

# Rise in class action litigation warrants third-party assistance for pension plan administrators

The vast majority of pension plan sponsors and administrators – and the lawyers representing them – would agree that pension litigation matters will continue to be significant in the class action landscape.

This sentiment was echoed by the Ontario Superior Court in *Ormrod vs. Etobicoke (Hydro-Electric Commission)*, in which Mr. Justice Warren Winkler noted that pension disputes are “tailor-made” for class actions, adding that “the advantages of a class proceeding are so apparent as to be incontrovertible.”

The Supreme Court of Canada’s 2004 decision in *Monsanto Canada Inc. vs. Superintendent of Financial Services* serves to demonstrate this fact. While the pension industry in Canada has yet to experience the full impact of the Monsanto decision, it is anticipated that the Ontario regulator, the Financial Services Commission of Ontario will be reviewing the way in which hundreds of past partial pension plan windups were administered.

Given the increase in the number of pension plan windups being revisited, plan sponsors and administrators are likely to encounter circumstances where pension beneficiaries cannot be located. This issue of unlocatable beneficiaries represents a persistent problem for plan administrators. In an effort to obtain authoritative guidance, plan administrators look to the governing regulator and existing legislation. In practice, administrators consult provincial regulators when faced with the challenges brought about by dated or missing records and unknown former plan participants. At present, there is consensus on the need for guidance in addressing unlocatable beneficiaries, but such clear direction remains elusive.

While proposals have been considered to address the lack of guidance, actual implementation has yet to occur universally across the country. In October 2002, the government of Ontario included measures in its Bill 198

that were intended to bring the necessary clarity and certainty to provisions of the Pensions and Benefits Act (Ontario) under which plan administrators face particular challenges. A new section would have addressed missing persons who are entitled to benefits and the management of payments due to them when a pension plan is being fully wound up. Unfortunately, that November, then Finance Minister Janet Ecker announced that “the measures in Bill 198 dealing with pension issues will never be proclaimed, even if the Budget Bill is passed by the legislature.”

In a further attempt, which addressed an absence of direction with respect to unlocatable plan members, the Canadian Association of Pension Supervisory Authorities released its proposed regulatory principles for a model pension law in January 2004, with the intent to harmonize approaches to multi-jurisdictional pension plans. Principle 32 provides direction regarding “any assets remaining in a terminated plan which the administrator is unable to distribute, after making reasonable efforts to do so.” According to the proposal, the funds attributable to unlocatable beneficiaries will be referred to a public agency.

But as one law firm noted: “This proposal would be helpful if such a public agency existed in every jurisdiction, but it does not. The Public Trustee in Ontario, for example, has been reluctant to hold funds for unlocatable beneficiaries. A more practical suggestion might be for the plan sponsor to hold the funds or hire someone to do so on their behalf, and have obligations to make attempts to locate beneficiaries at retirement age.”<sup>1</sup>

The absence of clear direction can lead to inconsistent treatment of undistributed benefits or residual class action entitlements.

This variability in approach can:

- result in a lack of fairness to all class members and ultimately the denial of unlocatable beneficiaries' legal entitlements
- undermine the credibility of the process and expose the defendant to potential future litigation
- generate unnecessary time and costs in isolating, maintaining, and managing the benefits for extended periods of time

One solution available to pension plan administrators to mitigate the challenges associated with unlocatable beneficiaries is to consult a knowledgeable class action administration firm. An experienced and independent class action administrator can effectively coordinate national outreach efforts to identify unlocatable beneficiaries.

A third-party administrator can adopt cost-effective electronic investigation techniques to reduce the outstanding benefits thereby reinforcing the parties' commitment to distribute any residual funds. After exhausting all search methods available to the independent administrator, a court may elect to distribute the remaining proceeds to a charitable organization or consumer protection agency, as the case may warrant. The result of employing an experienced third-party firm is a reduced burden on the plan administrators and greater comfort in the integrity of the distribution process.

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<sup>1</sup> Blake Cassels & Graydon LLP, "Blakes Bulletin on Pension and Employee Benefits", August 2004.

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