2017 01H 0029
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL

IN THE MATTER OF Section 13 of Part I of the *Judicature Act*, R.S.N.L. 1990, c. J-4, as amended

AND

IN THE MATTER OF Section 32 of the *Pension Benefits Act, 1997*, S.N.L. 1996, c. P-4.01

AND

IN THE MATTER OF a Reference of the Lieutenant Governor in Council to the Court of Appeal, for its hearing, consideration and opinion on the interpretation of the scope of section 32 of the *Pension Benefits Act, 1997*

APPENDIX A
LIST OF AUTHORITIES
OF THE SUPERINTENDENT OF PENSIONS OF NEWFOUNDLAND AND LABRADOR

Jurisprudence

Apotex Inc. v. Merck & Co. Inc., 2009 FCA 187 (CanLII), [2010] 2 F.C.R. 389, at paras. 88-89 .... **1**

Aveos Fleet Performance Inc. (Re), 2013 QCCS 5762, at para 82 .... **2**

Bloom Lake, g.p.l. (*Arrangement relatif à*), 2015 QCCS 3064, paras. 64 and 82 .... **3**

Boucher v. Stelco Inc., 2005 SCC 64 (CanLII), [2005] 3 S.C.R. 279, paras. 3, 26 .... **4**

British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24 .... **5**

Buschau v. Rogers Communications Inc., [2006] 1 S.C.R. 973,
2006 SCC 28, at paras. 12-13 .... **6**

Indalex Limited (Re), 2011 ONCA 265, at para. 103 .... **7**

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services),
[2004] 3 SCR 152, 2004 SCC 54, at paras. 1, 13, and 38... **8**

Montréal (City) v. 2952-1366 Québec Inc., 2005 SCC 62 (CanLII),
[2005] 3 S.C.R. 141 .... **9**

Régie des rentes du Québec v. Pension Commission of Ontario,
(2000), 189 DLR (4th) 304 (Ont Div Ct), at para. 61 .... **10**

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27,
1998 CanLII 837 (SCC), at para. 21 .... **11**

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411,
1997 CanLII 377 (SCC)... **12**

Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611, at para. 66 .... **13**

Sun Indalex Finance, LLC v. United Steelworkers, 2013 SCC 6,
[2013] 1 S.C.R. 271, at paras. 38, 43, 44 .... **14**

Doctrine

KAPLAN, A. and M. FRAZER, *Pension Law* (2nd edition: 2013),
at pp. 2-3, 106, 378, 538-539 .... **15**

SULLIVAN, R., *Sullivan on the Construction of Statutes* (6th ed.: 2014),
at pp. 195-196, 488-489 .... **16**

Legislative debates and inter-provincial law pension agreements

Legislative Assembly, Hansard, 43rd General Assembly, 1st Session, No 55
(December 17, 1996) (Mr.McLean)... **17**

Legislative Assembly, Hansard, 46th General Assembly, 1st Session
(April 24, 2008) (Hon. Mr. O'Brien and Ms. Michael, at pp. 790-807)..................................... **18**

Agreement Respecting Multi-Jurisdictional Pension Plans (2011) **19**

Agreement Respecting Multi-Jurisdictional Pension Plans (2016) **20**

Memorandum of Reciprocal Agreement (1968).. **21**

CITATION: APOTEX INC. *v.* MERCK & CO. INC., 2009 FCA 187, [2010] 2 F.C.R. 389 A-580-08

Merck Frosst Canada Ltd. and **Merck Frosst Canada & Co.** (*Appellants*)

v.

Apotex Inc. (*Respondent*)

INDEXED AS: APOTEX INC. v. MERCK & CO. INC. (F.C.A.)

Federal Court of Appeal, Noël, Layden-Stevenson and Ryer JJ.A.—Toronto, April 21, 22; Ottawa, June 4, 2009.

Patents — Appeal, cross-appeal from Federal Court decision holding Patented Medicines (Notice of Compliance) Regulations, s. 8, intra vires Patent Act, within Federal Court competence, within constitutional authority of Parliament, s. 8 remedy extending to compensation for future losses — Respondent's notice of compliance application approved by Minister of Health, stayed until appellant's prohibition proceedings dismissed — Respondent claiming damages pursuant to s. 8 — Federal Court ruling s. 8 not ordering disgorgement of appellant's profits, but damages appropriate beyond liability period defined therein — Compensation for prejudice actually suffered — S. 8 therefore not envisaging disgorgement of profit — Governor in Council limiting losses to those suffered as result of delayed market entry — Appeal allowed in part; cross-appeal dismissed.

Constitutional Law — Distribution of Powers — Appeal, cross-appeal from Federal Court decision holding Patented Medicines (Notice of Compliance) Regulations (PM(NOC) Regulations), s. 8, intra vires Patent Act, within Federal Court competence, within constitutional authority of Parliament, s. 8 remedy extending to compensation for future losses — S. 8 promoting use of PM(NOC) Regulations for prevention of infringement, within general grant of authority set out in Patent Act, s. 55.2(4) — S. 8 creating civil right of action within province's jurisdiction over property, civil rights — General Motors of Canada Ltd. v. City National Leasing test for constitutional validity of federal laws encroaching provincial powers applied — Intrusion herein minor — PM(NOC) Regulations validly promulgated, constituting valid regulatory scheme within Parliament's competence over patents, inventions — S. 8 sufficiently integrated into overall scheme to become part of it.

Federal Court Jurisdiction — Appeal, cross-appeal from Federal Court decision holding Patented Medicines (Notice of Compliance) Regulations (PM(NOC) Regulations), s. 8, intra vires Patent Act, within Federal Court competence, within constitutional authority of Parliament, s. 8 remedy extending to compensation for future losses — Federal Courts Act, s. 20(2) authorizing Federal Court to hear PM(NOC) Regulations s. 6 prohibition proceedings, s. 8 actions — Both sections providing for remedies pursuant to regulatory scheme aimed at prevention of infringement, within express grant of jurisdiction conferred to Federal Court — Federal Court correctly holding having jurisdiction over s. 8 action, but reasoning incorrect — Patent Act, s. 55.2(4)(d) not empowering Governor in Council to confer jurisdiction on courts not already possessed with such jurisdiction — Governor in Council designating courts of its choice among courts competent to hear action — Patent Act, ss. 12(2), 55.2(5) not validating grant of jurisdiction made pursuant to regulation.

Construction of Statutes — Patented Medicines (Notice of Compliance) Regulations, s. 8(4) authorizing Court to provide "for relief by way of damages or profits" — Contextual reading indicating compensation to be computed by reference to loss by second person or potential profits made during liability period — S. 8 clear first person liable to second person for any loss suffered during period of liability.

