McMillan Binch Mendelsohn

Risky Business

- Retirees and Their Benefits

McMillan Binch Mendelsohn
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Risky Business:

Retirees and their Benefits

By Karen M. Shaver

Introduction

For some time now, employers have been concerned about the cost of continuing to provide medical and life insurance benefits to employees at and after retirement, particularly as health care costs continue to rise and corporations have been require to report the present value cost of providing such benefits to retired employees on their financial statements. The future of public health care funding in Canada is still unsettled except that costs are expected to continue to rise and governments are expected to continue to attempt to download such costs to private plan sponsors and to individuals. In addition, the baby-boom has begun its migration into retirement, and is increasingly concerned about health care coverage.

Canadian plan sponsors are somewhat shielded from the full impact of the cost of providing health care by the taxpayer-supported health-care system. However, the North American media has focussed on the extraordinary rise in health care costs in the United States and on the actions taken by U.S. employers, particularly in the automotive, steel and telecommunications industries. With the impact on the very economic viability of some corporations, tensions continue to grow between a plan sponsor's need to manage current and future liabilities and the active and retired employees increasing concern about protecting coverage for benefit costs.

This paper will consider recent developments and emerging trends in the issue of post-retirement medical and life insurance coverage, the current legal framework in Canada and possible alternatives for Canadian plan sponsors.

Post-Retirement Benefits – Emerging Trends and Issues

For the past ten years, the legacy and expected increased cost of continuing to provide and to sustain post-retirement benefits has been an issue for plan sponsors. In addition, the impact of the aging population and the increase in the demographic age group that is expected to need expanded and more expensive health care has been a concern. Advances in medical technology and the provision of costly new procedures and drugs have extended life expectancy. At the same time, governments continue to wrestle with the high cost of continuing to provide tax-payer supported health care in Canada.

Provincial governments have responded by eliminating previously covered health care services and products and plan sponsors have attempted to manage the downloading of such costs onto employment-related plans. Further, since 2000, changes to financial accounting rules require corporations that sponsor such programs to include in their financial statements the present value of the estimated cost of post-retirement benefits for the lives of covered persons.

Against this developing backdrop, employers, employees, union and retired employees are increasingly concerned over the current and future costs of providing health care coverage. The North American media continues to report on the crisis of the extraordinary increase in U.S. health care costs in a system where private plan sponsors do not have the benefit of a tax-supported health care system. The media focus of the impact on the plan sponsors has focused on

the negotiated legacy plans in the automotive, steel and telecommunications industries. For example, General Motors has accounced plans to cap its future retiree health care contributions at 2006 levels, resulting in an anticipated saving to GM of $900M per year. GM took action to reduce its reported health care costs of $5B (2005), reported to be the equivalent of 3% of GM's revenues or $1,500 per car. GM currently covers in excess of one million retirees and its costs of health care are anticipated to increase at a rate of $1B per year. Ford Motor Company has announced plans to reduce its health care expenditures in 2007, although details of such reduction are not yet available. Nissan North American has reported that in 2007 it will replace its current retiree health care coverage in its manufacturing division with a subsidy of $2,500 per year per covered person.

In our experience, we are finding that despite the difference in the funding structures between the two countries, media attention on U.S. health care costs has had a spill-over effect on Canadian subsidiaries of U.S. parents. Canadian subsidiaries are being expected to aggressively manage Canadian health care costs, including reducing or eliminating such coverage and Canadian plan sponsors are actively considering alternatives. A 2006 Hewitt survey of 218 Canadian plan sponsors reports that in the next three years, 57% of survey respondents plan to reduce post-retirement benefits and 3% plan to eliminate such benefits altogether.

The Canadian media has reported that on May 5, 2006, the new President and CEO of Stelco Inc. announced that Stelco Inc. would be reducing benefits for salaried employees and salaried retirees as part of a strategy to ensure profitability through work-force reduction and cost cutting in benefit programs.[1] The cost cuts are purported to include a reduction in maximum vacation for salaried employees; ending reimbursement for the cost of over-the-counter medications; ending coverage for private or semi-private hospital rooms; capping dispensing fee payment for prescription drugs at $7.00 and effective January 1, 2008, requiring employees to share costs for all health care expenses. The newspaper reports also indicate that Stelco will target other cost reductions in its impending contract talks with Local 1005 of the United Steel Workers.

