COURT FILE NO.: 07-CV-335151CP
DATE: 20071005

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: NATIONAL TRUST COMPANY, Applicant

- and –

ROBERT M. SMALLHORN, STUART J. GALBRAITH, JOHN D. JAMIESON and EDWARD C. O'BRIEN, Respondents

BEFORE: LAX J.

COUNSEL: *D. Stamp and C. T. Lockwood*, for the Applicant
A. Kaplan and R. Matlin, for the Respondents

HEARD: September 18, 2007

ENDORSEMENT

[1] The applicant, National Trust Company, and the respondents, jointly seek an order certifying this proceeding as a class proceeding, and if certification is granted, approving the notice of certification and manner of service.

[2] National Trust sponsors the Scotiabank Pension Plan for Former Employees at National Trust Company (the "Plan") for current and former employees of National Trust. The respondents are all members or former members of the Plan. The Bank of Nova Scotia acquired National Trust on August 14, 1997. After the acquisition, the majority of active members in the Plan became employees of Scotiabank (most of them transferring in 1999) and Scotiabank became a participating employer under the Plan. In June 1999, there was a partial wind-up of the Plan affecting members who were retired or terminated between 1997 and 1999 (the "Partial Wind-Up Members").

[3] Over the years, the Plan has accumulated a large actuarial surplus. The applicant now seeks to wind up the pension plan and to distribute the surplus to the "Sharing Group" as defined

in an agreement (the "Surplus Sharing Agreement"). If certified, they will seek an order approving the Surplus Sharing Agreement between the applicant and the members of an unincorporated association, "The National Trust Pension Surplus Members Group Committee" ("the "Committee"). The respondents are all members of this Committee.

[4] The Committee and the applicant have been engaged in discussions regarding the respective entitlements of members, former members and the applicant to the surplus since 2003. Before this, the applicant had been engaged in similar discussions with a group of the Partial Wind-Up Members, who formed the Association for the Equitable Recovery of the National Trust Pension Surplus ("AFTER") in 1999 to seek a distribution of Plan surplus to Partial Wind-Up Members. These discussions with AFTER, and later with the Committee, ultimately culminated in the Surplus Sharing Agreement, which was executed in June 2007 and contemplates a distribution of surplus to Partial Wind-Up Members as well as to other members and former members of the Plan.

[5] The terms of the Surplus Sharing Agreement, which are subject to both court approval and regulatory approval, provide that upon termination of the Plan, and following transfer of assets from the Plan on account of active and certain disabled Plan members who will be transferred to the Scotiabank Replacement Plan, the Surplus will be divided equally between the applicant and the Sharing Group. After providing notice to the class, and after the expiry of the opt-out period, the parties intend to return to seek approval of the settlement on the terms of the Surplus Sharing Agreement, subject to regulatory approval.

[6] To give effect to the proposed Surplus distribution, the applicant commenced this Application and jointly with the respondents, moves to certify the proposed respondent class, consisting of 4,977 individuals who comprise the members of the Sharing Group. The respondents named have agreed to act as representative respondents for the proposed class.

[7] The *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA") provides that the court shall certify the proceeding as a class proceeding if all of the criteria set out in section 5(1) of the CPA are met. Section 5(1) provides:

> **5.(1)** The court shall certify a class proceeding on a motion under section 2,3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[8] These requirements may be applied less stringently when certification is sought on consent in the context of intended settlement approval as is the case here: *Bona Foods Ltd. v. Ajinomoto U.S.A. Inc.* (2004) 2 C.P.C. (6th) 15 (Ont. S.C.J.).

(a) Disclosure of a cause of action – section 5(1)(a)

[9] The notice of application seeks a declaration that National Trust is entitled to receive the Surplus in the manner and on the terms of the Surplus Sharing Agreement and for a declaration that National Trust is entitled to transfer assets from the Plan on account of active and disabled Plan members who will be transferred to the Scotiabank Replacement Plan effective prior to the Wind-Up date. In *Vivendi Universal Canada Inc. v. Jellinek*, [2006] O.J. No. 3687, Hoy J. was faced with a similar application and expressed the view that it would have been preferable to frame the application to focus on the justiciable issue rather than on the approval of the settlement of that issue. There, as here, the issues for determination are linked to terms of the Surplus Sharing Agreement, for which approval has not yet been sought, but is forthcoming. Nonetheless, Hoy J. was satisfied that in this special context, the requirements of section 5(1)(a) were met in that case and having regard to the less rigorous approach to be taken in these kind of cases, I am satisfied they are met in this case.

(b) An identifiable class – section 5(1)(b)

[10] The proposed respondent class consists of: (i) members and former members who were entitled to benefits or other payments under the Plan on or after June 24, 1997 (the date on which Scotiabank announced its acquisition of National Trust); (ii) the surviving spouse of any deceased member or former member of the Plan who was in receipt of a survivor pension from the Plan on or after June 24, 1997, or an individual entitled to a deferred vested benefit or other death benefit on or after this date upon the death of a member or former member of the Plan; (iii) all persons who were members of the Plan on or after June 24, 1997 and who ceased membership on or after this date with no payment owing to them; and where individuals identified in (i), (ii) or (iii) have died or die after June 24, 1997 and prior to the Wind-Up Date, the person entitled to a survivor pension or death benefit on the Wind-Up Date, or the beneficiary of the deceased individual named under the Plan, or the estate of the deceased individual.

