DB to DC Plan Conversions – Litigation Update

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PLAN CONVERSIONS

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There have always been trends in pension litigation. Instead of disputes over ownership of actuarial surplus, we now see disputes about benefit cuts and funding deficiencies on a wind-up of the plan. In recent years, many private sector employers in Canada have frozen participation in their defined benefit ("DB") plans and either stopped providing pension benefits entirely or now provide benefits through a defined contribution ("DC") plan. We are now seeing what may be the beginning of the newest pension litigation trend: employees affected by the shift from a DB to a DC plan commencing an action against the employer that initiated the shift where the employees' retirement income is less than anticipated.

Two recent British Columbia cases reflect that anticipated trend: *Weldon v. Teck Metals Ltd.*[1] and *Dawson v. Tolko Industries Ltd.*[2] While a finding on liability is not available in either decision, the cases should help sponsors who have or who are considering a conversion appreciate the nature of the litigation risk that could arise as a result.

If the employer decides to merely freeze its DB plan to new members and have new employees accrue under the DC plan, it will take some time for that change to give the employer the cost certainty that prompted the change because the employer will have a continuing obligation to fund the DB plan. One option some employers have considered is giving the employees the option of converting their DB entitlements to a DC pension, thereby eliminating the need for the employer to continue to fund those DB entitlements.

Tolko and *Teck Weldon* reveal that while the conversion option may give the employer more cost certainty, it may increase the employer's legal risk.

In *Tolko*, the sponsor gave the DB plan members a chance to convert their DB entitlements. If the member made the election, a lump sum amount would be transferred to the DC plan to reflect the value of the member's accruals under the DB plan to date. Members were given written materials containing actuarial projections based on discount rates and possible rates of investment return. The members of the plaintiff class in *Tolko* had all opted for the conversion option. The plaintiffs then argued that the employer (as sponsor and administrator) and the consulting actuary (in addition to his firm) committed the following breaches of duty:

- failed to advise the plaintiffs of the personal considerations they ought to have considered when considering the offer;
- failed to have regard for the plaintiffs' best interests when establishing initial account values;
- used the wrong discount rate;
- committed negligent misrepresentation in respect of the written material;
- failed to avoid a conflict of interest;
- used an unreasonable annuity purchase interest rate in the written material; and
- failed to advise the plaintiffs of the risks associated with the conversion.

The only written decision in respect of that case involves a pre-trial application brought by the actuarial consulting firm to have the claims against it dropped to the extent that they were brought by members of the plaintiff class that had signed releases when their employment was terminated. The consulting firm argued that the releases covered the firm as well and that application was dismissed. However, before a hearing was held on the merits of the case, the dispute was settled.

We cannot use *Tolko* to help us understand the standard that will be applied in a dispute about a DB to DC conversion. However, the case does illustrate the types of claims that are likely to be advanced by plan members who take the conversion option and who are later

[1] 2013 BCSC 345.
[2] 2010 BCSC 1384.

disappointed by the value of their DC accounts. Obviously, the nature of the materials provided to those offered the conversion option will be closely scrutinized and significant attention must be paid to making sure that those communication materials are not only accurate but that they encourage the members to obtain appropriate advice before making any election decisions.

Like *Tolko*, the plaintiff class in *Teck Weldon* were given a one-time opportunity to elect to convert their DB entitlement to a DC entitlement. The plaintiffs brought action against the employer, the actuarial consulting firm that was involved in the conversion and the trustee. Specifically, the plaintiffs claimed that:

- the employer and the trustee breached the fiduciary duties owed to the plaintiff class members;
- the actuarial consulting firm was an agent of the employer and subject to the same fiduciary liabilities;
- by providing information that was untrue, incomplete, inaccurate or misleading, each of the defendants are guilty of deceit and/or negligent misrepresentation; and
- the employer is vicariously liable for the actions of the trustee and the actuarial consulting firm.

There has not yet been a hearing on the substance of the claims being advanced. The latest decision in the *Teck Weldon* case resulted in the claims against the trustee being struck out on the basis that there was no genuine issue for trial (it was plain and obvious that they would not succeed against the trustee because the trustee did not have a role in providing advice to the employees in respect of the conversion).

The employer and the actuarial firm also sought to dismiss the claims against them on the basis that the plaintiffs were out of time to bring them because the claims were brought after the limitation periods established by the *Limitation Act*[3] in British Columbia. The plaintiffs argued that the defendants engaged in deceit, and the *Limitation Act* creates special postponement rules for that type of claim. That is, plaintiffs are allowed an extension of the normal limitation period if the claim involves deceit so that the limitation period does not begin to run until the plaintiffs knew that they had a claim or ought to have known that they had a claim.

Because the application was for a summary judgment where evidence is not to be considered and the claims are to be assessed merely on the applicable law and the pleadings, the Court determined that it could not make a decision about the limitation period and the deceit claims. Because dismissing the other claims on the basis that they were brought too late would not dismiss the case entirely (it would simply change the legal and factual ground on which the claims could be brought), the Court rejected the defendants' application.

[3] R.S.B.C. 1996, c. 266.