2009 FCA 187 (CanLII)

This was an appeal and cross-appeal from a Federal Court decision holding that section 8 of the *Patented Medicines (Notice of Compliance) Regulations* (PM(NOC) Regulations) was *intra vires* the *Patent Act*, within the Federal Court competence and the constitutional authority of Parliament, and that the remedy pursuant to section 8 could extend to compensation for future losses. Proceedings were instituted by the appellants to prohibit the Minister of Health from issuing a notice of compliance (NOC) to the respondent. Following the dismissal of the prohibition proceedings, the respondent claimed damages pursuant to section 8 for the period during which the Minister was prevented from issuing the NOC. The Federal Court ruled *inter alia* that the disgorgement of the appellant's profits could not be ordered pursuant to section 8, but that it was appropriate for the respondent to claim damages beyond the liability period defined in section 8.

There were two sets of issues in this case: (1) whether section 8 is *intra vires* the *Patent Act*; within the constitutional authority of Parliament; and within the Federal Court's jurisdiction, and (2) the nature and extent of remedies which can be ordered pursuant to section 8, namely the disgorgement of a second person's profits and compensation for future losses.

Held, the appeal should be allowed in part; the cross-appeal should be dismissed.

(1) Subsection 55.2(4) of the *Patent Act*, the statutory authority pursuant to which the PM(NOC) Regulations were promulgated, provides for a broad grant of authority for making regulations that the Governor in Council considers necessary to prevent patent infringement. The *Patent Act* seeks to establish a balance between effective patent enforcement through the PM(NOC) Regulations (subsection 55.2(4)) and the timely market entry of lower-priced generic drugs through the use of the "early working" exception set out in subsection 55.2(1). The PM(NOC) Regulations should be construed having regard to the *Patent Act* read as a whole and the balance which it seeks to create. The Governor in Council found it necessary both to provide the first person with the right to initiate prohibition proceedings, and prevent the issuance of the NOC to the second person for 24 months when that right is exercised. However, section 8 allows compensation to the second person for loss suffered by reason of delayed market entry of its drug. Liability can thus be visited on the first person when a prohibition application is withdrawn, discontinued or unsuccessful. The ability of the Court to order payment of damages resulting from the stay suggests that a first person no longer has an interest in delaying a prohibition proceeding or in triggering the stay. As a result, a first person must focus on the issue of infringement and consider the strength of its position before initiating a prohibition proceeding. This promotes the use of the PM(NOC) Regulations for the purpose for which they were intended: the prevention of infringement. Therefore, section 8 comes within the general grant of authority set out in subsection 55.2(4) of the *Patent Act*.

Section 8 creates a civil right of action which comes within the province's broad jurisdiction over property and civil rights. However, to determine whether the disposition is within the authority of Parliament pursuant to subsection 91(22) of the *Constitution Act, 1867*, the Supreme Court's three-part test devised in *General Motors of Canada Ltd. v. City National Leasing* must be applied. First, the right of action created by section 8 is only available to a limited group of persons within a defined industry, its scope of application is confined to patent controversies arising under the narrow conditions of the PM(NOC) Regulations, and it is limited to situations created by first persons when they make applications pursuant to subsection 6(1). Thus, the extent of the intrusion is minor. Second, the PM(NOC) Regulations were validly promulgated pursuant to the *Patent Act* and constitute a valid regulatory scheme falling within Parliament's competence over patents of invention, with section 8 being the only exception. Third, section 8 is sufficiently integrated into the overall scheme of the PM(NOC) Regulations to become part of it. Consequently, section 8 comes within subsection 91(22) of the *Constitution Act, 1867*, and is as such valid federal delegated legislation.

Subsection 20(2) of the *Federal Courts Act* is an express statutory grant of jurisdiction authorizing the Federal Court to hear both section 6 prohibition proceedings and section 8 actions. Those sections provide for remedies pursuant to a regulatory scheme aimed at the prevention of infringement and, as such, come within the express grant of jurisdiction conferred on the Federal Court by virtue of subsection 20(2). Although the Federal Court correctly held that it had jurisdiction over the section 8 action brought by the respondent, its reasoning on

2009 FCA 187 (CanLII)

this issue was incorrect. Paragraph 55.2(4)(*d*) of the *Patent Act* does not empower the Governor in Council to confer jurisdiction on courts not already possessed with such jurisdiction. Rather, it envisages that the Governor in Council may, amongst courts which are competent to hear the action, designate the courts of its choice. To the extent that paragraph 55.2(4)(*d*) does not authorize the Governor in Council to confer jurisdiction by way of regulation, subsections 12(2) and 55.2(5) cannot be construed as validating a grant of jurisdiction made pursuant to a regulation. The Federal Court had to look no further than subsection 20(2) of the *Federal Courts Act*.

(2) The debate over whether the respondent was entitled to compensation by way of a disgorgement of the appellant's profits turned on the words in subsection 8(4), which authorize the court to provide "for relief by way of damages or profits". A contextual reading of section 8 indicates that compensation for the loss resulting from the automatic stay is to be computed by reference to the loss by the second person or the profits that it would have made during the period when it was prevented from going to the market. The compensation provided is for prejudice actually suffered. The disgorgement of the appellant's profit was not necessary to achieve the balance which underlies section 55.2 of the *Patent Act.* A measure which compels a first person to place the second person in the position in which it would have been if the stay had not been triggered fits within the contemplated balance. Section 8 of the PM(NOC) Regulations therefore does not envisage the disgorgement of a first person's profit.

Regarding the respondent's claim for damages for what the Federal Court characterized as "future losses", section 8 is clear that the first person is liable to the second person for any loss suffered during the period of liability. The Governor in Council chose to limit the measure of the losses which can be compensated to those suffered during the period of liability, and not the losses caused during that period regardless of when they are suffered. The Governor in Council's clearly expressed intent must be given effect. The appeal should be allowed on this limited point. In order to be compensated, the respondent's losses must be shown to have been incurred during the period of liability.

2009 FCA 187 (CanLII)

STATUTES AND REGULATIONS CITED

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 91(22), 92(13).
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Food and Drugs Act, R.S.C., 1985, c. F-27.
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APPLIED:

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CONSIDERED:

Bristol-Myers Squibb Co. v. Canada (Attorney General), 2005 SCC 26, [2005] 1 S.C.R. 533, 253 D.L.R. (4th) 1, 39 C.P.R. (4th) 449; *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, 2006 SCC 49, [2006] 2 S.C.R. 560, 272 D.L.R. (4th) 577; *Merck & Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)* (1994), 55 C.P.R. (3d) 302, 169 N.R. 342 (F.C.A.); *Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)*, [1998] 2 S.C.R. 193, (1998), 161 D.L.R. (4th) 47, 80 C.P.R. (3d) 368; *Bayer AG v. Canada (Minister of National Health and Welfare)* (1993), 51 C.P.R. (3d) 329, 163 N.R. 183 (F.C.A.); *Aktiebolaget Hassle v. Apotex Inc.*, [1988] 1 F.C. 360, (1987), 44 D.L.R. (4th) 755, 15 C.I.P.R. 238 (T.D.); *Composers, Authors & Publishers Assoc. of Canada Ltd. v. Sandholm Holdings Ltd. et al.*, [1955] Ex. C.R. 244, (1955), 24 C.P.R. 58.