Legislation

This section of the paper summarizes the legal principles and legal risks that could apply to an Ontario sponsor of post-retirement benefits in introducing cost-containment measures in its post-retirement benefit program applicable to retired employees and in its promise to active employees to provide a benefit program at and after retirement.

An Ontario employer is not required by law to provide employees with health care or life insurance coverage on or after retirement. However, once an employer does choose to provide such benefits, its right to amend, reduce or terminate such coverage is subject to the principles of contract and common law. Therefore, an employer's obligation to continue to provide, and employee's entitlement to post-retirement benefits is subject to a different legal regime than benefits such as wages and vacation pay (generally regulated by the *Ontario Employment Standards Act, 2000*)[2] and pension benefits (generally regulated by the *Ontario Pension Benefits Act*)[3]. The following section distinguishes between an active employee's legal right to enforce an employer's promise to provide benefits at and after retirement and a retired employee's legal right to enforce the employer's promise after the employee has retired.

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[1] Globe and Mail: "Stelco Cuts Benefits for Salaried Workers" (May 15, 2006); Toronto Star: "Cuts Ahead, Stelco Chief Say" (May 15, 2006)

[2] S.O. 2000, c. CH.41 (the "ESA")

[3] R.S.O. 1990, c. P. 8

Common Law

Pre-Retirement Rights – Active Non-Union Employees

An employer can withdraw its promise to active employees to provide benefits on or after retirement if it has retained express right to change or terminate benefits at any time.

An employer who has expressly retained the unilateral right to change its promise to provide benefits coverage on retirement should be able to withdraw its promise to active non-union employees at any time before the employee retires. Courts have indicated in class actions certification proceedings (discussed in greater detail below) that whether or not an employer is deemed to have retained such rights will be based on an assessment of all employee communications, including the language of disclaimers, if any, in employee booklets, documents, retirement letters and in daily oral representations made to employees.

An employer who has not reserved an express right may seek to obtain consent of employees to alter the employment contract.

Generally, either party to an employment contract can change the terms of the contract by providing reasonable notice of the change. If the employer has not expressly reserved the right to change its promise, it should still be able to minimize its risk by providing reasonable notice of its intended change. For greater certainty, the employer could also require each employee to indicate, in writing, his or her acceptance of the change and intention to continue the employment contract under the altered terms. Further, the employer could advise that an employee who does not agree to accept the change would be treated as terminated and provided with reasonable notice provisions. Based on this course of action, employees should not be able to raise a successful claim of constructive dismissal in future against the employer for withdrawing its promise.

An employer who has not reserved an express right may seek to alter benefits by providing employees with reasonable notice.

An employer who has not reserved the express right to withdraw its promise could proceed on the basis of providing affected employees with employees with "reasonable notice" of its intention to change its promised benefits without requiring employee consent or sign off. However, the employer could be at an increased risk that an employee could bring an action of constructive dismissal.

In this case, the employer could defend its actions on the following basis:

1. That the promise was not a significant term of the employment contract and therefore, withdrawal of the promise does not constitute constructive dismissal.

2. Even if the promise was found to be a significant term of the employment contract, the employer provided the employee with "reasonable notice" that fulfilled its contractual obligations. Courts have considered a variety of factors relevant to an employee's ability to obtain comparable employment in determining what constitutes "reasonable notice" including the age, position, experience, and length of service of the employee; and

3. Even if the employer's actions could be found to constitute constructive dismissal, the employee has a duty to mitigate his or her damages.

An employee could claim that the employer cannot provide "reasonable notice" to change the terms of the contract for which the employee has already provided consideration for the promised benefits.

