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PENSION & BENEFITS LAW BRIEFING NOTE

SUPREME COURT OF BRITISH COLUMBIA UPHOLDS UNEQUAL REDUCTION OF BENEFITS IN MULTI-EMPLOYER PLAN

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Overview

A recent B.C. court decision provides welcome news for trustees of multi-employer, defined benefit, negotiated cost pension plans. Under s. 59(3) of the *Pension Benefits Standards Act* ("PBSA"), trustees of these plans can reduce accrued benefits to meet solvency requirements, and have used this power at various times in the last 12 years. But this power had never been judicially tested. In *Neville v. Wynne*, 2005 BCSC 483, the Court confirmed that the PBSA means what it says; but it also added a fiduciary test, which, on the facts, the trustees were able to meet, even though they reduced benefits unequally as between retirees and non-retirees. The reasoning in the decision provides important guidance for trustees concerned with the funding of multi-employer plans.

Details of the Case

The action was brought by Ian Neville, a member of the Plumbing and Pipefitting Workers Local 170 Pension Plan, against the Plan's seven trustees. It was instigated by steps the trustees took after an actuarial valuation showed the Plan to be unsustainable. After submitting a report to the Superintendent of Pensions and getting his approval, the trustees implemented benefit reductions that affected all members, but that disproportionately affected non-retired ones. Normally, accrued or vested benefits cannot be reduced, and the Plan had a section barring amendments that purported to do so. However, the PBSA provides an exception for negotiated cost plans in s. 59(3), which permits such reductions where circumstances require it. In particular, the Court said the trustees derived a discretion from s. 59(3) to reduce benefits to meet Plan solvency requirements, but only with the Superintendent's consent. Although the PBSA has been in force since 1993 and various plans have relied on s. 59(3), *Neville v. Wynne* is the first decision to interpret it.

What the Trustees Did

The trustees' discretionary exercise, made after receiving various options from the actuary, comprised a number of things. The trustees first reduced pensions to both retired and non-retired members by 13.5% across the board. Then, with respect to non-retired members only, they:

- changed future pensions from "joint with 50% survivor benefit" to "life only";
- changed unreduced early retirement for members with 15 years of service from age 60 to age 62;
- eliminated unreduced early retirement at age 59 for members with age plus years of service equal to 80;
- changed pre-retirement death benefit from the greater of 100% of commuted value and 50% of surviving spouse's pension to 100% of commuted value only;
- reduced monthly pension for future service from 5.7¢/hour to 4.6¢/hour; and
- removed the 1600 hour limit on contributions in any given year.

All but the last of these reduced the benefits to non-retired members.

What the Trustees Considered

Mr. Justice Preston of the Supreme Court of British Columbia found that the trustees had considered all relevant factors and no irrelevant ones; based on this, he said that the Court would not interfere with their exercise of discretion, even if the Court itself might have approached the solvency problem differently. The trustees were able to show that they had considered several things, including the following: (i) percentage increases for non-retired members since 1983 had been twice those granted to retirees and widows, except for a single increase in 1989; (ii) pensions to retirees and widows were not indexed for inflation; and (iii) non-retired members were still building pension benefits. The Court thought these were proper considerations, and also set out some others, namely:

- trustees should consider the circumstances giving rise to the loss;
- trustees should not impose burdens that imperil the employment of non-retired members;
- trustees should compare the plan benefits to other similar plans or pensions generally;
- benefit levels should not deter the members from employment in the industry; and
- trustees should consider whether retired members' benefits kept up with the cost of living.

Conclusion and Next Steps

Subject to the judgment being reversed—a notice of appeal has been filed and we will be monitoring the appeal's progress—the law in B.C., then, is that: (i) trustees of a negotiated cost plan may reduce benefits to meet solvency requirements, even where the benefits have accrued or are being paid and where the Plan might otherwise prohibit such a reduction; (ii) the reduction must have the Superintendent's prior written approval; and (iii) to withstand a court challenge, the trustees must be able to show that they considered all relevant factors and no

irrelevant ones. The list of relevant factors shown above is indicative rather than exhaustive. For example, a factor present in some plans, but not in *Neville v. Wynne*, is the ability to raise contribution levels. In other words, each case needs to be assessed on its own facts.

For a copy of the case or more information on it and its application to your circumstances, contact Murray Campbell, head of Lawson Lundell's Pension and Employee Benefits Group, at (604) 631-9187 (mcampbell@lawsonlundell.com), or John Kleefeld at (604) 631-9146 (jkleefeld@lawsonlundell.com).