REFERRED TO:

Merck & Co. Inc. v. Apotex Inc., 2005 FC 755, 41 C.P.R. (4th) 35, 274 F.T.R. 113; *Beloit Canada Ltd. v. Valmet-Dominion Inc.*, [1997] 3 F.C. 497, (1997), 73 C.P.R. (3d) 321, 214 N.R. 85 (C.A.); *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Ferring Inc. v. Canada (Attorney General)*, 2003 FCA 274, 26 C.P.R. (4th) 155, 242 F.T.R. 160, 310 N.R. 186; *Hoffmann-La Roche Ltd. v. Canada (Minister of Health)*, 2005 FCA 140, [2006] 1 F.C.R. 141, 253 D.L.R. (4th) 644, 40 C.P.R. (4th) 108; *AB Hassle v. Canada (Minister of National Health and Welfare)* (2000), 7 C.P.R. (4th) 272, 256 N.R. 172 (F.C.A.); *Apotex Inc. v. Canada (Minister of National Health and Welfare)* (2000), 181 D.L.R. (4th) 404, 3 C.P.R. (4th) 1, 252 N.R. 72 (F.C.A.); *R.W. Blacktop Ltd. v. Artec Equipment Co.* (1991), 39 C.P.R. (3d) 432, 50 F.T.R. 225 (F.C.T.D.); *Netbored Inc. v. Avery Holdings Inc.*, 2005 FC 490, 272 F.T.R. 131; *Innotech Pty. Ltd. v. Phoenix Rotary Spike Harrows Ltd.* (1997), 74 C.P.R. (3d) 275, 215 N.R. 397 (F.C.A.); *Minister of Health v. The King, Ex p. Yaffe*, [1931] A.C. 494 (H.L.); *Trans-Canada Pipe Lines Ltd. v. Provincial Treasurer of Saskatchewan* (1968), 67 D.L.R. (2d) 694 (Sask. Q.B.); *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, 212 D.L.R. (4th) 1, [2002] 5 W.W.W. 1; *Schmeiser v. Monsanto Canada Inc.*, 2002 FCA 449, 22 C.P.R. (4th) 455.

AUTHORS CITED

Regulatory Impact Analysis Statement, SOR/98-166, *C. Gaz.* 1998.II.1055.
Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL AND CROSS-APPEAL from a Federal Court decision (2008 FC 1185, [2009] 3 F.C.R. 234) holding that section 8 of the *Patented Medicines (Notice of Compliance) Regulations* is *intra vires* the *Patent Act*, within the Federal Court's competence to hear and determine an action brought thereunder, within the constitutional authority of Parliament, and that the remedy which the Court may order pursuant to section 8 can extend to compensation for future losses. Appeal allowed in part; cross-appeal dismissed.

2009 FCA 187 (CanLII)

APPEARANCES

Patrick E. Kierans, *Jason C. Markwell*, *Kristin Wall* and *Andres Garin* for appellants.
Kenneth W. Crofoot and *Andrew R. Brodkin* for respondent.

SOLICITORS OF RECORD

Ogilvy Renault LLP, Toronto, for appellants.
Goodmans LLP, Toronto, for respondent.

The following are the reasons for judgment rendered in English by

[1] NOËL J.A.: Merck Frosst Canada Ltd. and Merck Frosst Canada & Co. (collectively Merck) appeal from the decision of Justice Hughes (the Federal Court Judge) ([*Apotex Inc. v. Merck & Co. Inc.*] 2008 FC 1185, [2009] 3 F.C.R. 234), wherein he held, *inter alia*, that section 8, as amended by SOR/98-166 [ss. 7, 8] of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (PM(NOC) Regulations) is *intra vires* the *Patent Act*, R.S.C., 1985, c. P-4 (*Patent Act*), as amended by S.C. 1993, c. 2, s. 4 [enacting sections 55.1 and 55.2]; within the competence of the Federal Court to hear and determine an action brought thereunder; and within the constitutional authority of the Parliament of Canada.

[2] Also at issue were questions relating to the remedy which the Court may order pursuant to section 8 of the PM(NOC) Regulations. Merck challenges that aspect of the decision which held that the remedy can extend to compensation for future losses. Apotex Inc. (Apotex) for its part cross-appeals the Federal Court Judge's conclusion that it was not entitled to the disgorgement of the profits earned by Merck, but was limited to a claim for damages or its lost profits. Apotex also takes issue with the Federal Court Judge's decision not to award costs. It contends that since it was for the most part successful, costs should have been awarded in its favour.

THE RELEVANT FACTS

[3] Merck received a notice of compliance (NOC) approving for sale in Canada its version of alendronate, used primarily in the treatment of osteoporosis, on February 4, 2002.

[4] Apotex filed an abbreviated new drug submission (ANDS) for alendronate on February 7, 2003 and sent a notice of allegation (NOA) to Merck on April 14, 2003 alleging that Merck's Canadian Patent No. 2294595 (the '595 Patent) was invalid for a number of reasons.

[5] On May 29, 2003, Merck & Co. Inc. (a United States company) and Merck Frosst Canada & Co. commenced proceedings in the Federal Court (Court File T-884-03) to prohibit the Minister of Health (the Minister) from issuing an NOC to Apotex which otherwise would permit Apotex to sell its generic version of alendronate (Apo-alendronate) in Canada.

[6] On February 3, 2004, the Minister sent a letter to Apotex advising it that its application for the issuance of the NOC was approved but would be held in abeyance pending the outcome of the prohibition proceedings in the Federal Court.

2009 FCA 187 (CanLII)

[7] On May 26, 2005, Mosley J. of the Federal Court dismissed Merck's prohibition application, finding that Apotex's allegations as to invalidity, on some but not all grounds, were justified ([*Merck & Co. Inc. v. Apotex Inc.*] 2005 FC 755, 41 C.P.R. (4th) 35). The next day, the Minister issued an NOC to Apotex permitting it to sell its Apo-alendronate in Canada.

[8] No appeal was taken from Mosley J.'s decision.

[9] On July 5, 2005, Apotex instituted an action in the Federal Court pursuant to section 8 of the PM(NOC) Regulations claiming damages for the period from February 3, 2004 to May 27, 2005. This is the period during which the Minister was prevented from issuing the NOC to Apotex by reason of the filing by Merck of the prohibition application eventually dismissed by Mosley J.

[10] By orders of the Federal Court dated January 24, 2006 and August 14, 2008, the quantification of amounts found to be properly recoverable in the action were left to be determined at a subsequent trial. The Federal Court Judge later agreed to consider a number of preliminary issues submitted by the parties. He disposed of these issues by decision rendered on October 21, 2008. This is the decision now under appeal.