We can anticipate that the evolving creativity of plaintiff counsel in the area of employee benefits could result in an employee bringing a claim for breach of contract, regardless of whether the employer provides what would otherwise be considered "reasonable notice". In this case, a court could find that an employee had already provided consideration to enforce the employer's promise to provide benefits at and after retirement. The employer's decision to change or withdraw its promise at or before retirement could, therefore, constitute a breach of contract for consideration already provided and notice of the proposed change would be irrelevant. If a court found the employer to be in a breach, damages could be assessed on the cost to the employer to replace such benefit coverage for the period for which the employee had provided consideration, or, if coverage could not be replaced, the actual value to the employee of foregone benefits attributable to the period. We are not aware that any employees have yet made claims on such a basis.

Unionized Employees

Employer options depend on the terms of the collective agreement.

A collective agreement that requires an employer to provide active unionized employees with benefit coverage at or after retirement also governs the employer's ability to change its promise on and after retirement. If the collective agreement specifically provides that the employer has the unilateral right to withdraw its promise, then an employer should be able to withdraw its promise at any time. Alternatively, if the collective agreement requires the employer to provide and maintain coverage for the duration of the collective agreement and the employer attempts to unilaterally withdraw its promise of benefits at and after retirement, then the employees' union could file a grievance on behalf of the employees. In subsequent negotiations, an employer could target negotiations to change or withdraw its promise to provide post-retirement benefits to employees who retire under subsequent contracts.

Post-Retirement Rights – Non-Union Employees

An employer's promise to provide benefits at and after retirement may become enforceable on retirement.

Different issues arise when an employer seeks to vary or otherwise terminate benefits that it has promised to provide at retirement and that the retired employees are now receiving. Generally, employers are limited in their ability to modify or terminate such benefit coverage since retired employees have already provided the employer with required consideration to secure the benefits as promised. As a matter of contract law, the retired employee is entitled to enforce such promise. Further, unlike active employees, regardless of any advance notice, a court would not expect retired to mitigate the damages attributable to the loss of post-retirement benefits by finding alternative employment.

At a minimum, an employer who wanted to reduce or terminate such benefits could attempt to obtain the consent of all retired employees to whom the benefits applied. This strategy would likely require the employer to provide some form of adequate consideration in order to secure such consent. In this case, the required amount of adequate consideration could be quite high to adequately compensate for the value of foregone benefits in a retiree group. In addition, an employer who attempts to obtain the consent of such a group could be vulnerable to claims of undue influence.

We are not aware of any reported Canadian cases that specifically address this issue. However, in a lower court decision in *Andrew Bathgate et al* v. *National Hockey League Pension Society,*[4] the court discussed the nature of pension promises in the context of pension contributions and surplus distribution issues that a court could apply to post-retirement benefits. Adams, J. stated:

> "I have also kept in mind that the context in which pension promises are made is one of employment… Not only are pension promises long-term in nature but consideration for them is furnished everyday by work. This can result, as a matter of employment or contract law, in the earning of pension rights independent of a law of trust…" [emphasis added]

In the context of consideration for promised pension benefits, these comments suggest that an employer could not unilaterally change the terms of the employment agreement after a retired employee has already provided consideration by virtue of the employee's work prior to retirement. In affirming the lower court's decision, the Ontario Court of Appeal did not disagree with Adams, J.'s comments.

Similarly, in *Sloan* v. *Union Oil Company of Canada Ltd.,*[5] an employee brought an action against a successor employer to enforce a promise made by his original employer to provide employees with an allowance on termination. After his original employer sold the business, Sloan was hired by the successor employer. On retirement from the successor employer, Sloan contended that he had been terminated by his original employer as a result of the sale to the successor employer and had therefore met the conditions for the termination allowance.

The court found that, in the employment context, an employee provides the employer with consideration on a daily basis for promises such as a termination allowance and the employer cannot then unilaterally change such benefits.

The court also considered that the fact that the contract of employment contained a clause whereby the employer had reserved the right to terminate or modify the termination allowance provisions at any time did not permit the employer to unilaterally cancel the termination allowance after the employee's right to such allowance had crystallized.

Based on the foregoing, unless an employer has reserved the explicit right to change, reduce or terminate benefits after the employee has begun receiving or is eligible to begin receiving such coverage, the employer's ability to change such promise is limited if not prohibited.

Retired Former Union Employees

Employer's right to change benefits coverage available after retirement depends on whether such benefits had vested under the terms of the collective agreement.