[11] The proposed class comprises all members of the Sharing Group as defined in the Surplus Sharing Agreement and no one who is not in the Sharing Group. The Sharing Group is, in turn, exhaustive of all members, former members, spouses and other beneficiaries entitled to benefits or other payments from the Plan as well as certain former members and others no longer entitled to benefits or other payments from the Plan. The proposed class is objectively ascertainable, rationally bounded, and is not unnecessarily broad: see, *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para.17 and 18. I am satisfied that this requirement is met.

(c) Common Issues – section 5(1)(c)

[12] The common issues raised in respect of all members of the proposed class are:

(i) Is National Trust entitled to receive the Surplus in the manner and on the terms of the Surplus Sharing Agreement?

(ii) Is National Trust entitled to transfer assets from the Plan on account of active and certain disabled members who will be transferred to the Scotiabank Replacement Plan effective prior to the Wind-Up Date, in the manner and on the terms of the Surplus Sharing Agreement?

[13] In considering section 5(1)(a) of the *CPA*, I noted that the application frames the issues with reference to the settlement between the parties. The same comment applies to the common issues as they too are linked to the Surplus Sharing Agreement. In view of the less rigorous

approach that is taken on motions of this kind, I am prepared to find that this requirement is met. Both issues are issues that are shared by the class members. Their determination would advance the issues in the proceeding in a meaningful way and facilitate the regulatory approval that will ultimately be required.

(d) Preferable Procedure – section 5(1)(d)

[14] The Committee and the applicant have been engaged in discussions regarding the respective entitlements of members, former members and the applicant to the surplus since in or about 2003. Before this, there were discussions with AFTER, the group seeking a distribution of the Surplus to Partial Wind-Up Members. The details of the proposed surplus sharing arrangements have been conveyed to members of the Sharing Group through several initiatives, including an initial information package from the Committee and National Trust in 2005; a second information package in 2006; a series of information sessions held in various cities across Canada in November/December 2006; and a website.

[15] The proposed class of 4,977 individuals reside across ten provinces and in a limited number of cases, internationally. There are current addresses for all but 13 individuals. To date, 3,756 of the 4,977 members of the Sharing Group have expressly affirmed in writing their endorsement of the terms of the Surplus Sharing Agreement and approximately ¾ of the proposed class have retained Koskie Minsky. Only 8 members of the Sharing Group have voted against it. The Surplus Sharing Agreement will not bind members of the proposed class who opt out of the class proceeding and they will be able to make submissions to the court at the settlement hearing. I find that certification is the preferable procedure by which to resolve the common issues in this case in respect of the entire class.

Representative Respondents – section 5(1)(e)

[16] As I noted earlier, the respondents are all members or former members of the Plan and are also members of the Committee. They have been actively involved with the claims that the Committee has advanced on behalf of the members and former members of the Plan, including providing instructions to legal and actuarial advisors with respect to the negotiation of the Surplus Sharing Agreement. None of the proposed representative respondents has an interest in

conflict with the interests of other class members on the common issues for the class. Moreover, all members of the class have an equal interest in the determination of whether National Trust is entitled to the Surplus, or a portion thereof, and a determination as to the terms of the proposed Surplus Sharing Agreement. On the basis of their affidavit evidence, I am satisfied that Robert M. Smallhorn, Stuart J. Galbraith, John D. Jamieson and Edward O'Brien would fairly and adequately represent the interests of the class comprised of the Sharing Group.

Notice and Opt-Out period

[17] Where certification is sought for the purpose of effecting settlement, the courts have recognized that a workable litigation plan is unnecessary for certification: *Bona Foods Ltd.* at para 30. Section 17 of the *CPA* sets out the requirements for the content and service of the Notice of Certification, which is attached as a schedule to the draft order. The applicant, with the support of the representative respondents have proposed a method of notifying the class members of the proceeding by newspaper advertisements in a weekend edition of the *Globe & Mail* (in English) and in *La Presse* (in French), supplemented by direct mailings of the Notice of Certification to the known addresses of all members of the class other than those who have retained Koskie Minsky to execute the Surplus Sharing Agreement on their behalf.

[18] The applicant proposes an opt-out period of 30 days, which is appropriate, given the extensive communications with members of the class to date. The courts have approved a 30-day opt-out period in the context of a class certification for the purposes of settlement: *Elliott v. Currie* (2001) 12 C.P.C. (5th) 233 (Ont. S.C.J.); Paramount *Pictures (Canada) Inc. v. Dillon*, [2006] O.J. No. 2368 (S.C.J.); *Vivendi, supra*. The class members have been kept apprised of the progress of negotiations over several years and the vast majority have explicitly consented to the proposed sharing of the Surplus with only 8 dissents. I am satisfied that the proposed Notice of Certification meets the requirements of section 17(6) of the *CPA* and that the proposed method of notice and 30-day opt-out period are appropriate.

[19] Finally, the requested order pursuant to s.22 of the CPA that the costs associated with the Notice of Certification be paid from the Plan is approved.

[20] For the above reasons, I find that the requirements for certification have been met and the orders sought on the motion are granted. I have signed the order provided to me at the hearing.

LAX J.

DATE: October 5, 2007