THE RELEVANT LEGAL PROVISIONS

[11] Subsections 55.2(1) and 55.2(4) [as am. by S.C. 2001, c. 10, s. 2] of the *Patent Act* read as follows:

> **55.2** (1) It is not an infringement of a patent for any person to make, construct, use or sell the patented invention solely for uses reasonably related to the development and submission of information required under any law of Canada, a province or a country other than Canada that regulates the manufacture, construction, use or sale of any product.
>
> (4) The Governor in Council may make such regulations as the Governor in Council considers necessary for preventing the infringement of a patent by any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1), including, without limiting the generality of the foregoing, regulations
>
> (*a*) respecting the conditions that must be fulfilled before a notice, certificate, permit or other document concerning any product to which a patent may relate may be issued to a patentee or other person under any Act of Parliament that regulates the manufacture, construction, use or sale of that product, in addition to any conditions provided for by or under that Act;
>
> (*b*) respecting the earliest date on which a notice, certificate, permit or other document referred to in paragraph (*a*) that is issued or to be issued to a person other than the patentee may take effect and respecting the manner in which that date is to be determined;
>
> (*c*) governing the resolution of disputes between a patentee or former patentee and any person who applies for a notice, certificate, permit or other document referred to in paragraph (*a*) as to the date on which that notice, certificate, permit or other document may be issued or take effect;
>
> (*d*) conferring rights of action in any court of competent jurisdiction with respect to any disputes referred to in paragraph (*c*) and respecting the remedies that may be sought in the court, the procedure of the court in the matter and the decisions and orders it may make; and

2009 FCA 187 (CanLII)

(*e*) generally governing the issue of a notice, certificate, permit or other document referred to in paragraph (*a*) in circumstances where the issue of that notice, certificate, permit or other document might result directly or indirectly in the infringement of a patent.

(5) In the event of any inconsistency or conflict between

(a) this section or any regulations made under this section, and

(b) any Act of Parliament or any regulations made thereunder,

this section or the regulations made under this section shall prevail to the extent of the inconsistency or conflict.

(6) For greater certainty, subsection (1) does not affect any exception to the exclusive property or privilege granted by a patent that exists at law in respect of acts done privately and on a non-commercial scale or for a non-commercial purpose or in respect of any use, manufacture, construction or sale of the patented invention solely for the purpose of experiments that relate to the subject-matter of the patent.

[12] Section 8 of the PM(NOC) Regulations in the form in which that section stood at the time relevant to the action (i.e. on July 5, 2005) reads as follows:

8. (1) If an application made under subsection 6(1) is withdrawn or discontinued by the first person or is dismissed by the court hearing the application or if an order preventing the Minister from issuing a notice of compliance, made pursuant to that subsection, is reversed on appeal, the first person is liable to the second person for any loss suffered during the period:

(*a*) beginning on the date, as certified by the Minister, on which a notice of compliance would have been issued in the absence of these Regulations, unless the court is satisfied on the evidence that another date is more appropriate; and

(*b*) ending on the date of the withdrawal, the discontinuance, the dismissal or the reversal.

(2) A second person may, by action against a first person, apply to the court for an order requiring the first person to compensate the second person for the loss referred to in subsection (1).

(3) The court may make an order under this section without regard to whether the first person has commenced an action for the infringement of a patent that is the subject matter of the application.

(4) The court may make such order for relief by way of damages or profits as the circumstances require in respect of any loss referred to in subsection (1).

(5) In assessing the amount of compensation the court shall take into account all matters that it considers relevant to the assessment of the amount, including any conduct of the first or second person which contributed to delay the disposition of the application under subsection 6(1).

[13] It is also useful to reproduce section 8 as it read when it was originally introduced in 1993:

8. (1) The first person is liable to the second person for all damage suffered by the second person where, because of the application of paragraph 7(1)(*e*), the Minister delays issuing a notice of compliance beyond the expiration of all patents that are the subject of an order pursuant to subsection 6(1).

2009 FCA 187 (CanLII)

(2) The court may make such order for relief by way of damages or profits as the circumstances require in respect of any damage referred to in subsection (1).

[14] The Regulatory Impact Analysis Statement (RIAS) which accompanied the change to section 8 brought in 1998 explains the purpose of the amendment as follows [*C. Gaz.* 1998.II.1055, at pages 1056 and 1058]:

Specifying circumstances in which damages or costs can be awarded: A clearer indication is given to the court as to circumstances in which damages could be awarded to a generic manufacturer to compensate for loss suffered by reason of delayed market entry of its drug, and the factors that may be taken into account in calculating damages. The court may also award costs to either a generic manufacturer or a patentee, including solicitor or client costs, as appropriate, consistent with Federal Courts Rules.

. . .

The amendments reinforce the balance between providing a mechanism for the effective enforcement of patent rights and ensuring that generic drug products enter the market as soon as possible.

[15] Finally, reference should also be made to section 20 [as am. by S.C. 1990, c. 37, s. 34; 2002, c. 8, s. 29] of the *Federal Courts Act* [R.S.C., 1985, c. F-7, s. 1 (as am. *idem*, s. 14)]:

20. (1) The Federal Court has exclusive original jurisdiction, between subject and subject as well as otherwise,

(*a*) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade-mark, industrial design or topography within the meaning of the *Integrated Circuit Topography Act*; and

(*b*) in all cases in which it is sought to impeach or annul any patent of invention or to have any entry in any register of copyrights, trade-marks, industrial designs or topographies referred to in paragraph (*a*) made, expunged, varied or rectified.

(2) The Federal Court has concurrent jurisdiction in all cases, other than those mentioned in subsection (1), in which a remedy is sought under the authority of an Act of Parliament or at law or in equity respecting any patent of invention, copyright, trade-mark, industrial design or topography referred to in paragraph (1)(*a*).

THE FEDERAL COURT DECISION

[16] The first set of issues addressed by the Federal Court Judge was whether section 8 is *intra vires* the *Patent Act*; within the constitutional authority of Parliament; and whether the Federal Court had the jurisdiction to hear the action. The second set of issues dealt with the nature and extent of the remedies which can be ordered pursuant to section 8 of the PM(NOC) Regulations.

[17] Dealing with the first set of issues, the Federal Court Judge rejected Merck's argument that the *Patent Act* does not confer on the Federal Court jurisdiction to hear actions brought pursuant to section 8 of the PM(NOC) Regulations. The Federal Court Judge held that Parliament has, by statute, enacted subsection 55.2(4) of the *Patent Act* which in paragraph (*d*) gives the authority to the Governor in Council to make regulations "conferring rights of action in any court of competent jurisdiction". The Federal Court Judge further noted that section 2 [as am. by SOR/2008-211, s. 1] of

2009 FCA 187 (CanLII)

the PM(NOC) Regulations defines "court" to mean "the Federal Court or any other superior court of competent jurisdiction". According to the Federal Court Judge, this has the same effect as a grant of jurisdiction made under the *Patent Act* given that subsection 12(2) [as am. by R.S.C., 1985 (3rd Supp.), c. 33, s. 3] of the *Patent Act* provides that "[a]ny . . . regulation made by the Governor in Council has the same force and effect as if it had been enacted herein" (reasons, at paragraphs 63 and 64).

[18] Although he also referred to subsection 20(2) of the *Federal Courts Act*, the Federal Court Judge found that subsection 55.2(4) of the *Patent Act* and the designation of the Federal Court as a court of competent jurisdiction in section 2 of the PM(NOC) Regulations was the source of the Federal Court's jurisdiction (reasons, at paragraphs 66 and 67).