The leading case in Canada in respect of an employer' right to change post-retirement benefits originally negotiated as part of a collective agreement is a unanimous decision of the Supreme Court of Canada ("Supreme Court"),[6] in *Dayco.* The Supreme Court decided this case in the context of whether an arbitrator had the right to hear a dispute in respect of retired

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[4] (1993). 11 O.R. (3d) 449 at 498 (Ont. Gen. Div.), affirmed by the Ontario Court of Appeal at (1994), 16 O.R. (3d) 761, (Leave to appeal to the Supreme Court of Canada refused on July 28, 1994)

[5] [1955] 4 D.L.R. 664 (B.C.S.C.)

[6] *Dayco(Canada) Ltd.* v. *The National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada* (1993), 102 D.L.R. (4th) 609 (S.C.C.) ("Dayco")

employees. The Supreme Court also considered whether an employer had an obligation to maintain benefits provided for retired former union employees ("Retired Employees") under an earlier collective agreement. The employer and the union had negotiated a "shut-down agreement" that included a provision to discontinue group insurance benefits for active union employees but did not address the group benefits applicable to the Retired Employees. Shortly after closure of the employer's automotive supply plant, the current collective agreement expired and the employer terminated both the active employee benefits as set out in the shut-down agreement, and the benefits applicable to the Retired Employees. The union immediately grieved and demanded that the Retired Employees benefits be reinstated and continued.

The arbitrator upheld the grievance. Eventually, the Supreme Court was asked to consider whether the arbitrator had jurisdiction to consider benefits applicable to the Retired Employees.

Although the Supreme Court considered whether a provision that required an employer to continue benefits post-retirement could survive the expiration of the agreement, its comments regarding the nature of an employer's contractual obligations to its retired employees could also apply to non-union employees after retirement.[7]

The Supreme Court agreed with the general proposition that, depending on the wording of an employer's promise in the collective agreement to pay post-retirement benefits after the employee retires, that promise could survive the expiration of the collective agreement in which the employer made the promise.

The Supreme Court cited with approval, Brennan, J., of the United States Supreme Court in *Chemical and Alkali Workers* v. *Pittsburgh Plate Glass Company,*[8] who stated that "vested retirement rights may not be altered without the pensioners' consent". The Supreme Court also cited with approval a decision of the British Columbia Labour Relation Board in *Canadian Paper Workers Union* v. *Pulp and Paper Industrial Relations Bureau*[9] in which an employer had argued that retirement rights vested in the retired employee, thus disentitling the union to bargain over benefits.

In terms of the concept of "vesting", the Board had concluded that welfare benefits for retirees had an equivalent legal status to vesting of pension benefits. Both types of benefits <u>could</u> vest, according to the terms that created the benefit. Moreover, the benefits could only be divested if the parties had anticipated this problem at the outset and provided for such divesting in the terms that promised the benefit.

In *Dayco*, the Supreme Court accepted the proposition that post-retirement benefits could be altered or terminated if the parties to the agreement had anticipated and specifically

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[7] The Newfoundland Supreme Court Trial Division subsequently applied the decision of *Dayco* in *Kennedy* v. *Canadian Salt Fish Corp.* In this case, the issue was whether subsequent to Mr. Kennedy's retirement, the company had a right to alter the medical and life insurance benefits provided to him on his retirement. Referring to *Dayco*, the court held:

> *In this case, although we do not have a collective agreement between Kennedy and the Corporation, we have throughout his employment, as part of his remuneration for his services, a health care package. That health care package continued and was amended during his term office. That was part of his remuneration for work. Part of the remuneration was the continuation of benefits following retirement…*

Accordingly, the court found that Mr. Kennedy was entitled to damages for an amount to permit him to acquire the additional benefits covered in his retirement package.

[8] 404 U.S. 157 (1971)

[9] (1977), 77 C.L.L.C. 675 at 682 (B.C.L.R.B.)

contracted for such eventuality. The Supreme Court held that "vesting is determined by the contractual agreement between the parties, not the subsequent bargaining between them".

