CITATION: Toronto District School Board v. Field, 2010 ONSC 3865
COURT FILE NO.: 10-CV-399712CP
DATE: July 6, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Toronto District School Board

Applicant

- and -

Audrey Field and Alexander Thomson

Respondents

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

Frank Cesario and Stephanie Kalinowski for the Applicant
Jon Ptak, Clio Godkewitsch, and Anthony Guindon for the Respondents

HEARING DATE: July 6, 2010

REASONS FOR DECISION

PERELL, J.

Introduction

[1] There are two motions before the court.

[2] First, the applicant, Toronto District School Board, and the proposed Representative Respondents, Audrey Field and Alexander Thomson, seek an order certifying this application as a class proceeding and approving a settlement sharing the surplus of a pension plan; namely, the Toronto District School Board Business and Support Employees' Paid-Up Pension Plan, FSCO Registration No. 0369785.

[3] Second, there is a motion for an order for: (a) approval of the retainer agreement between Class Counsel and the Representative Respondents; (b) a approval of Class

Counsel fees in the amount of $140,655.40, plus a multiplier of 2, and disbursements in the amount of $4,162.76 for a total fee of $285,473.56; and (c) approval of Class Counsel fees up to a maximum of $50,000 for implementation of the settlement, subject to further court approval, if necessary.

[4] The surplus sharing agreement, for which court approval is sought, was entered into on February 1, 2010 between the Board, the proposed Representative Respondents, and certain beneficiaries of the Plan. The amount of surplus to be divided is approximately $5.4 million.

[5] If approved, the settlement provides that the Plan will be wound up, and the Board and beneficiaries of the Plan will share, on a 50/50 basis, the actuarial surplus remaining in the Plan after payment of benefits and deduction of all expenses associated with winding up the Plan ("Shareable Surplus"). Each side will bear its costs of negotiation and implementation of the Agreement out of its 50% share of the net surplus.

Background

[6] The background to the two motions is as follows:

- The Board is the Sponsor and Administrator of the Plan. The Plan actuary is Mercer (Canada) Limited ("Mercer"). The Plan custodian is RBC Dexia, the successor to the Royal Trust Company

- The Plan was established in 1971 to accept the transfer of assets from another pension plan. The Plan is a defined benefit plan providing retirement benefits for certain former employees of the North York Board of Education, which has since merged with the Board, and to certain other persons entitled to benefits or other payments from the Plan. The Plan has been closed to new members and future accruals since August 30, 1971.

- The Respondents, Audrey Field and Alexander Thomson receive pensions under the Plan. They are both members of the Toronto District School Board Paid-Up Pension Plan Pension Surplus Committee ("the Committee") established in 2005 to advocate for the distribution of surplus from the Plan to Plan members, or alternatively, to negotiate a surplus sharing agreement with the Board.

- In order to fund the benefits payable under the Plan, the Plan text and the *Pension Benefits Act* R.S.O. 1990, c. P.8 and its predecessor statutes required that the Board make periodic contributions to the Plan fund. The amount to be contributed by the Board was based on an actuary's recommendation as to the amount required to fund the pension benefits stipulated in the Plan.

- Due to the way in which defined benefit plans are funded, surplus arises when the assets in the pension fund on termination exceed the amount of assets required to satisfy the value of the Plan's promised pension benefits to Plan members, former members and other beneficiaries of the Plan (i.e. the Plan's liabilities) and the Plan's wind-up administration expenses.

- The most recent Actuarial Report was prepared by Mercer, as at December 31, 2006. The Plan's assets and liabilities were valued both on a going concern basis and on a solvency basis (which assumes that the Plan terminates on the valuation date). The Actuarial Report indicates that the Plan had surplus assets of $5,378,200 (on a solvency basis) as at December 31, 2006.

- Section 27 of the original Plan text from 1971 states that surplus on the Plan wind-up is payable to the Board. The Plan has been amended on a number of occasions and was last restated in 1981. Article XIII of the 1981 restated Plan text also states that the surplus on the Plan wind-up is payable to the Board.

- In the absence of a settlement, there are contested legal questions about who is entitled to the surplus in the Pension Plan and about how the surplus might be obtained. Each party claims an absolute entitlement to the whole of the surplus and there are obstacles to overcome to obtain a wind-up of the Plan if a wind-up were resisted.

- Ms. Field and Mr. Thomson retained Koskie Minsky LLP as legal counsel on behalf of the Committee. The Committee entered into negotiations with the Board to establish terms on which the Board might wind-up the Plan and distribute the surplus. The negotiations relating to the wind-up of the Plan and about distributing the surplus took over four years.

- By way of a term sheet dated April 24, 2008, the Board and the Committee agreed on the principal terms of a proposal to wind-up the Plan and share surplus between the Board and the Plan membership pursuant to a surplus sharing agreement.