[19] The Federal Court Judge also rejected Merck's contention that section 8 of the PM(NOC) Regulations is *ultra vires* the *Patent Act*. Drawing an analogy, he emphasized that section 8 provides a disincentive for seeking what is in effect an interlocutory injunction. The liability created by section 8 acts like an undertaking for damages provided by the person seeking such an injunction. He held that paragraph 55.2(4)(*d*) specifically provides for regulations respecting remedies and procedures in respect of disputes under paragraph (*c*) as to when the NOC may issue. According to the Federal Court Judge: "[t]his includes the 24-month stay on any issuance of the NOC . . . and disincentives for seeking such a stay" (reasons, at paragraph 74).

[20] Finally, the Federal Court Judge rejected Merck's argument that the right of action provided pursuant to section 8 is in its pith and substance a matter respecting property and civil rights under the exclusive jurisdiction of the provinces under subsection 92(13) of the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5]] (reasons, at paragraph 76). The Federal Court Judge held that section 8 is an integral part of the scheme set out in the PM(NOC) Regulations as enabled by the *Patent Act*. The scheme is directed to the enforcement of rights in certain types of medicinal patents including a balanced procedure respecting such enforcement (reasons, at paragraphs 76 and 77).

[21] Turning to the issue of remedy, the Federal Court rejected Apotex' contention that the disgorgement of Merck's profit could be ordered pursuant to section 8. The Federal Court Judge noted that a section 8 order may provide for "relief by way of damages or profits" as set out in subsection 8(4). He further noted that there is no mention anywhere of any remedy aimed at the profit made by the first person. The entire context of section 8 is focused on compensation for loss suffered by the generic (reasons, at paragraph 88).

[22] The Federal Court Judge observed that the word "profits" appears nowhere in the *Patent Act* and that there was considerable debate as to whether the provision for an "account" in an infringement action meant that a court could order disgorgement of an infringer's profits. He noted that the debate was laid to rest by the Federal Court of Appeal in *Beloit Canada Ltd. v. Valmet-Dominion Inc.*, [1997] 3 F.C. 497, at paragraphs 89–93, where it was held that the remedy of disgorgement of an infringer's profits is authorized by paragraph 57(1)(*b*) of the *Patent Act*, when read with section 20 [as am. by S.C. 1990, c. 37, s. 34] of the *Federal Court Act* [R.S.C., 1985, c. F-7] (reasons, at paragraph 92).

2009 FCA 187 (CanLII)

[23] However, the Federal Court Judge noted that a generic making a claim pursuant to subsection 8(4) of the PM(NOC) Regulations is not in the position of a patentee whose patent has been infringed. The reasonable interpretation of the words "damages or profits" is that the generic can seek, as a measure of its damages, in the alternative, the profits that it would have made if it had been able to market its product at an earlier time (reasons, at paragraph 97).

[24] Lastly, the Federal Court Judge considered Apotex' contention that during the period from February 3, 2004 to May 26, 2005, the marketplace for its alendronate product (i.e. Apo-alendronate) became distorted because two other generics entered the marketplace in that period. More specifically, Apotex claimed that, were it not for Merck's prohibition application, it could have been first in the marketplace or it would have at least entered the marketplace at about the same time that the other generics did and that its market share would, thereby, have been larger than it is now. Apotex argued that a lesser market share is a matter that permanently endures and that it should be entitled to damages for lost sales and lost permanent market share beyond May 26, 2005 (reasons, at paragraph 120).

[25] The Federal Court Judge concluded that it is appropriate for Apotex to make the claim for losses beyond May 26, 2005 provided that the marketplace did not rectify itself or Apotex could not have remedied the marketplace disadvantage before that date. The Federal Court Judge also left the matter of quantification to the later trial (reasons, at paragraph 122).

ALLEGED ERRORS

[26] In support of its appeal, Merck reiterates each of the arguments made before the Federal Court Judge and submits that he committed a variety of legal errors in rejecting these arguments.

[27] With respect to both the *vires* issue and the constitutional issue, Merck submits that section 8 is not necessary or integral to the overall scheme of the PM(NOC) Regulations. The scheme created by the PM(NOC) Regulations seeks to prevent patent infringement. Section 8 is not directed towards that end. Indeed, it undermines the statutory objective.

[28] Furthermore, Merck takes issue with the analogy drawn by the Federal Court Judge between the automatic stay which the PM(NOC) Regulations provide, and an undertaking given in the context of an infringement action in order to obtain an interlocutory injunction. According to Merck, the Governor in Council could have adopted the patent litigation model, but did not. Merck submits that the Federal Court Judge erred in conducting his analysis on the basis of that analogy.

[29] With respect to jurisdiction, Merck submits that, the Federal Court Judge erred in holding that paragraph 55.2(4)(*d*) of the *Patent Act* when read with the definition of "court" in section 2 of the PM(NOC) Regulations confers jurisdiction on the Federal Court. The *Patent Act* does not authorize the Governor in Council to confer jurisdiction by delegated legislation. Merck submits that the Federal Court Judge misinterpreted subsection 12(2) of the *Patent Act* when he held that the designation of the Federal Court in section 2 of the PM(NOC) Regulations amounts to a grant of jurisdiction which has the same force and effect as if it was found in a statute.

[30] With respect to the issue of remedy, Merck submits that the Federal Court Judge erred in

2009 FCA 187 (CanLII)

concluding that Apotex is entitled to claim damages for lost sales and loss of permanent market share occurring outside of the period of liability defined in paragraph 8(1)(*b*) of the PM(NOC) Regulations. The language of section 8 refers to "any loss suffered during the period" in the past tense. Merck submits that this precludes recovery for losses suffered outside the period.

[31] By its cross-appeal, Apotex contends that the Federal Court Judge erred in finding that section 8 of the PM(NOC) Regulations does not allow for an award of disgorgement of profits. The ordinary and grammatical meaning of subsection 8(4) is that two forms of relief are available i.e. "damages or profits". Apotex submits that given that the second person's own lost profits are its damages, it must be the first person's profits that are referred to as profits. Otherwise, the words "or profits" are surplusage.

[32] Apotex submits that the construction which it proposes is consistent with the balance which the *Patent Act* seeks to achieve between generics and inventors. A first person has an incentive to commence a proceeding regardless of whether there is any real possibility of infringement. Only the risk of being compelled to disgorge its own profits can remove the incentive which a first person has to commence a prohibition proceeding for the sole purpose of extending its monopoly rights.

ANALYSIS AND DECISION

[33] The first question which needs to be addressed in order to dispose of this appeal is whether section 8 of the PM(NOC) Regulations is *ultra vires* the *Patent Act*. The analysis which must be conducted in order to address this issue will assist in dealing with the constitutional challenge directed at section 8 and the attack on the jurisdiction of the Court.

The *vires* issue

[34] True questions of *vires* such as the one here in issue are to be reviewed on a standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 59). The question before this Court is therefore whether the Federal Court Judge came to the correct conclusion when he held that section 8 was authorized by the *Patent Act*, and therefore validly promulgated. In my respectful view, he did.