The Court summarized its position in the following terms:

> "To summarize, I am of the view that retirement rights can, if contemplated by the terms of a collective agreement, survive the expiration of that agreement. Moreover, although it is not strictly necessary to decide the point in this appeal, I would also find <u>that these surviving rights vest at the time of retirement, and would survive subsequent collective bargaining purported to divest such rights</u>. As such, I have concluded that the arbitrator's general proposition in this respect were correctly stated, and the arbitrator had jurisdiction to hear the union's grievance. Of course, I make no comment on whether the terms of the agreement between the company and the union do in fact create such a vested right. That is a question for the arbitrator to decide when the arbitration hearing proceeds on the merits." [emphasis added]

The forum for determining rights of former union employees is still unsettled.

We note that in *Dayco*, the Supreme Court considered the narrow issue of, and held that, post-retirement benefits promised under a collective agreement could survive the expiration of the collective agreement. In its decision, the Supreme Court left open the question of whether former union employees could seek to enforce the terms of their former collective agreement directly against an employer.

This issue was subsequently raised in an Ontario civil action in the case of *Ormrod,*[10] as discussed in greater detail below. Because this action settled, we do not have the benefit of a court's discussion on the application of *Dayco* or its ruling on whether former union employees could seek to enforce rights arising out of a collective agreement in a civil action against their former employer or that such issues can or must be determined by the arbitrator.

In *Kranjcec,*[11] which is discussed in greater detail below, in certifying the action as a class proceeding, the court again raises the issue of whether a claim by former union members is enforceable by a court or through an arbitration under a collective bargaining agreement. As in *Ormrod*, this case is expected to settle before it reaches the court for trial and we will not yet have the benefit of a court's discussion of *Dayco* in this context.

The union may be able to bargain post-retirement benefits on behalf of former union members.

Generally, by statute a union is not authorized to bargain on behalf of non-active members who are not members of the bargaining unit (for example, retired employees) and an employer is entitled to refuse to negotiate with respect to benefits to applicable to non-active members. However, in a recent pension surplus case,[12] an Ontario court found that, "unions may, and in fact do with the participation of the employer, bargain for improved pension benefits on behalf of both active and non-active members" and "although retirees may not be able to enforce

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[10] *Ormrod* v. *Etobicoke (Hydro-Electric Commission)*; class action certification reported at 53 O.R. (3d) 285; settlement approved October 24, 2002, Ct. File No. 97-CV-123455 ("Ormrod")

[11] *Kranjcec* v. *Ontario,* [2004] O.J. No. 19 (Ont. Sup. Ct.) ("Kranjcec")

[12] *Misfud* v. *Owens Corning Canada Inc.*, [2004] O.J. No. 857 ("Misfud")

their entitlement to improve benefits through grievance procedures, they would be entitled to enforce them through an action of the courts".

Class Proceedings as a Litigation Tool

Class Proceedings Act provides employees with an accessible forum for resolving post-retirement benefit issues

In the past, even where an employer's right to amend or terminate post-retirement benefit coverage was questionable, some employers might have elected to proceed with the proposed changes on the basis that individually, employees or retired employees would be unlikely to commence an action in respect of those changes. Since Ontario enacted the *Class Proceedings Act* in 1992, a number of law firms have aggressively marketed class proceedings as an effective vehicle to obtain relief against employers for groups of employees and former employees who share common workplace issues such as the provision of post-retirement benefits. Class proceedings can be seen as economical, accessible and practical, and are ideally suited to active and retired employees as a means of challenging an employer's decision to reduce or terminate a post-retirement benefit program.

In *Ormrod*,[13] a group of approximately 85 retired employees was certified as a class action against their employer after the employer reduced its share of premiums for health and dental benefits from 50% to 0% over a three-year period and refused to reimburse the retired employees for the $100.00 deductible that the Ontario government introduced in the Ontario Drug Benefit Plan.

