KOSKIE MINSKY
JUSTICE MATTERS

Pension and Benefits

This is a summary of Pension and Employee Benefits matters of interest.

Eggleton Tables Bill to Protect Pensioners Before and During a Company's Insolvency

On September 25, 2018, just days before his retirement, Senator Art Eggleton moved second reading of Bill S-253, An Act to amend the Bankruptcy and Insolvency Act and other Acts and Regulations (pension plans).

Bill S-253 seeks to accomplish two things:

1. To amend the *Bankruptcy and Insolvency Act* ("BIA") and the *Companies' Creditors Arrangement Act* ("CCAA") to provide for priority status for claims in respect of underfunded pension plans; and
2. To amend the federal *Pension Benefits Standards Act, 1985* ("PBSA") and the *Pension Benefits Standards Regulations, 1985* to empower the Superintendent of Financial Institutions to prescribe measures to be taken by the employer in respect of an underfunded pension plan, including restrictions on the issuance of dividends or share buy-backs.

The proposal to amend the BIA and the CCAA is not new. Last October, we published **a post** on two private Members' Bills in the House of Commons aimed at making changes to the insolvency regime to give priority to claims arising out of an underfunded pension plan and the cessation of employer activity in a group insurance plan. Since then, a third private Member's Bill was introduced in June 2018 to amend the PBSA to authorize the administrator of an underfunded pension plan, where the employer is insolvent, to amend the plan or to transfer any part of the assets or liabilities of the plan to another pension plan. This Bill also proposed amendments to the CCAA to require the relevant parties to agree on the payment of missed normal cost pension contributions before key employee retention plans can be approved in a CCAA proceeding. All of these Bills remain at first reading.

However, Bill S-253 is distinguishable from the private Members' Bills because it not only addresses pension priorities in an insolvency situation, but also pension underfunding *before* a company becomes

insolvent.

During second reading, Senator Eggleton cited the *Sears Canada* case as a direct example of what his Bill is trying to prevent. The hundreds of millions of dollars of dividends doled out to Sears Canada shareholders while the pension plan was underfunded have come under recent scrutiny. As a company financially deteriorates, vulnerable creditors like retirees and employees are left to pay the price of the company's actions with their earned wages – deferred or otherwise. This past August, many Sears retirees have had their monthly pension benefits cut by 30%. Their pension promise has not been kept.

While Sears Canada serves as a cautionary tale to pension regulators across Canada, it is not alone in its corporate practice of directing large cash flow to shareholders and directors. In **a report** published by the Canadian Centre for Policy Alternatives (CCPA) last year on pension deficits and shareholder payments among Canada's largest companies, it was found that 25 of the companies listed on the S&P/TSX 60 could make up their pension shortfalls with less than a year's worth of shareholder payments. In 2016 alone, payments to shareholders via dividends or share buy backs "were four times the value of the pension deficit for those companies with pension plans."

The CCPA Report's recommendations include:

- Limiting shareholder payouts when pension plans are underfunded;
- For pensions plans that are covered by Ontario's Pension Benefits Guarantee Fund (PBGF), increasing PBGF premiums for companies not making up pension shortfalls;
- Mandatory disclosure and consultation with regulators and plan members before extraordinary dividends can be declared and before share buyback programs can be initiated

These recommendations are in line with what other countries are already doing to ensure the security of retirees' benefits. For example, in the United Kingdom, pension regulators have 'moral hazard powers' to act where it believes an employer is deliberately attempting to avoid their obligations to a defined benefit pension plan. In the United States, plan sponsors are required to give the American Pension Benefit Guaranty Corporation advanced notice of corporate and pension plan activity that could potentially put pensions at risk, including the declaration of an "extraordinary dividend". It is time that Canadian regulators follow suit.

Like the many Bills that have been put forth to protect pensioners, Bill S-253 must go through a long legislative process and will undoubtedly be debated at length by the Senate, as well as the House of Commons, before it can be proclaimed into law. While the Bill is unlikely to pass in its current form, pressure continues to mount on politicians and regulators to act to strengthen workplace pension security.

Naming the Correct Parties Correctly: A note on

common corporate law errors made by union-sponsored pension and benefit plans

The application of commercial law concepts to pension and benefit plans often creates confusion for stakeholders in the pension and benefits industry. This article seeks to shed light on two basic but fundamental issues trustees and their advisors should keep in mind when acting for a pension or benefit fund and entering into legal relationships.

As a preliminary note, it is important to understand the distinction between the pension plan and the pension fund. The pension plan will create the pension fund which will hold the assets of the pension plan. It is integral to keep the trust relationship between the trustees and beneficiaries of a pension fund in mind when decision making occurs on behalf of the pension fund. In the context of a pension fund, a trust can be conceptualized as a legal relationship whereby the trustees of the pension fund have legal ownership and control over the assets of the pension fund. Consequently, the trustees will receive, hold, administer and make investment decisions in respect of the assets of the pension fund for the benefit of the beneficiaries (who in most cases are the employees who are members of the pension plan and beneficiaries of the pension fund).

A useful starting point in understanding how such funds enter into legal relationships is to examine where the decision-making power of the trustee derives from. When forming a pension fund, an important step is to determine how the trustees are selected. Typically, this will be mandated in the trust agreement itself which will state who may become trustees. In most cases, the trust document will give the union (or unions) and/or employer (or employers) the power to appoint representatives to the board. The duties of the trustees will flow from the trust agreement itself as well as other trust documents such as the pension plan rules and statement of investment policies and procedures, legislation such as the *Pension Benefits Act* (Ontario) and/or the *Pension Benefits Standards Act*, the *Income Tax Act* and the common law. The trustees are empowered to make decisions on behalf of the pension fund such as entering into various contracts and agreements and to provide for the payments of pension and benefits to employees and their beneficiaries.

From a corporate commercial perspective there are two simple but crucial matters that trustees should be aware of:

1: Ensuring that the correct parties are named.

It is vital to determine who the trustees, on behalf of the pension fund, will be contracting with. For example, if the pension fund is entering into a services contract with a company, the trustees should be sure to determine whether they are intending to contract with the company itself, or a parent company or perhaps the individual owner of the company. If the proper parties are not named, the trustees may lose any recourse against that party should it not meet its obligations under the contract.

2: Ensuring that the parties are named correctly.

A second consideration to take into account is to ensure that the parties themselves are named in accordance with the legal name under which they are registered. Businesses will often conduct business or use short forms that are different from their legal name. Similarly, pension and benefit funds will often adopt shortened versions of their names on documents that are different from the legal name of the relevant fund. The fund itself has a distinct legal name mandated by the trust agreement that should be used by the trustees when entering into agreements. If the proper name is not listed, a pension or benefit fund may not be able to enforce its contract and in certain cases this might lead to trustee liability.

While these two points may seem straightforward, these are in fact common mistakes that occur and can result in significant repercussions and added cost for union-sponsored pension and benefit plans.

This edition of Pension and Benefits was produced and edited by the following members of the Pension and Benefits Law Group at Koskie Minsky LLP

Amy Tang, Associate

Omar Sunderji, Associate

For previous issues of Pension and Benefits or other Koskie Minsky LLP publications, please visit our publications.