

## **Pension Alert: Nolan v. Kerry (Canada) Inc. S.C.C.**

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The Supreme Court of Canada released its decision in *Nolan v. Kerry (Canada) Inc.* on August 7, 2009. The decision will be received with relief by sponsors of defined benefit pension plans.

First, the Court dealt comprehensively with the issue of whether and when plan expenses can be charged to the pension fund. It is now established that reasonable expenses of the administration of the pension plan, including the internal expenses of the plan sponsor in its role as administrator, may be paid from the plan fund where the plan does not prohibit such payments. If the plan is silent, the presumption is that the payment of expenses is permitted.

Secondly, the Court dealt with the issue of using the surplus from the trust fund for the defined benefit component of the plan for employer contributions to the defined contribution component of the plan. The Court found that use of surplus acceptable if the plan so provides and the members of the defined contribution component are beneficiaries of the defined benefit trust. This is irrespective of whether there is a different trustee or custodian for the defined benefit and defined contribution plan components.

Thirdly, the Court considered the issue of the payment of plaintiff's costs in pursuing litigation in respect of pension plans. In this case the member plaintiffs were not awarded costs from the plan. A clear statement was made that plaintiffs will not be awarded costs from the pension fund if the proceedings are adversarial in nature and not necessary for the due administration of the plan.

Finally, the decision gives deference to the Ontario Financial Services Tribunal as an expert tribunal in matters involving the interpretation of pension plan and industry practice. The standard of review of the that Tribunal's decisions in such matters is one of reasonableness, although the standard of review of matters involving the interpretation of statutes is correctness.

The Kerry decision is not by any means a carte blanche for plan sponsors to charge expenses to the plan and to take contribution holidays using defined benefit surplus to fund the defined contribution plan component. The decision may have laid down principles but the result was still heavily dependent upon the documentation in the case. Plan sponsors should carefully review the plan and trust documents and ensure they are on solid ground as to the payment of expenses from the pension fund and as to the use of defined benefit surplus in a defined contribution plan component.

The Kerry decision may put a damper on what seem to be the never-ceasing challenges of plan members to contribution holidays and the use of plan monies to pay plan expenses. This may or may not be good for the pension system. The prospect of litigation does focus the attention of plan sponsors upon the importance of solid documentation and sound plan administration.

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This article is intended for general information purposes only and should not be relied upon as legal advice.

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