As discussed above, since the action settled, we do not have the benefit of the court's deliberations in respect of post-retirement benefit issues. However, in reaching settlement, the parties raised issues that a trial court might find relevant in considering post-retirement benefit issues:

- Assuming that an employer would aggressively defend against a claim by the retired employees based on its promise to provide permanent cost sharing of health and dental premiums, the court could likely require an exhaustive review of current and historic plan documentation and testimony to establish the substance of the employer's promise;

- Whether former union employees have the right to bring a civil action against their former employer (see comments above in respect of the forum of such actions);

- Whether all retired employees, including those who retired before the employer altered premium cost sharing, had a [lock-step] right to all improvements granted after retirement (counsel for the retired employees admitted that success on this issue was far from certain); and

- Whether retired employees would have a weaker claim if the employer had changed its communications and plan documentation before the retired employees had retired to more clearly set out its right to change or eliminate benefits after retirement.

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[13] *supra,* 10

Based on a total settlement of $450,000.00, retired employees received $420.000.00 on a pro rata basis, and counsel for the retired employees received $30,000.00. The employer also appears to have agreed to use its best efforts to provide retired employees with a similar benefit plan to the plan that had been in place before the settlement and for which the retired employees could participate at their own expense.

Kranjcec[14] was certified as a class proceeding covering 51,000 retired employees of Ontario. We understand that the parties have reached a conditional settlement that is subject to court approval. Details of the conditional settlement are not available. As discussed above, we will not have the benefit of a court's discussion in *Dayco* in the context of these facts.

In this case, the Ontario Court would have been required to consider whether the Ontario government (the "Employer") could impose reductions on the benefits provided to retired government employees on the basis of benefit reductions that it had negotiated in its contract covering active unionized government employees. For 30 years, the Employer has changed benefits provided to retired government employees in lock-step with the negotiated changes to the active employee program. *Kranjcec* was certified as a class proceeding to consolidate individual actions that might have been asserted by an estimated 51,000 retired Ontario civil servants who retired after August 28, 1974 and were eligible to receive the Employer's health, dental and life insurance plans in effect immediately prior to June 1, 2002.

Although the collective bargaining agreement between the union for the active employees and the Employer do not appear to cover retired employees and their benefit plans, the retired employees maintained that the Employer was prevented from reducing benefits post-retirement by an implied term of their employment contract. Further, the retired employees maintained that the Employer had a fiduciary duty to the retired employees that prevented it from exercising an arguable legally enforceable right to reduce its cost or to allocate benefit assets between active and retired employees. The retired employees were seeking damages estimated as an aggregate of the losses suffered by the entire class of retired employees and determined as an estimate of the saving to the Employer.

A British Columbia court has recently certified a class action in respect of members of a provincial pension plan.[15] In *Bennett* v. *British Columbia*, the court found that although not all 27,000 proposed members of the class were direct employees of the Province of British Columbia (the defendant), all were direct or indirect contributors to the British Columbia Public Service Pension Plan under the control of the defendant and from which entitlement to post-retirement benefits under the Medical Services Plan and the Extended Health Plan flowed. The court held that, therefore, the lack employment relationship between the defendant and some of the potential class members was not relevant. The court also held that a class action was the only logical way to determine the rights of the claimants to benefits alleged owed by the defendant. In this case, the retired members of the Public Service Pension Plan brought an action for breach of contract and breach of fiduciary duties after the defendant announced that it would no longer pay 100% of the premiums for the Medical Services Plan and the Extended Health Plan and that effective December, 2002, retired employees would be required to pay premiums. The retired employees claim that the defendant had promised to pay monthly premiums for these benefits for the retirees and their dependants after retirement, that these benefits vested in retired employees on retirement or termination of employment. The retirees claim that the unilateral change by the defendant allegedly

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[14] *supra,* 11

[15] *Bennett* v. *British Columbia,* [2005] B.C.J. No. 2636 (British Columbia Supreme Court)

constitutes a breach of their employment contract and violated their vested retirement rights and benefits.

In certifying this claim as a class action, the court reinforced the position taken by the Ontario court in *Ormrod*. The British Columbia court noted that the plaintiffs' claim depended on documentation issued by or on behalf of the defendant in relation to the pension plan (coupled with years of a course of conduct by the defendant or the plan) and that such course of conduct was common to all 27,000 persons who retired on or before November 30, 2002.

