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The *Samoisette* Case: Sponsors May Not Be Able To Amend a Pension Plan Whenever They Want

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The Québec Superior Court judgement in *Samoisette* v. *IBM Canada Ltd.*[1] certainly provides considerable food for thought to the pension community in Canada and invites caution in dealing with pension plan amendments that reduce or suppress future employee benefits. It is generally understood that pension plan amendments cannot reduce or suppress retirement benefits that have already vested and accrued in favour of participating employees for their past service and retirees who receive retirement income. The particular feature of the *Samoisette* case, however, is the recognition that past events and representations made to active employees can create a crystallisation of future rights which arguably have not yet vested in the traditional sense. In so doing, the power of sponsors to amend their pension plans can be affected.

> Pension law practitioners often refer to the creation of vested rights as "crystallisation."

BACKGROUND

The case deals with a class action brought on behalf of approximately 450 persons affected by a pension plan amendment which, in 2007, eliminated the early retirement monthly bridge benefit available upon attaining the age of 55 or reaching 30 years of service. In the result, the Superior Court ruled that the employer could not legally amend the plan to remove bridge benefits for the group in the class action and found in favor of the plaintiffs in the amount of CND $ 23.5 million.

The employer had given all employees a 24-month notice of the eventual change. However, plaintiffs were unable to qualify for early retirement because they fell short of attaining the age of 55 or reaching 30 years of service when the amendment came into effect. The average length of service in the class action group was 27.2 years of service and the average age was just above 53 years. The bridge benefit would have allowed them to receive, upon taking early retirement, a supplement to their early retirement pension payable for the entire period between the date of their early retirement and the date they attained the age of 65.

The employer's pension plan was composed of a defined benefit component and a defined contribution component. The class action plaintiffs and the monthly bridge benefit belonged to the defined benefit component. In fact, the defined benefit component had been closed to new participants since 1995. As we shall see, the plaintiffs had elected at the time to remain in the defined benefit component and their choice in this regard was key to their success in keeping their bridge benefit in Superior Court more than 20 years later.

THE GHOST OF A PAST PENSION PLAN REFORM

As mentioned, the employer undertook a significant pension plan reform in 1994–1995. Previously, it had operated a strictly defined benefit plan. In essence, the restructuring involved the closing of the defined benefit and the introduction of a defined contribution component for new employees. This type of restructuring was fairly common in Canada in the 1990s and early 2000s as a number of pension plan sponsors wished to move away from the financial liability associated with deficits in defined benefit plans.

The employer conducted many internal sessions to explain the pension reform to employees. Although participants in the defined benefit component were allowed to continue to grow and accrue their defined benefits post restructuring, their employer, IBM Canada Ltd., nonetheless encouraged them to migrate to the new defined contribution component for their future service. Accordingly, the employer offered the current participants in the defined benefit component of the plan to increase the commuted value of their accumulated pensions by 40 percent in order to induce them to migrate to the new defined contribution component. In a written manual given to these employees during the campaign, the employer made the following statement:

> *"If you decide to join the new plan, your initial account will be credited with 140% of the value of the rights you accumulated under the defined benefit plan. The value of your rights corresponds to the commuted value of your pension at the end of 1994, taking into account your life expectancy and interest rates. The 40% supplement is meant to compensate*

for certain differences between both plans such as the update of the reference period and the bridge benefit for persons who retire before the age of 65." (The translation is ours)

The class action plaintiffs were employees who had refused the 40 percent increase and who had chosen to remain in the defined benefit component in the 1994–1995 restructuring. In their testimony, a number of them explained they preferred the stability of a defined benefit pension, that they counted on the bridge benefit as a factor in their decision and that the bridge benefit was important in planning their eventual retirement. The evidence also revealed that the employer had provided employees during the phase-in period with a software program to calculate the value of their defined benefit pension and this program included the value of the early retirement bridge benefit in the calculation. The employees forfeited the 40 percent gross-up to keep their defined benefit pensions.