- In May 2009, the Committee sent a report to the last known addresses of all Plan Members advising them of the terms of the proposal. In addition, a meeting was held for Members to ask questions of Koskie Minsky and members of the Committee.

- Over 72% of the Members approved the proposal and agreed to authorize and retain Koskie Minsky to act on their behalf to negotiate a surplus sharing agreement.

- After five years of discussions and negotiations, the parties executed the final settlement agreement effective February 1, 2010.

[7] The settlement agreement includes the following provisions:

- Members are defined to mean "the members and former members of the Plan and any other person to receive benefits from the Plan as of December 31, 2004."

- Conditional on approval of the court and of the Superintendent of Financial Services, the Members and the Board will each receive an equal share of Shareable Surplus.

- All legal and actuarial fees incurred by the Board associated with the negotiation and court approval of the Agreement, and obtaining approval of the Superintendent and which are not "wind-up expenses" shall be paid directly by the Board or out of the Board's share of the Shareable Surplus.

- All legal and actuarial fees incurred by the Committee in negotiating, settling, and implementing the Agreement and which are not "wind-up expenses" shall be paid out of the Members' share of the Shareable Surplus.

- Each Member will receive a cash distribution of the Members' portion of net Shareable Surplus, less withholding taxes, based upon the actuarial value of each Member's pension entitlement under the Plan as at December 31, 2004, as determined by an actuary in accordance with the Agreement and subject to a minimum distribution of $2,000.

- The Agreement is conditional on receiving regulatory approval, court approval, and no more than 5% of the Sharing Group members opting-out of the court settlement approving the Agreement

[8] To date, the fees incurred by Class Counsel in negotiating the Surplus Sharing Agreement between Class Members and the Board total approximately $140,655.40 with disbursements of $4,162.76, not including actuarial expenses. The total time expended by Class Counsel over a five-year period totals 280 hours (lawyers), 10.1 hours (law students) and 178.7 hours (communications clerks), for a total of 468.8 hours total.

[9] There are 413 Members as at December 31, 2004, and they constitute the proposed class. As at January 1, 2006, their average age was 81.3 years old.

[10] As of June 28, 2010, the proposed Class is composed of: (a) 190 retirees; (b) 134 surviving spouses; (c) 87 estates of individuals who were retirees or surviving spouses in receipt of pension benefits as at December 31, 2004; and (d) 2 deferred pensioners.

[11] Notice of this motion for certification of the Respondent Class and settlement approval was sent via regular mail by Koskie Minsky to those Members who retained the firm. The Board sent notices to the balance of members for whom addresses had been obtained.

[12] There are 20 proposed class members who have not been located despite efforts to do so. There are 7 members whose residence have been located, but notices to them were returned to sender. Therefore, there are 27 Members for whom current contact information is not available.

[13] If this court approves the settlement, the Board will make an application to the Superintendent to approve the wind-up of the Plan and the related distribution of Shareable Surplus. Section 79(3) of the *Pension Benefits Act* permits payment of surplus to an employer on pension plan wind-up, where certain conditions are met. Section 79 (3) states:

> 79 (3) Subject to section 89, the Superintendent shall not consent to payment of surplus to an employer out of a pension plan that is being wound up in whole unless all of the criteria set out in subsection (3.2) are satisfied and,
>
> (a) the pension plan provides for payment of surplus to the employer on the wind-up of the pension plan; or
>
> (b) a written agreement of the employer and the members, former members and other persons entitled to payments on the date of the wind-up is made in accordance with such conditions as may be prescribed and authorizes payment of surplus to the employer.
>
> (3.1) [deleted; addresses surplus on "partial" wind-ups of pension plans]
>
> (3.2) The following are the criteria referred to in subsections (3) and (3.1) that must be satisfied for the payment of surplus to an employer:
>
> 1. The Superintendent is satisfied, based on reports provided with the employer's application for payment of the surplus, that the pension plan has a surplus.
>
> 2. Provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of the termination of the pension plan.
>
> 3. The applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus.

[14] Section 79 (3) was enacted effective May 18, 2010 by the *Pension Benefits Amendment Act, 2010*, and no corresponding regulations have yet been promulgated under paragraph 3 of 79(3.2).

[15] Before May 18, 2010, s. 79(3) of the *Pension Benefits Act* read:

> 79 (3) Subject to section 89 (hearing and appeal), the Superintendent shall not consent to an application by an employer in respect of surplus in a pension plan that is being wound up in whole or in part unless,
>
> (a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;
>
> (b) the pension plan provides for payment of surplus to the employer on the wind-up of the pension plan;
>
> (c) provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of termination of the pension plan; and
>
> (d) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

[16] In *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 at p. 655-56, the Supreme Court of Canada held that to determine whether an employer is entitled to the surplus remaining in a pension fund impressed with a trust upon termination of the Plan,

a court must review the current and historic pension plan texts and related trust agreements to ascertain whether at the time the trust was created, the employer expressly reserved its right to the surplus upon plan termination.

