

Labour, Employment and Human Rights / Litigation Bulletin

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Fasken Martineau DuMoulin LLP

***Nolan v. Kerry (Canada) Inc.*: Important Answers for Employers, Pension Plan Sponsors, Administrators and Participants**

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The Supreme Court of Canada issued a landmark pension decision in *Nolan v. Kerry (Canada) Inc.* on August 7, 2009, dismissing the appeal of a committee of former employees of the company and awarding costs against them.

The Court acknowledged that the issues raised in the appeal affect millions of Canadians who are members of occupational pension plans, as well as their families. The Court clarified two significant points of contention:

- the administrative and investment costs of maintaining a pension plan can be paid from the pension fund ;
- employers may take contribution holidays not only in respect of defined benefit (DB) components of their pension plans, but also defined contribution (DC) components. This is of particular significance to the large number of employers who have added DC components to their pension plans in the last decade or so.

The Court was very clear that whether an employer can take advantage of these practices will depend in each case on the

“text and context” of the particular pension plan. As it stated, “Each case will turn on its own facts and the terms of the plan and trust at issue.” In Kerry’s case, the Court held that DC contribution holidays are permitted once its pension plan is retroactively amended to clarify that the DC members are beneficiaries of the trust established for the plan.

It also held that the fact that the plan stated that it was being provided for the “exclusive benefit” of the participants did not mean that the administrative expenses associated with maintaining the pension plan could not be paid from the pension fund. “Here the existence of the Plan is a benefit to the employees. The payment of Plan expenses is necessary to ensure the Plan’s continued integrity and existence. It is therefore to the exclusive benefit of the employees ... that expenses for the continued existence of the Plan are paid out of the Fund,” the Court stated.

The Court upheld the Ontario Court of Appeal in deciding that it was appropriate in this case to award costs against the appellants, a committee of former employees of the company, several of whom had made the decisions they were now challenging. “This case is adversarial

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in nature,” the Court stated, and was brought on behalf of only the DB members of the plan, not on behalf of all of the plan members.

The Court’s decision was unanimous in all respects except the DC contribution holiday issue. On that point, two of the seven judges who heard the appeal held that the DC and DB parts of the plan were actually separate plans, so that the surplus in the DB “plan” could not be used take contribution holidays in respect of the DC “plan”.

Fasken Martineau represented Kerry Canada throughout the hearings and appeals with a team comprised of Ronald Walker, Christine Tabbert, and Peggy McCallum.

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