COURT FILE NO.: 06-CV-307491 CP
DATE: 20061003

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **MONTREAL TRUST COMPANY OF CANADA**, Applicant

- and -

JAMES ROBERT ARMSTRONG, KENNETH JAMES McGREGOR and DONALD ROSS LARGE, Respondents

COUNSEL: **J. Brett G. Ledger, Alexander Cobb**, for the Applicant

Robyn Matlin and Susan L. Philpott, for the Respondents

DATE HEARD: September 20, 2006

ENDORSEMENT

[1] Montreal Trust Company of Canada commenced an application regarding the rights to actuarial surplus in the Montreal Trust Pension Plan (2001) (the "Plan"). As of March 31, 2006, the surplus was valued at approximately $30.5 million. At present, only 30 individuals are accruing credited service under the Plan. Twenty-two of those individuals are on long-term disability; only eight individuals are " active" members of the Plan.

[2] Further to an endorsement dated June 27, 2006, I certified the application as a class proceeding, with James Armstrong, Kenneth McGregor and Donald Large as the representative respondents (the "Representative Respondents").

[3] Montreal Trust and the Representative Respondents now jointly move for approval of the settlement of this class proceeding on the terms set out in the Surplus Sharing Agreement made as of February 1, 2006, as subsequently amended (the "SSA").

The following are the key provisions of the SSA

[4] The Plan will be amended to provide for pre-retirement indexation for active and disabled members of the Plan and certain Plan members whose employment has been transferred to an affiliated company. As detailed below, expenses associated with the Plan termination and with the negotiation and implementation of the surplus- sharing proposal will be paid from the Plan. Disabled members receive a special payment out of the surplus, in

recognition of the fact that after the termination of the Plan they will no longer accrue pension benefits. The remaining amount will be divided 50/50 between Montreal Trust and what is defined as the " Sharing Group". Allocations among members of the Sharing Group are proportionate to the value of individual class members' liabilities in the Plan or the value of their liabilities when they transferred out of the Plan, as the case may be.

[5] The Sharing Group includes what are referred to as "Cash-Outs", who are basically individuals who terminated employment with Montreal Trust after December 2, 1993 and whose benefits under the Plan have been previously settled. Counsel advised that the December 2, 1993 cut-off was chosen because this was the date that Bank of Nova Scotia acquired Montreal Trust. They did not select an earlier date because of the administrative difficulty in locating persons who terminated employment with a predecessor more than 13 years ago. Counsel refer me to *McMaster University* v. *Robb* (2001), 37 C.C.P.B. 252 (Ont. S.C.J.); *CF Kingsway Inc.* v. *Goetz* (2002), 32 C.C.P.B. 226 (Ont. S.C.J.) and *Hembruff* v. *Ontario Municipal Employees' Retirement Board* (2005), 78 O.R. (3d) 561 (C.A.) as authority for the proposition that persons who choose to remove the commuted value of his or her benefits under a pension plan give up any continuing claim to any benefits under that pension plan. Counsel explains that the minimal payout to this subset of the Sharing Group was negotiated to foreclose nuisance claims.

[6] The Sharing Group also includes the estates of individuals who died after April 17, 2002 without a spouse or other person entitled to death benefits or other payments under the Plan. The April 17, 2002 date was selected because it is the date on which discussions were first held between Montreal Trust's legal counsel and legal counsel for the committee of members and former members of the Plan formed to pursue the issue of entitlement to pension surplus (the "Committee").

[7] The inclusion of these two categories in the Sharing Group was negotiated.

[8] The distribution of the surplus pursuant to the SSA is subject to the approval of the various provinces' pension regulatory authorities.

[9] The SSA provides for the payment of Montreal Trust's and the Committee's reasonable legal, actuarial, and other fees, expenses and disbursements "off the top" out of the Plan. Under the SSA, each of Montreal Trust and the Committee has the opportunity to review the fees, expenses and disbursements incurred by the other. Counsel submit that this amounts to a mutual check on the reasonableness of the their respective fees. Neither objects to the costs claimed to date by the other. Those costs are substantial: they total approximately $4.4 million. In communications with members of the Sharing Group, the administrative, legal and actuarial expenses related to the Plan termination and the implementation of the sharing proposal were estimated at $5 million. Counsel for Montreal Trust points out that the costs incurred are in line with those incurred in comparable matters: in *Burleton* v. *Royal Trust Corp. of Canada* (2003), 37 C.C.P.B. 19 (Ont. S.C.J.), which also involved the settlement of the issue of entitlement to pension surplus, fees and disbursements of $5,294,000 were approved by the Court. Montreal Trust has paid the fees, expenses and disbursements incurred, and will be reimbursed if the SSA is approved. The fact that Montreal Trust has, on an ongoing basis, paid the considerable legal fees and actuarial fees it

has been charged, and the legal fees of the Committee's counsel and actuary, without a guarantee that they would be reimbursed from the Plan is to me a greater indication that the charges incurred to date are reasonable.

[10] The class has 3,615 members. There has been extensive communication with class members and 2,977 have consented to the proposed arrangement. Only one proposed member has opted-out of the class. Class Counsel advised the court orally that the party that opted out is an estate trustee entitled to a $500 payment. The trustee's position is that the receipt of a $500 payment at this stage of the estate's administration entails more work than it is worth.

[11] The 50/50 split roughly approximates the historic contributions of Montreal Trust and the Plan members to the Plan.

[12] The settlement is the result of five years of arm's length negotiations. The parties were represented by experienced counsel with the benefit of extensive advise from actuaries.

[13] If the SSA is not approved, a stalemate could result: the only way to require the distribution of the surplus from the Plan is to wind it up. While the Plan is ongoing, the members and former members of the Plan do not have the power to unilaterally force a wind-up. Instead, they would have to seek regulatory and/or court intervention in an attempt to force a wind up.

[14] The question of who is entitled to the surplus in the Plan is complex, and resolving it through contested litigation would be a lengthy process with risks to both sides.

[15] Having regard to the foregoing factors, I am satisfied that the SSA is in the circumstances fair, reasonable and in the best interests of those class members affected by it. Accordingly, an order shall issue approving the SSA in the form on which I have endorsed my fiat. I have made minor changes to the revised draft order submitted to me to clarify that whether or not legal, actuarial and other fees, expenses and disbursements incurred after the date hereof in connection with the implementation of the SSA are "reasonable" is subject to further determination by the Court.

Alexandra Hoy J.

DATE: October 3, 2006