[35] The background and the statutory authority for the PM(NOC) Regulations are comprehensively set out by Binnie J. in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 (*Biolyse*). Reference can also usefully be made to *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, 2006 SCC 49, [2006] 2 S.C.R. 560 (*AstraZeneca*), at paragraphs 12 to 23. It is sufficient for present purposes to set out paragraphs 6 to 12, 45, 46 and 50 of *Biolyse*:

> Over the years, Canada has developed a major sector of "generic drug" manufacturers described as companies that generally manufacture and distribute "drugs which were researched, developed and first brought to market by 'innovator' companies" (*Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), at p. 751, aff'd [1994] 3 S.C.R. 1100). They produce what is sometimes known in the trade as "copy-cat" drugs.
>
> The success of the generic drug manufacturers has been a source of grievance to owners of patents for pharmaceutical medicines, who view monopoly profits conferred by patents as essential to recoup the cost of

2009 FCA 187 (CanLII)

their research program as well as to earn a profit on their investment. Generic drug manufacturers, who generally do not have significant research costs in relation to a drug first brought to market by an innovator company, need only turn a profit on their manufacturing and distribution facilities. Generic drugs can therefore be sold at a discount to "brand name" products in the market place, at considerable savings to the public and at considerable cost to the profits of the innovator drug companies.

Until 1993 the Minister of Health was not directly concerned with patent issues. Indeed, Parliament's policy since 1923 had been to favour health cost savings over the protection of intellectual property by making available to generic manufacturers a scheme of compulsory licencing of an "invention intended or capable of being used for medicine or for the preparation or production of medicine" under s. 39(4) of the *Patent Act*. The compulsory licencing scheme gathered momentum after 1969 when it was extended to imported drugs. A compulsory licence could invariably be obtained from the Commissioner of Patents, and a notice of compliance ("NOC") from the Minister of Health, providing the generic manufacturer could establish pharmaceutical equivalence of its product with the innovator drug ("the Canadian reference product"). In determining the terms of the licence and amount of royalty payable, the Commissioner of Patents was required to "have regard to the desirability of making the medicine available to the public at the lowest possible price consistent with giving to the patentee due reward for the research leading to the invention and for such other factors as may be prescribed" (s. 39(5)). The royalty payable to the patent owner was generally fixed at 4 percent to 5 percent of the net selling price of the drug in posological form, or 15 percent of the net selling price of the drug in bulk (T. Orlhac, "The New Canadian Pharmaceutical Compulsory Licensing Provisions on How to Jump Out of the Frying Pan and Into the Fire" (1990), 6 *C.I.P.R*. 276; G. F. Takach, *Patents: A Canadian compendium of law and practice* (1993), at p. 119; and see *Imperial Chemical Industries PLC v. Novopharm Ltd.* (1991), 35 C.P.R. (3d) 137 (F.C.A.), at pp. 139-40). Linking licence fees to the cost of the "research leading to the invention" did not cover the cost of massive research programs required by the innovators to produce the few "winners" from the many false starts and failed research projects that never came to market.

Section 39(14) of the *Patent Act* simply required the Commissioner of Patents to notify the Department of National Health and Welfare of all compulsory licence applications.

In a reversal of policy, Parliament in 1993 repealed the compulsory licence provisions of the *Patent Act* by what became known as Bill C-91 (S.C. 1993, c. 2) and extinguished all compulsory licences issued on or after December 20, 1991. In part, these changes flowed from international obligations accepted by Canada under the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1869 U.N.T.S. 299 ("TRIPS"). More immediately, perhaps, it was thought that Canada's compulsory licensing system would be declared incompatible with Canada's obligations under the *North American Free Trade Agreement*, Can. T.S. 1994 No. 2, in particular art. 1709(10), signed at the end of 1992.

However, having agreed to respect the 20-year monopoly granted by patents, Parliament wished to facilitate the entry of competition immediately thereafter. It acted to eliminate the usual regulatory lag of two years or more after expiry of a patent for the generic manufacturer to do the work necessary to obtain a NOC. Parliament did so by introducing an exemption from the owner's patent rights under which the generic manufacturers could work the patented invention within the 20-year period ("the early working exception") to the extent necessary to obtain a NOC at the time the patent(s) expired (s. 55.2(1)) and to "stockpile" generic product towards the end of the 20-year period to await lawful market entry (s. 55.2(2)). In order to prevent abuse of the "early working" and "stockpiling" exceptions to patent protection, the government enacted the *NOC Regulations* that are at issue in this appeal.

The patent owner's remedies under the *NOC Regulations* are *in addition to* all of the usual remedies for patent infringement under the *Patent Act*.

. . .

2009 FCA 187 (CanLII)

This Court has accepted the view that Parliament enacted Bill C-91 "with the intent of thwarting the possible appropriation by generic drug companies, such as Apotex, of the research and development initiatives of innovators, such as Merck" (*Apotex v. Canada (Attorney General)*, *per* Robertson J.A., at p. 752 (emphasis added), whose reasons were substantially adopted by this Court at [1994] 3 S.C.R. 1100).

The Regulatory Impact Analysis Statement, which accompanied but did not form part of the *NOC Regulations*, confirms that this was the intention of the regulator. It says that following the abolition of the compulsory licensing system, the government enacted the *NOC Regulations* in order to protect the right of patentees by preventing generic manufacturers from marketing their products until the expiry of all relevant patents (*Merck & Co. v. Canada (Attorney General)* (1999), 176 F.T.R. 21, at para. 51). The relevant portion of the Regulatory Impact Analysis Statement reads:

> . . . As a general rule, judicial remedies are sufficient to address patent infringement. However, with the enactment of Bill C-91 the government has created an exception to patent infringement allowing generic competitors to undertake any activities necessary to work up a submission to obtain regulatory approval of a product. This removes a patent right that may have otherwise been available to patentees to prevent generic competitors from obtaining such regulatory approval of their products.
>
> These Regulations are needed to ensure this new exception to patent infringement is not abused by generic drug applicants seeking to sell their product in Canada during the term of their competitor's patent while nonetheless allowing generic competitors to undertake the regulatory approval work necessary to ensure they are in a position to market their products immediately after the expiry of any relevant patents. [Emphasis added.]

(Regulatory Impact Analysis Statement, SOR/93-133, *Canada Gazette*, Part II, vol. 127, No. 6, at p. 1388)

. . .

Recognizing that the "early working" and "stockpiling" exceptions could be abused, Parliament balanced creation of these exceptions with creation of a summary procedure designed to strengthen the hand of patent owners against generic competitors *within* the 20-year patent period. This carrot and stick combination is found in s. 55.2 of the *Patent Act* [quote of s. 55.2 omitted]. [Emphasis in the original throughout the above quote.]

