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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MCMASTER UNIVERSITY v. A. LESLIE ROBB and
JOHN P. EVANS et al.

BEFORE: CUMMING J.

COUNSEL: J.A. Prestage and Randy V. Bauslaugh, for the Plaintiffs

Mark Zigler and Michael Mazzuca, for the Defendants

Barry L. Glaspell, for CIBC Mellon Trust Company

HEARD: October 31, 2001

ENDORSEMENT

The Motion

[1] This motion seeks an order approving the settlement in respect of an application made as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”). The proceeding was certified by an order dated September 4, 2001. The affidavit of Reesha Hosein attests to the requisite publication of the notice of certification.

The Application

[2] The applicant, McMaster University (the “University”) is the sponsor and administrator of the Contributory Pension Plan for Salaried Employees of McMaster University including McMaster Divinity College (the “Plan”). CIBC Mellon Trust Company is the appointed trustee in respect of the trust fund created under the Plan. The respondent class is defined as “ all members, past members, annuitants and other beneficiaries (other than McMaster University) at any time between July 1, 2000 and December 31, 2000 inclusive of the Contributory Pension Plan for Salaried Employees of McMaster University including McMaster Divinity College”.

- [3] The Plan as of July 1, 2000 had a surplus in excess of \$300 million. After lengthy negotiations the University and representatives of the Plan have entered into a “Surplus Sharing Settlement Agreement” (the “Agreement”). The essence of the Agreement is that the University will distribute in cash \$150 million of the Plan’s surplus as at July 1, 2000 (plus interest) The distributed monies will be divided 50/50 between the University and the group of persons who had an interest in the Plan between July 1, 2000 and December 31, 2000. The Plan has been amended to provide for the implementation of the Agreement.
- [4] There are 4496 class members who are to participate in the cash distribution, of whom 4474 have expressly approved of the Agreement. There has been no response from the remaining 22 to the published notice. There are no objections by any class member, other than a single individual who became a past member of the Plan prior to July 1, 2000 with no continuing legal interest therein, as discussed below.
- [5] The class representatives have had the benefit of independent legal advice from the class counsel, Koskie Minsky. As well, they have had independent actuarial advice from Eckler Partners Limited. Class counsel and the actuary recommend the settlement.
- [6] The application and settlement represent a consensual arrangement. The purpose of commencing this class proceeding is to bind with finality all past and present members of the Plan to the Agreement: s.29(3) of the CPA.
- [7] William M. Mercer has provided an initial and four recent updated actuarial reports for the University which verify the surplus, deal with the transfer of assets and liabilities from the Plan to new Plan 2000, and identify the valuation of both the continuing Plan (for those few members of the class who did not respond to the notice sent and therefore did not expressly consent to the Agreement) and the new Plan 2000 (for those members of the class who expressly consented to the Agreement). Actuary John M Higgins, one of the authors to the actuarial reports, attended at the settlement approval hearing and confirmed through the University’s counsel that the terms of the Agreement with respect to both the continuing Plan and new Plan 2000 were actuarially sound so as to meet the continuing present and contingent liabilities under the pension plans.
- [8] The Agreement does not provide for any payment of surplus to past members of the Plan who withdrew their assets from the Plan prior to July 1, 2000. A letter was received by the court from one objector to the proposed settlement. This person elected some three to six months prior to July 1, 2000 to receive a lump sum commuted value from the Plan rather than a lifetime annual pension. This individual would receive a substantial lump sum payment through the cash distribution of the surplus if he was to be eligible.
- [9] The detailed four page letter by the objector argues that it is unfair that someone in his position is left out of the settlement. He argues that the small group of voluntary retirees in his position should receive “equivalent treatment” to the class members

participating in the surplus distribution. This individual is the only person to file the requisite notice to opt out of the class proceeding. Thus, any legal rights he might have are preserved.

- [10] The court requested the University to respond to the concerns raised by this letter. It is annexed as exhibit F to the supplementary affidavit of Karen Belaire, Vice President of Administration for the University, sworn October 26, 2001. She mentions that the objecting individual was a participant in on a University Committee in the late 1990's which was considering the issue of the University withdrawing surplus and that at the time of his retirement there was a proposal contemplating that members and past members would receive surplus, but in the form of benefit improvements (not a cash distribution).
- [11] Ms. Belaire states that the University has never represented to persons who elected to remove the commuted value of their benefits from the Plan that they would continue to have any right whatsoever under the Plan including any right to surplus. Anyone choosing to remove the commuted value of his/her benefits would be well aware the s/he is giving up any continuing claim to any benefits under the Plan. A choice is made on a basis of what is assumed will be financially best for the individual for the future and expert advice can be obtained to assist in making that choice. Individuals are responsible for the choice they make.
- [12] There are reportedly 36 Plan members who upon retiring from the University elected to withdraw the commuted value of their benefits between July 1, 1986 and July 1, 2000. The actuary estimates that approximately 80 to 100 people each year who have terminated their employment with the University have made the same election.
- [13] The objecting individual argues that the 26 retiring individuals have a compelling argument on a basis of fairness to participate in the surplus distribution. While the objector is of a different view, in my opinion there would be no justifiable reason for treating those members of the Plan who terminated their employment differently from the 26 retiring members, as he proposes. That is, all past members who elected to withdraw the commuted value of their benefits from the Plan prior to July 1, 2000 should be treated in the same manner.
- [14] But this begs the question- what is the claim upon the surplus of any of these past members? It is the right of those persons who have legal rights in the Plan, together with the employer University, to decide what to do with the surplus that can be distributed. They have made a decision, as seen with the terms of the Agreement, as to the manner of distribution, without objection by any person having a legal right in the Plan. Quite obviously, at least some of those persons object to a payment to anyone beyond those having a legal claim within the Plan. It is their right to make that decision.
- [15] Ms. Belaire states that the July 1, 2000 date was chosen as the logical date because it coincided with the annual valuation of the Plan, the beginning of the academic

year and the term of many of the University's employment contracts. The July 1, 2000 date was requested by the committee representing the Plan members and was agreed to by the University. The University had first formally put forward a written proposal which contemplated a cash distribution of surplus (as opposed to benefit improvements) on June 26, 2000.

Disposition

- [16] In my view, the settlement contemplated by the Agreement is fair, adequate and in the best interests of all class members with a legal right to the monies in the Plan. For the reasons given, the settlement is approved as required by s.29 (2) of the CPA. The order attached hereto, signed today, is to be issued.
- [17] The Agreement provides that legal fees will be paid on a solicitor and client basis. Counsel advise that fees will be on a time basis. The record indicates that all parties have been well served by counsel in negotiating and concluding this complex Agreement with achievement of the result sought by the employer and virtually every individual (and not objected to by anyone) having a legal right to monies within the Plan. Approval is given to the payment of fees on this basis. Should any party be dissatisfied with the quantum of fees there is the right, of course, to have an assessment.

The original bears the signature of Justice Cumming
CUMMING J.

Released: November 1, 2001.