

## pensions and employee compensation bulletin

March 2008

### Update: Supreme Court of Canada to Rule on Pension Expenses and Surplus in Kerry (Canada) Inc. v. DCA Employees Pension Committee (“Kerry”)

The Supreme Court of Canada has granted leave to the DCA Employees Pension Committee to appeal the Ontario Court of Appeal decision in Kerry. The appeal is scheduled to be heard on November 18, 2008. The Court of Appeal decision found that:

- It was permissible to pay third party expenses out of the pension fund;
- The employer could use funds from the defined benefit portion of the plan to fund contribution holidays for both the defined benefit and the defined contribution portions of the plan; and
- The pension committee was required to pay the company’s costs of the litigation.

We discussed the Court of Appeal decision in detail in our October 2007 client bulletin ([http://www.mcmillan.ca/Upload/Publication/PensionPlanExpenses\\_1007.pdf](http://www.mcmillan.ca/Upload/Publication/PensionPlanExpenses_1007.pdf)).

The issues to be decided by the Supreme Court of Canada on the appeal are:

1. Whether the Ontario Court of Appeal erred in finding that Kerry Canada Inc. could use the surplus in the pension plan to fund its contribution obligations either to the defined benefit portion or to the defined contribution portion of the plan.
2. Whether the Ontario Court of Appeal erred in finding that Kerry Canada Inc. could amend the pension plan to permit the payment of plan expenses out of the pension fund.
3. Whether the Ontario Court of Appeal erred in interfering with the Divisional Court order awarding payment of costs of the action to the Company from the pension fund and whether the Financial Services Tribunal had the jurisdiction to award costs from the pension fund to the DCA Employees Pension Committee.

This case is a rare opportunity for the country’s highest court to provide guidance on questions of importance to pension plan members and administrators. We expect that the Supreme Court’s decision will clarify when pension fund assets can be used to pay plan expenses or fund contribution holidays. We will continue to follow this important case and keep you advised of the status of the Supreme Court appeal.

*Written by Dilani Wright*

### A Cautionary Note

*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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For further information on these or other labour and employment matters, please contact one of the lawyers listed below:

### PENSIONS AND EMPLOYEE COMPENSATION CONTACTS

Karen Shaver	416.865.7292	karen.shaver@mcmillan.ca
David Wentzell	416.865.7036	david.wentzell@mcmillan.ca
Dilani Wright	416.865.7242	dilani.wright@mcmillan.ca

[www.mcmillan.ca](http://www.mcmillan.ca)



McMillan LLP

Toronto | t 416.865.7000 | f 416.865.7048

Montreal | t 514.987.5000 | f 514.987.1213

Barristers & Solicitors

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