese based on the plan documentation at issue, which said: (1) There was no obligation for HBC to transfer surplus pension plan assets on the sale of the business, and (2) The employer had the right to charge expenses against the pension plan.

Were there any surprises in this decision, particularly in view of the SCC decision in *Kerry*?

A. As you say Sheryl, the Supreme Court agreed with the OCA in *Kerry* on both of the key issues considered in *HBC* at the lower level. There are really no surprises in the *HBC* decision, but the case is still very important as a confirmation of those earlier decisions -- and in particular *Kerry* -- on the question of paying administration expenses from a pension plan.

It affirms the principle which is now I think well established, that absent an obligation to pay expenses directly contained either in a statute or in the plan documents, the employer is free to pay those administration expenses from the fund.

Q. To what extent does the SCC clarify the role of the corporation as an administrator and fiduciary vs. its role as a sponsoring employer for other purposes where it is not a fiduciary? How important is this distinction?

A. The SCC accepts what Justice Gillese said on this issue in the OCA decision. That is, HBC was the legal administrator of the plan and therefore had fiduciary obligations directly to the plan members when administering the plan.

The SCC then picks up on an important part of Justice Gillese's reasons, saying had there been a legal obligation to transfer part of the surplus as part of this asset transfer agreement, then the failure to complete such a transfer would have been a failure of fiduciary duty.

The key here is that at the time, there was no legal obligation to transfer any surplus under either the PBA or the plan documents. So there could be no breach of fiduciary duty, where there was no obligation to actually transfer the surplus. I think that's a very important distinction made by the Court.

Q. What does this decision mean for employers involved in the purchase or sale of a business?

A. If the parties are interested in negotiating a pension asset transfer for business reasons, the seller needs to get advice to determine if there is a legal obligation to transfer any surplus that might exist at the time of the transfer.

Now of course today many plans are in a deficit position, so the issue of transferring surplus is less likely to arise.

Q. Have subsequent economic and legal events superseded relevance of this decision? For example, I understand that Bill 236 amending the Ontario *Pension Benefits Act* (PBA) overrides the *Burke* decision by clearly requiring that the value of assets transferred include a prescribed portion of surplus. When does it come into effect? What about other Canadian pension jurisdictions?

A. Well you are right.

Generally asset transfers under the PBA currently require the Superintendent's approval, and this requirement will continue after the relevant sections of Bill 236 are proclaimed in force.

As one condition of that approval, the bill is going to amend s.80 of the PBA to require a prescribed share of any surplus in an exporting pension plan to be transferred to the successor plan when an employer sells, assigns or otherwise disposes of all or part of the business, or all or part of the assets of the business.

Now the new amended s.80 is not in force; Bill 236 indicates it will be proclaimed in force on a future date. And unlike for other provisions, there is nothing in the technical background issued with Bill 236 stating when that date may be.

The other thing is there have not yet been corresponding draft regulations governing the determination of what the prescribed share of surplus to be transferred will be, so we don't yet know how that calculation will have to be done.

But presumably this is one of the provisions that will not come into force until at least we have draft regulations. So much of the new asset transfers will depend on funding and surplus requirements that are yet to be prescribed.

Q. Will Bill 236 override the situation even where surplus ownership clearly belongs to the plan sponsor?

A. It will because of the section I'm talking about. Under s.80 the determining factor is going to be whether there is a surplus in the exporting plan at the time of the transfer, not who owns it.

Now, we don't know what the regulations are going to say about what the prescribed share will be, but just based on the new wording of the Act itself, it seems clear that there will be a transfer of surplus, whether or not there is any determination as to ownership.

Q. So have the labour and management side “buried the axe” on this one, or perhaps concluded that there won't be any surplus to worry about in the near future?

A. Well labour and management never bury the axe, but I think on this one the statue is going to take care of the issue at least as far as Ontario is concerned. Quebec also requires a pro-rata share of surplus be transferred in all asset transfers.

It's possible that in other Canadian pension jurisdictions there may still be some open question with respect to transfers and in those cases if you don't have a clear statutory provision, the *Burke* case doesn't clearly resolve everything

In the *Burke* case, the documents did not grant surplus entitlement to the members. So the Court could easily come to the conclusion that there was no entitlement to surplus on termination, and therefore there could be no common law requirement to transfer any surplus.

In another case, absent a statutory requirement to do otherwise, if the documents clearly gave surplus entitlement to the members on plan termination, someone might still argue that surplus should be transferred based on the common law principle that the members have some kind of contingent right to those assets.

Q. So this decision was very much on the facts?

A. Absolutely, but as you've pointed out and we've talked about, Bill 236 is going to resolve that issue at least for Ontario transfers going forward. Other jurisdictions may still have to deal with the facts.

Q. The SCC has ruled on a number of important pension cases including *Schmidt, Monsanto, Buschau, Kerry* and now *Burke* over the last several years. Where do you think the next frontier is? What might the next issue be that will make its way up to the top court?

A. I think it may relate to funding and the obligation of funding under a pension plan. When you are making decisions how much to contribute to the plan, what assumptions to use while funding a plan, how to instruct the actuary, when to file valuation reports, and whether to fund a plan on a minimum funding only basis, the question is whether the employer is acting as a fiduciary or in his role as plan sponsor? I think that is a decision ripe for some clarification.

A. Interesting. Thanks very much for talking to me today Elizabeth.

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