In these circumstances, the Superior Court held that the employer no longer had the right to remove the bridge benefit for these employees in the future nor the ability to use its power to amend the pension plan to achieve such a purpose. The representations made during the 1994–1995 reform were construed as a clear assurance that the bridge benefit would be maintained for early retirees who opted to remain in the defined benefit component and forfeited the 40 percent increase. Any other conclusion would be unfair and abusive.

A NEW APPROACH TO VESTED RIGHTS?

In Canada, the traditional approach to vesting and the notion of "vested rights" is based on the celebrated Supreme Court of Canada decision in *Dayco*.[2] Pursuant to this decision, it is generally understood that rights and benefits vest at the date of retirement of the individual. In regard to pensions, it is also generally understood that the accumulated credited past service of a participant under the terms of a pension plan is a vested right. Future or contingent expectancies and interests are not, however, considered to be vested rights. Pension law practitioners often refer to the creation of vested rights as "crystallisation." Typically, there is no crystallisation or vested rights for matters where specific contractual conditions are not met.

What is novel in the *Samoisette* case is the recognition that certain situations and representations can bring a Court to conclude that future expectations, such as the early retirement bridge, for which contractual requirements have not yet been satisfied have crystallised or become vested rights so as to place them beyond the scope of the employer's power of amendment.

Indeed, it is significant to note that none of the plaintiffs in the *Samoisette* case had actually attained the age of 55 or reached 30 years of service when the bridge benefit was removed from the plan. Furthermore, none of the plaintiffs were in a position to attain or reach those milestones in the course of a 24-month notice. Accordingly, the bridge benefit was merely something they could expect in the future providing they met the requirements at a certain point in time.

The employer's right to amend a pension plan is confirmed in legislation and in standard pension plan texts.[3] Normally, this power of amendment can be exercised to suppress or eliminate future expectancies or interests for persons who have not yet met the pension plan conditions for vesting. However the lesson of the *Samoisette* case is precisely that there are changes that employers cannot implement at all, no matter the right to amend or the notice given.

It could be argued that the factual situation and more specifically the 40 percent increase in *Samoisette* is unique and that a similar outcome is unlikely in future cases. There are aspects of the ruling, however, that are of general import and the Court expressly declared that the power to amend a pension plan could not be exercised in abusive fashion.

It remains to be seen what the impact of this Superior Court decision will be and both sides have launched appeals to the Québec Court of Appeal. There is no doubt that it is an interesting new development in Canadian Pension Law.

BUYER BEWARE

A further consideration relating to the *Samoisette* case arises in the field of commercial transactions and the necessary due diligence to conduct for pension plans.

One need only ponder the hypothetical situation of a buyer who would have acquired the business division or unit that was involved in the ruling and who, in good faith and without knowledge, would have proceeded to make the same amendments with a 24-month notice in 2007. That buyer would have been condemned to pay damages in the amount of CDN $23.5 million in 2016 for events that occurred 22 years earlier.

There is no question that it now becomes more important for a prospective buyer to get the clearest picture possible of the pension plan(s) which may be in effect in the business or company he intends to purchase.

I have little doubt that corporate and commercial lawyers will have the creativity to deal with these problems but they should at the very least be aware of them. As mentioned, there have been many pension plans that have been restructured in Canada in the 1990s and the 2000s, especially to move away from defined benefit models to defined contribution models. A complete and thorough due diligence ought to examine what representations or incentives, if any, were made or offered to employees to migrate from one model to the other. Such an exercise can allow the buyer to better appreciate if he can further amend the plan without the risk of any substantial financial liability going forward.

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ENDNOTES

1 2016 QCCS 2675, June 13, 2016

2 [1993] 2 S.C.R. 230

3 In *Samoisette,* the employer's right to amend was confirmed in section 204 of the Québec Supplemental Pension Plans Act, R.S.Q. c. R-15.1 and in articles 15.01 and 15.02 of the plan text.