Employer Alternatives

Based on the foregoing, an employer who has currently promised benefit coverage to employees at and after retirement could consider options to manage the risks and the costs of such post-retirement benefits. Each of these alternatives would have to be considered in the context of documentation, employee communications and representations in respect of the employer's right to change, reduce or terminate the promise to provide such benefits to active employees and its right to change, reduce or terminate such benefits coverage to retired employees who are in receipt of those benefits. Options and strategies could include:

- Eliminating post-retirement benefits for future retirees; identify and grandfather current employee groups based on age and service factors; offer alternative benefits or lump sum payments to employees who do not meet the grandfathering provisions;
- Establish more restrictive requirements for eligibility for future coverage (for example, increase in age plus service requirement);
- Introduce coordination of benefits that would apply to retired employees who have access to comparable benefits through subsequent employment or a spousal plan;
- Introduce changes in cost sharing;
    - Increase deductibles;
    - Increase retiree portion of premiums or introduce service-related premium levels;
- Segregate pooled retiree funding costs from active employee costs to ensure that retiree premiums are set in accordance with claims experience;
- Introduce annual and life-time caps; off-set by other less costly benefits of value to retired employees;
- Introduce form of health spending account that cap the employer's annual contributions;

Strategies that an employer could undertake to manage risks could include:

- Review all plan communications, documentation, website content, presentation materials, administration manuals and policies and individual communications with employees and retired employees in respect to group benefits to ensure:

    - Consistency between all documents in respect of the employer's right to amend, reduce or terminate benefits;
    - Include express reservation of the employer's unilateral right to amend, reduce or terminate:
        - Employer's promise to pay benefits or after retirement; and
        - Its continued right to change, reduce or terminate such benefits coverage at and after retirement.
- Clearly set out any age and service eligibility requirements;
- Clearly state that the employer will not responsible for any services previously funded by government programs; and
- Revise and redistribute plan booklets.

Summary

Generally, the relationship between a sponsor of post-retirement benefits and the intended or actual beneficiaries of such benefits is contractual in nature. In the absence of an express agreement to the contrary (e.g. a collective agreement), a fundamental term of an employment contract is that a party to the agreement can terminate any portion of the contract or the contract itself by giving the other party reasonable advance notice. Therefore, an employer has the right to make a unilateral change to a provision of an employment contract by giving reasonable notice to a non-unionized employee. This could include, for example, withdrawing a promise to provide all or part of a benefit program post-retirement or the right to change such benefits post-retirement. There is still a risk that an affected employee could claim that a change in the employer's promise constitutes constructive dismissal. There is also a possibility, as yet untested by the courts, that an employer's unilateral right to give notice of a change of benefits could only apply prospectively. An employee could bring an action against an employer for damages for the value of benefits attributable to a period of employment for which the employee has already provided consideration prior to the employer's notice of change.

An employer is restricted, if not prohibited from unilaterally changing the terms of post-retirement benefits after a retired employed is in receipt of such benefits, unless prior to retirement, the employer had specially reserved the right to change post-retirements benefits coverage after an employer retires.

The terms of a collective agreement may limit an employer's right to amend the promise of post-retirement benefits program for which unionized employees may be eligible at retirement.

Rights to post-retirement benefits vest at the time of retirement and can, if contemplated by the terms of the collective agreement, survive the expiration of that agreement. Although normally a union cannot negotiate on behalf of retired employees, where a union and the employer have included post-retirement benefits in negotiations, retired employees may be bound by, and may be able to enforce, agreements reached by the union.

The rights of a retired employee to a post-retirement benefit plan must be determined in relation to the terms of the plan and the employment contract. In addition, in class proceedings certifications, the courts have indicated that documents such as employee brochures, plan documents, letters, presentations and oral representations, which are not normally considered

to have legal effect, when taken together, can be relevant in determining the nature and substance of the employer's promise in establishing employees' rights to pension and non-pension benefits.

Class actions continue to evolve as the preferred forum for resolving the post-retirement benefit issues although we are not aware, of a class action in respect of post-retirement benefits that has proceeded to a trial of the issues beyond the certification stage. As a result, we continue to speculate about how a court will decide some of the more contentious issues and finally provide some direction and certainty in respect of the rights of the parties in this increasingly important employment and benefits area.

May 17, 2006