[36] It is also useful to briefly consider what was decided by the Supreme Court in *Biolyse* and later in *AstraZeneca*. The issue in *Biolyse* was whether a "submission" for an NOC by a person who did not rely (i.e. piggyback) on a first person's drug came within the ambit of the PM(NOC) Regulations. Binnie J., writing for the majority, recognized that the word "submission" in subsection 5(1.1) [as am. by SOR/99-379, s. 2] was on the face of it unambiguous and all inclusive (*Biolyse*, at paragraph 43). However, the PM(NOC) Regulations had to be construed having regard to the *Patent Act* read as a whole and the balance which it seeks to create between the effective enforcement of patent rights through the use of the PM(NOC) Regulations (subsection 55.2(4)) and the timely entry of lower price generic drugs through the use of the "early working" exception (subsection 55.2(1)) (*Biolyse*, above, at paragraph 50).

[37] Viewed in that light, it became apparent that the word "submission" must be confined to situations where a manufacturer in fact copies from an innovator company (*Biolyse*, above, at paragraphs 65 and 69). Giving the word "submission" a wider ambit would overshoot the limited purpose for which regulations may be made and upset the balance which the *Patent Act* seeks to create.

2009 FCA 187 (CanLII)

[38] Soon after *Biolyse* was released, the Supreme Court was again called upon to apply the rationale developed in that case. In *AstraZeneca*, the issue was whether the PM(NOC) Regulations applied in respect of listed patents from which the second person had not derived any advantage in making use of the "early working" exception.

[39] Binnie J., writing for a unanimous Court this time, noted that subsection 4(1) [as am. by SOR/2006-242, s. 2] of the PM(NOC) Regulations allows the Minister to identify the precise patents relevant to the "early working" of a copy-cat drug (*AstraZeneca*, above, at paragraph 22). In order to limit the application of the PM(NOC) Regulations to the stated statutory objective, subsection 5(1) [as am. by SOR/99-379, s. 2] must be construed as requiring a patent-specific analysis restricted to the patents relevant to the comparator drug (*AstraZeneca*, above, at paragraph 39). Thus, the "other drug" referred to in subsection 5(1) can only refer to the drug to which a reference is made by second persons "for the purpose of demonstrating bioequivalence". Again, to construe these words more broadly would allow the PM(NOC) Regulations to apply when the prevention of infringement is not in issue and would upset the balance which the *Patent Act* seeks to create (*AstraZeneca*, above, at paragraphs 15, 38 and 39).

[40] Against this background, I now turn to the specific language of subsection 55.2(4) of the *Patent Act.* It provides for a broad grant of authority for the making of such regulations as the Governor in Council "considers necessary for preventing the infringement of a patent" by any person who makes use of the "early working" exception. The specific authority outlined in paragraphs (*a*) to (*e*) is said not to limit the generality of the initial grant. The only limitation lies in the limited purpose for which regulations may be made.

[41] Paragraph (*a*), although drafted in much broader terms, authorizes the Governor in Council to impose conditions for the issuance of NOCs which, in addition to those usually imposed pursuant to the *Food and Drugs Act*, R.S.C., 1985, c. F-27 and the *Food and Drug Regulations*, C.R.C., c. 870, are aimed at the prevention of infringement. Paragraph (*b*) specifies that this authority to impose further conditions extends to setting the date on which NOCs can be issued.

[42] Paragraph (*c*) provides authority for resolving disputes as to when NOCs may be issued. For that purpose, paragraph (*d*) authorizes the Governor in Council to "confer rights of action in any court of competent jurisdiction" and to provide for the "remedies" that may be sought and the "orders" that may be made.

[43] Paragraph (*e*) provides the Governor in Council with the authority to provide for other measures in the event that the issuance of an NOC might result directly or indirectly in the infringement of a patent.

[44] I also note subsection 55.2(5) which provides that section 55.2 and any regulations made thereunder prevail over any Act of Parliament in the event of any inconsistency or conflict, and subsection 55.2(6) which confirms that the common law exemption for non-commercial use of patented products for the purpose of experimentation is not affected by the "early working" exception.

[45] Subsection 55.2(4) is the statutory authority pursuant to which the PM(NOC) Regulations

2009 FCA 187 (CanLII)

were promulgated, including section 8. In its original form section 8 did not clearly set out the circumstances entitling a second person to a remedy. In *Merck & Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)* (1994), 55 C.P.R. (3d) 302 this Court stated (at paragraph 15):

> Section 8 is particularly obscure in its meaning. It appears to create a liability in the first person in the event that the Minister should comply with the 30 month prohibition in circumstances where subsection 7(2) specifically provides that that prohibition shall have ceased to apply. Fortunately, we are not required to interpret it on this appeal.

[46] Counsel advised during the hearing that there are pending actions in the Federal Court where the original section 8 is in play. I will therefore say no more about this provision as it read when it was initially promulgated.

[47] Section 8 was amended in 1998 by SOR/98-166. In the RIAS which accompanied the amendment, it is explained that the amendment was brought in order to provide [at page 1056] "a clearer indication . . . as to the circumstances in which damages could be awarded to a generic manufacturer to compensate for loss suffered by reason of delayed market entry of its drug". The amendment makes it clear that liability can be visited on a first person when a prohibition application is withdrawn, discontinued or turns out to be unsuccessful.

[48] The liability so created extends to "any loss" suffered by a second person during the period when an NOC could have been issued but was not by reason of the operation of the automatic stay (paragraphs 8(1)(*a*) and (*b*)). A right of action is created in favour of second persons in order to obtain compensation for the loss in question (subsection 8(2)) and the court is authorized to provide relief by way of "damages or profits as the circumstances require" (subsection 8(4)).

[49] Subsection 8(3) makes it clear that the authority of the court to make an order is unaffected by a patent infringement action relating to the patent in play in the failed prohibition application.

[50] Finally, in assessing the amount of compensation, the court is required by virtue of subsection 8(5) to take into account all matters that it considers relevant, including any conduct of the first or second person which contributed to the delay in the disposition of the prohibition proceedings.

[51] I now turn to Merck's contention that section 8 is *ultra vires* the *Patent Act*. The essence of the argument made by Merck before the Federal Court Judge and before this Court boils down to this: since the authority of the Governor in Council is limited to the making of regulations for the purpose of preventing infringement, a regulation which makes a first person liable for damages only by reason of being unsuccessful in asserting its patent rights in conformity with the remedy set out in the PM(NOC) Regulations, cannot be said to prevent infringement. As such, section 8 is *ultra vires* the *Patent Act*.

[52] I accept that, as Merck contends, the power of the Governor in Council is constrained by the wording of subsection 55.2(4) of the *Patent Act* according to which regulations may be made for preventing infringement by a person who makes use of the "early working" exception. I also accept that this is the only purpose for which regulations may be made (*Biolyse*, above, at paragraphs 38, 53 and 67; *AstraZeneca*, above, at paragraphs 15 and 16). However, the authority to devise remedies in

2009 FCA 187 (CanLII)

order to prevent infringement necessarily brings with it the power to ensure that those remedies are used by first persons for that purpose and not for some other purpose such as perpetuating their monopolies beyond the statutory period. This is particularly so when regard is had to the aforesaid balance which the *Patent Act* seeks to establish between effective patent enforcement through the use of the PM(NOC) Regulations and the timely market entry of lower-priced generic drugs through the use of the "early working" exception.

