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Highlights

SALE OF BUSINESS

who gets the surplus?

When Hudson's Bay Company sold its Northern Stores division, assets to cover past liabilities, but no surplus, was transferred to the new employer's pension plan. The affected members claimed that they had not been treated with an "even hand," and that Hudson's Bay had breached its fiduciary duty to them. As Peggy McCallum explains, the Supreme Court of Canada found that Hudson's Bay had no legal obligation to transfer surplus. 1054

PLAN CONVERSIONS

the future of accrued benefits

Michael Wolpert and Kristin Smith discuss the Alberta Court of Appeal decision in *Halliburton Group Canada Ltd. v. Alberta*, which raises serious doubts as to what constitutes an accrued benefit under a pension plan, and the level of control sponsors have over pension plans. In this case, the Court upheld the decision of the Alberta Superintendent of Pensions to revoke previously registered amendments that froze salaries under a defined benefit formula when the members switched to a defined contribution formula. 1056

GOVERNANCE

Ontario records retention policy

Sonia Mak summarizes and provides commentary about the recently released Financial Services Commission of Ontario records retention policy. Although not a legal requirement in Ontario, in contrast with other jurisdictions, the FSCO policy provides guidelines and a best practices standard that will likely be given significant weight by a court in determining whether the plan administrator discharged its duty of care. 1058

also in this issue:

Death benefits after wind-up. Josée Dumoulin examines a decision of the Quebec Court of Appeal, which ruled that the value of a terminated pension plan's liabilities must be determined as of the wind-up date – even if some retirees die after the wind-up date, but before annuities are purchased. The plan sponsor's position was that the plan's liabilities should only include actual pension payments made to the retirees (page 1060). **Funding.** As funding obligations for defined benefit pension plans increase, plan sponsor finances in Canada continue to be under considerable pressure, particularly in the broader public sector. As Hugh Wright explains, if such organizations are required to meet traditional funding requirements, their ability to deliver necessary public services could be impaired (page 1062). **Legislation.** New Brunswick embarks on pension legislation review (page 1064).

Federated Press

SALE OF BUSINESS

Sale of a Business – Who Gets the Surplus?

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The Supreme Court of Canada has ruled on yet another "novel question in pension law:" Is the seller of a business required to transfer a portion of its pension plan's actuarial surplus when it transfers pension assets and liabilities to the buyer's pension plan?

The answer, according to the Supreme Court in the *Burke v. Hudson's Bay Company*[1] case, depends on the terms of the seller's pension plan documents, the relevant principles of the common law of contracts and trusts, as well as the relevant pension legislation. Where the plan members are not entitled under the plan documents to surplus on plan termination, members who are transferred to the buyer have no right to require a transfer of surplus from the seller's ongoing plan to the buyer's plan.

While, as a practical matter, this decision may have limited application in Ontario once the recent amendment to the Ontario *Pension Benefits Act*[2] requiring a transfer of surplus is proclaimed in force, it is nonetheless a significant decision for its findings with respect to surplus entitlement and members' rights in an ongoing plan.

In this case, the Court held unanimously that no surplus assets were required to be transferred from the plan of the seller, Hudson's Bay Co. ("HBC"), to the buyer of its Northern Stores division, the North West Company ("NWC"). However, the Court emphasized that the result was determined primarily on the historical terms of HBC's pension plan, which provided that HBC was entitled to any surplus upon termination of the plan. Accordingly, the result may well have been different if the plan documents had provided for employee entitlement to surplus. As the Court stated: "Each situation must be evaluated on a case-by-case basis. Specifically, the resolution of the issue of surplus transfer when the pension plan documents indicate that employees are entitled to surplus on plan termination is best left to another case where that issue arises."

The claim for the surplus transfer was made by representatives of the 1,200 employees who transferred employment from HBC to NWC as a result of the sale. In accordance with the terms of the sale, NWC had established a new pension plan for the transferred employees, and had agreed to provide pension benefits of equivalent value to those provided under the HBC plan. It had also agreed to assume the past service liabilities of the transferred employees under the HBC plan, contingent upon receipt of assets from the HBC plan that were sufficient to cover the accrued liabilities.

The transferred employees claimed that HBC, in its capacity as plan administrator, had breached its fiduciary duty to treat all pension plan members with an "even hand." By not transferring the surplus, the transferred employees argued that those employees who remained in the HBC Plan were able to benefit from the surplus, while the transferred employees did not. They claimed that they lost the opportunity to obtain benefit improvements that they might have received if they had been retained by HBC. Further, they claimed that they lost the protection that the surplus could give them from "solvency swings."

The Court agreed that HBC, as plan administrator, did have a fiduciary duty to the beneficiaries of the HBC Plan, including the transferred employees. As a result, it stated that HBC would have been obligated to transfer surplus to the NWC Plan if there was a legal obligation to transfer part of the surplus at the time of the sale. However, the Court agreed with the Ontario Court of Appeal that, in fact, HBC had no such legal obligation in this case.

In reaching this conclusion, the Court first considered the application of the PBA. It held that the PBA is "not a complete code," i.e., that compliance with the asset transfer

[1] 2010 SCC 34.
[2] R.S.O. 1990, c. P.8, hereinafter referred to as the "PBA."

requirements of the statute was not a complete answer to the question of whether HBC should be required to transfer surplus. It quoted from its previous decision in *Monsanto*[3] that the PBA's "*purpose is to establish minimum standards* and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members, and other entitled to receive benefits under private pension plans" [emphasis added by the Court].

Since the PBA establishes the minimum standard for asset transfers, the Court held that it was possible that the relevant plan and trust documents may set a higher standard. Following a review of all of the historic and current plan and trust documentation for the HBC Plan, the Court held that the members (including the transferred employees) were not entitled to the surplus upon termination of the Plan. As a result, they did not have any equitable interest in that surplus while the plan was ongoing, and HBC did not have a duty of even-handedness with respect to the surplus.

The Court reiterated its view, as expressed in *Kerry*,[4] that members of defined benefit plans have a right to have their defined benefits adequately funded, but they do not have a right to require surplus funding.

The Court dismissed the transferred employees' appeal claiming that HBC had improperly paid plan expenses from surplus in the six years immediately preceding the sale. It found, as it had in *Kerry*, that there was no term of the plan documents that obligated HBC to pay these expenses.

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[3] *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54.

[4] *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39.