

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MONTREAL TRUST COMPANY OF CANADA, Applicant

- and -

**JAMES ROBERT ARMSTRONG, KENNETH JAMES MCGREGOR
and DONALD ROSS LARGE, Respondents**

BEFORE: Justice Alexandra Hoy

**COUNSEL: J. Brett G. Ledger, Alexander Cobb and Craig T. Lockwood,
for the Applicant**

Mark Zigler, Robyn Matlin and Susan L. Philpott, for the Respondents

DATE FIRST HEARD: May 11, 2006

SUPPLEMENTARY ENDORSEMENT

[1] This endorsement is further to, and supplements, my handwritten endorsement in this matter, released May 11, 2006.

[2] Counsel for the Applicant and the Respondents appeared before me on May 11, 2006, jointly seeking an order certifying this proceeding as a class proceeding and approving the proposed notice of certification and proposed manner of service.

[3] In this proceeding, the Applicant seeks a declaration that the surplus in the Montreal Trust Pension Plan (2001) (the "Plan") can be transferred to the Applicant in accordance with the Surplus Sharing Agreement entered into between the Applicant, and The Montreal Trust Member Surplus Committee (the "Committee") on February 1, 2006.

[4] By handwritten endorsement issued on May 11, 2006, I indicated that I was satisfied that the requirements for certification set out in section 5 of the Class Proceeding Act had been met.

[5] In that endorsement, I reflected what I thought had been counsels' oral submissions to me, including that the pension regulators in several provinces required a court declaration that the Applicant was entitled to the surplus in the Plan before they would consider whether or not to approve the distribution of surplus provided for by the Surplus Sharing Agreement.

This was a factor in my conclusion under section 5(1)(e) of the Act that certification was the preferable procedure for the resolution of the common issue.

[6] After my endorsement was released, counsel contacted me to indicate that I had misapprehended certain oral submissions made. In particular, counsel clarified that the regulators of five provinces do not “require” a court declaration before they will consider whether or not they will permit the distribution of surplus contemplated by the Surplus Sharing Agreement, as I had indicated.

[7] I appreciate counsel having drawn this to my attention.

[8] Counsel made further oral submissions at a telephone case conference on May 18, 2006. On June 16, 2006, counsel for the Applicant filed the Supplementary Affidavit of Odette Ferland, and certain other materials, to address concerns, outlined below, I raised as to whether a class proceeding in Ontario was the “preferable procedure”.

[9] Counsel made clear that they may not simply be asking the court to approve the Surplus Sharing Agreement subject to all applicable regulatory approvals pursuant to section 29(2) of the Act, as a settlement agreement. Counsel may also seek a declaration of substantive rights to trust property, namely, the Applicant’s right to surplus under the terms of the Plan and the related trust agreement, again subject to all applicable regulatory approvals. Alternatively, counsel may seek a consent order as to pension entitlement.

[10] The declaration of entitlement, if sought in the Application, would require the interpretation of documents subject to the laws of Quebec, the Plan and the related trust. Presumably, expert evidence as to the laws of Quebec would have to be adduced at the hearing of the application. The so-called “major authority”, that is the provincial pension regulator that coordinates the regulation of the Plan, is La Régie des Rentes du Québec. The majority of Plan members and former members, including those not entitled to benefits under the Plan on the wind-up date, reside in Québec. The distribution of the surplus provided for in the Surplus Sharing Agreement is subject to the approval of the pension regulator in each province in which members of the Plan reside. Although several provincial pension regulators must be satisfied before they approve a distribution of surplus that the Plan documents entitle the employer to the surplus on a plan wind up, none of them requires a court declaration that the plan documents entitle the employer to the surplus on plan wind-up before it will consider whether or not to approve a proposed distribution of surplus. Under the legislation of other provinces, an employer is not required to demonstrate entitlement to surplus under plan documents in order to be entitled to a portion of the surplus assets. Instead, various levels of employee approval must be met. Under the applicable legislation in Manitoba, the regulator may decide to seek a court declaration as to whether an employer is entitled to the surplus under the plan documents. If it does so, it is to seek a declaration from the Court of Queens Bench in that Province.

[11] Moreover, the declaration as initially worded appeared to involve the interpretation of pension legislation of provinces other than Ontario. In connection with its June 16 submissions, the Applicant has revised the order sought to make clear that this is not the case.

[12] Counsel for the Applicant submits, and the Supplementary Affidavit of Odette Ferland indicates, that there is a real and substantial connection between the subject matter of the Application and the jurisdiction of Ontario. Ontario is connected with more members currently entitled to receive benefits (as either “active” or “former” members of the Plan) than any other Province. Two of the three Representative Respondents reside in Ontario, as do 6 of the 12 members of the Montreal Trust Member Surplus Committee, the committee of former Plan members formed to seek a wind-up of the Plan and surplus distribution. RBC Dexia Investor Services Trust holds all of the Plan assets in custody in Ontario.

[13] The Applicant has filed with the Court a copy of a letter from Ontario’s pension regulator, the Financial Services Commission of Ontario (“FSCO”), indicating that if the Applicant obtains a court order declaring that the Plan provides for the payment of surplus to the Applicant before obtaining the regulator’s consent to the distribution of surplus, it is assisted in exercising its regulatory function. Pursuant to section 79(3)(b) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the Plan must provide for payment of surplus to the employer on wind-up of the Plan before FSCO can consent to the refund of surplus.

[14] The evidence is that the Régie has also been made aware of this proceeding and has no objection to it.

[15] As noted on my prior endorsement, counsel have advised that all pension regulators will receive notice of the hearing at which the approval of the settlement of the class action and the Surplus Sharing Agreement will be sought.

[16] As indicated in my prior endorsement, the proposed class consists of 3,615 individuals across 10 provinces. Counsel has submitted that pension legislation of provinces affecting a significant number of the members of the proposed class requires that the provincial pension regulator be satisfied that the employer is entitled to surplus on the wind up of the plan before approving a surplus sharing arrangement, and the Surplus Sharing Agreement is subject to all required regulatory approvals. Accordingly, all members of the proposed class have an interest in the proposed common issue, namely:

Under the terms of the Plan, is the Applicant entitled to the actuarial surplus remaining in the Plan after the payment of all accrued benefits and permissible expenses (the “Surplus”), and does the Plan permit payment of such Surplus to the Applicant?

Subject to any submissions that may be made at the hearing at which the approval of the settlement of the class action and the Surplus Sharing Agreement will be sought on the issue of jurisdiction, having regard to the number of members of the proposed class, and the advantages of judicial economy and access to justice afforded by a class action proceeding, I am satisfied a class proceeding is the preferable procedure for the resolution of the common issue.

[17] Accordingly, an order certifying the proceeding as a class proceeding shall issue in the form on which I have today endorsed my fiat. The order of today's date replaces my order of May 11, 2006 in this matter.

Alexander H. J.
Hoy J.

DATE: June 27, 2006