Certification

[17] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992,* the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff or defendant, (applicant or respondent) who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[18] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements: *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16; *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825 (S.C.J.) at para. 8; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9.

[19] Where the proposed class proceedings is a proceeding by application, the criteria of disclosing a cause of action is satisfied by disclosing a justiciable issue in the application: *Paramount Pictures (Canada) Inc. v. Dillon,* [2006] O.J. No. 236 (S.C.J.); *National Trust Company v. Smallhorn* [2007] O.J. No. 3825 (S.C.J.).

[20] I am satisfied that for settlement purposes, the criterion for certification have been satisfied in the case at bar. In particular: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons who will be represented by the representative respondents, which is set out below; (c) the claims of the class raise common issues of fact or law, which are set out below; (d) a class proceeding is the preferable procedure; and (e) Ms. Field and Mr. Thomson are suitable representative respondents with adequate Class Counsel.

[21] See *Paramount Pictures (Canada) Inc. v. Dillon, supra,* where Justice Cullity certified a pension surplus case as a class proceeding for settlement purposes. See also *National Trust Company v. Smallhorn, supra.*

[22] For the purposes of certification, the class is defined as follows: "All persons who are entitled to benefits or other payments from the Plan on December 31, 2004.

[23] The application raises the following common issues:

> (a) whether the Plan provides for payment of surplus to the Applicant on the wind-up of the Plan within the meaning of s. 79(3)(a) of the *Pension Benefits Act*;

(b) whether the Applicant is entitled to all or a portion of the surplus remaining in the Plan after the payment of all accrued benefits and wind-up expenses; and

(c) the manner in which surplus remaining in the Plan may be distributed or otherwise dealt with on the wind-up of the Plan.

[24] I, therefore, certify this application as a class proceeding pursuant to the *Class Proceedings Act, 1992.*

Settlement Approval

[25] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[26] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[27] When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) if any; number of objectors and nature of objections; (h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[28] In my opinion, in the case at bar, the settlement is a good result for the Class Members. It is the outcome of extensive negotiations between the parties assisted by experienced and competent legal and actuarial advisors. There have been extensive communications with proposed Class Members throughout. Class Counsel recommends the settlement. Seventy-two percent (72%) of the proposed Class Members have voted in

favour of the Agreement, and no one has objected to it. The alternative of litigation would be time-consuming, expensive, and uncertain for both the applicant and the proposed Class Members who are advanced in age.

[29] Surplus sharing agreements with similar terms have been approved by the courts, including in the following cases: *Montreal Trust Co. of Canada v. Armstrong* 2006 CanlII 33473 (Ont. S.C.J.); *Paramount Pictures (Canada) Inc. v, Dillon, supra*; and *National Trust Co. v. Smallhorn, supra.*

[30] I conclude that the proposed settlement is fair and reasonable and in the best interests of the Class.

Fee Approval

[31] Under the terms of the Retainer Agreement, Class counsel would be entitled to request the court to approve a multiplier of 3.5. Class counsel seeks court approval for the application of a multiplier of 2 to the base fees incurred to date in this matter, as well as, the approval of additional fees to a maximum of $50,000, to be incurred in implementing and administering the Surplus Sharing Agreement.

[32] Class Counsel also seeks approval of actuarial fees incurred on behalf of the Class, in the amount of approximately $15,000, to be paid out of the member share of surplus pursuant to the Surplus Sharing Agreement.

[33] Class Counsel obtained an excellent and fair result in a complicated and still developing area of the law. *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973; *Sutherland v. Hudson's Bay Company* (2007), 60 C.C.E.L. (3d) 64 (S.C.J.); and *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678 are significant recent cases that were churning the law about the entitlement to pension plan surplus funds during the negotiations between the parties.

[34] Class Counsel confronted considerable risk because the outcome of any litigation was uncertain. Moreover, Class Counsel was confronted with the problem that there was uncertainty about whether the court could direct a sponsor to wind-up a pension plan. (In *Lomas v. Rio Algom Limited*, [2010] O.J. No. 932 (C.A.), the Court of Appeal recently removed the doubt by ruling that that the court cannot direct a pension plan sponsor to wind-up a pension plan.)

[35] In my opinion, the fee requests are fair and reasonable and should be approved. The retainer agreement should be approved pursuant to s. 32 of the *Class Proceedings Act, 1992*. The base fee has been earned with productive work and a multiplier of 2 is fair and reasonable. Class counsel fee should be approved pursuant to s. 33 of the Act.

Conclusion

[36] For the above reasons, the two motions should be granted.

[37] Orders accordingly.

Perell, J.

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