[53] The general scheme set out in the PM(NOC) Regulations in order to prevent infringement provides for the filing of a patent list by a first person (section 4 [as am. by SOR/2006-242, s. 2; *erratum C. Gaz.* 2006.II.1874(E)]); the right of action (application) created in favour of a first person when a second person seeks an NOC and refers to a patented drug in order to demonstrate bioequivalence (sections 5 [as am. by SOR/2006-242, s. 2; *erratum C. Gaz.* 2006.II.1874(E)] and 6 [as am. by SOR/2006-242, s. 2; *erratum C. Gaz.* 2006.II.1874(E)]) and the resulting stay which prevents the Minister from issuing the requested NOC to the second person for 24 months [paragraph 7(1)(*e*) (as am. by SOR/98-166, s. 6)] (formerly 30 months). No one takes issue with the fact that these provisions are designed to achieve the statutory purpose of preventing infringement. In particular, it is clear that the Governor in Council formed the view that, in order to prevent patent infringement in the circumstances described in subsection 55.2(4) of the *Patent Act*, it was necessary <u>both</u> to provide first persons with the right to initiate prohibition proceedings in the circumstances described and prevent the issuance of the NOC to the second person for 24 months when that right is exercised.

[54] At the same time, it was readily apparent that the automatic 24-month stay was capable of being used in a manner which does not advance patent protection. In *Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)*, [1998] 2 S.C.R. 193, Iacobucci J. writing for the Court observed (at paragraph 32):

> The Regulations provide for what is, in effect, a statutory prohibition on, or injunction against, the granting of a NOC, commencing immediately upon the filing by a "first person" of an application for a court-imposed prohibition order and concluding only upon the earlier of the judicial determination of the application or the passage of 30 months. This prohibition takes effect automatically, without any consideration of the merits of the application; not even the ordinary requirements for an interlocutory injunction must be complied with. Under these conditions, and absent some prior indication to the contrary, I think it would be permissible for a generic producer to predict that either the patentee, the holder of a prior NOC, or both, is likely to attempt to protect or prolong their as-yet exclusive rights for as long as possible by taking advantage of the procedure set out in the Regulations.

[55] One of the more obvious concerns flowing from the automatic stay was identified by Mahoney J.A. in *Bayer AG v. Canada (Minister of National Health & Welfare)* (1993), 51 C.P.R. (3d) 329 (F.C.A.) (*Bayer*), where he noted (at paragraph 14) that given the scheme, it is the patentee who has both the carriage of the proceeding and the interest in its dilatory prosecution.

[56] In *AstraZeneca*, Binnie J. identified a broader concern (at paragraph 39):

> By imposing the 24-month delay called for by the *NOC Regulations*, the decision of the Federal Court of Appeal undermines achievement of the balance struck by Parliament between the objectives of the *FDA* [*Food and Drugs Act*] and regulations thereunder (making safe and effective drugs available to the public) and the *Patent Act* and its regulations (preventing abuse of the "early working" exception to patent infringement). <u>Given</u>

2009 FCA 187 (CanLII)

the evident (and entirely understandable) commercial strategy of the innovative drug companies to evergreen their products by adding bells and whistles to a pioneering product even after the original patent for that pioneering product has expired, the decision of the Federal Court of Appeal would reward evergreening even if the generic manufacturer (and thus the public) does not thereby derive any benefit from the subsequently listed patents. [My emphasis.]

[57] Attempts by first persons to list patents on the basis of a change in a drug name or a change in a manufacturing site, neither of which can remotely have anything to do with patent infringement, have also been noted judicially (*Ferring Inc. v. Canada (Attorney General)*, 2003 FCA 274, 26 C.P.R. (4th) 155 (*Ferring*); *Hoffmann-La Roche Ltd. v. Canada (Minister of Health)*, 2005 FCA 140, [2006] 1 F.C.R. 141 (*Hoffmann-La Roche*)). (This last concern was directly addressed in 2006 by the addition of subsection 4(3) and the definition of "supplement to a new drug submission" in subsection 3(1) which exclude the possibility of listing a patent on the basis of an administrative submission (SOR/2006-242, section 2).)

[58] Section 8, by imposing on first persons a liability for the losses suffered by a second person, as a result of the operation of the automatic stay, when a prohibition application is withdrawn, discontinued or is ultimately unsuccessful, alleviates these concerns. As was noted in *AB Hassle v. Canada (Minister of National Health and Welfare)* (2000), 7 C.P.R. (4th) 272 (F.C.A.) (*AB Hassle*) (*per* Stone J.A., at paragraph 27), the ability of the court to order payment of damages resulting from the operation of the automatic stay suggests that a first person no longer has an exclusive interest in delaying the progress of a section 6 prohibition proceeding.

[59] By the same logic, a first person no longer has an exclusive interest in triggering the operation of the automatic stay by reference to patents which are not properly listed (*Ferring*, above; *Hoffmann-La Roche*, above; see also *Apotex Inc. v. Canada (Minister of National Health and Welfare)* (2000), 181 D.L.R. (4th) 404 (F.C.A.), at paragraphs 27 and 28) or to "evergreen" a patented drug in order to perpetuate the benefit which the PM(NOC) Regulations provide (*AstraZeneca*, above, at paragraphs 23 and 39; *Biolyse*, above, at paragraph 66). As a result of section 8, a first person must focus on the issue of infringement and consider the strength of its position before initiating a prohibition proceeding.

[60] This promotes the use of the PM(NOC) Regulations for the purpose for which they are intended: the prevention of infringement. Significantly, it does so in a manner which is consistent with maintaining the balance alluded to in *Biolyse* and in *AstraZeneca*. It is useful to repeat that both these cases were decided on the basis that the PM(NOC) Regulations should be construed in a manner which goes no further than is necessary in order to prevent infringement since overshooting this objective would upset the other part of the balance which section 55.2 of the *Patent Act* seeks to achieve, namely the timely entry of cheaper generic drugs on the market. The statutory authority of the Governor in Council to make regulations pursuant to subsection 55.2(4) of the *Patent* Act must be construed accordingly.

[61] I therefore find that section 8 of the PM(NOC) Regulations comes within the general grant of authority set out in subsection 55.2(4) of the *Patent Act* and that the Federal Court Judge came to the correct conclusion when he held that section 8 was validly promulgated.

The constitutional issue

2009 FCA 187 (CanLII)

[62] Merck further contends that the Federal Court Judge erred in holding that the right of action created by section 8 of the PM(NOC) Regulations is within the authority of Parliament pursuant to subsection 91(22) of the *Constitution Act, 1867.* According to Merck, section 8 provides for an independent cause of action unconnected to the PM(NOC) Regulations, which falls within provincial legislative competence over property and civil rights. The standard applicable to the review of the decision of the Federal Court Judge on this point is again correctness.

[63] It is common ground that, looked upon in isolation, section 8 creates a civil right of action which comes within the province's broad jurisdiction over property and civil rights. In *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 (*General Motors*), at pages 671 and 672, the Supreme Court devised a three-part test for determining the constitutional validity of federal laws which encroach on provincial heads of power: firstly, the court must determine the extent of the encroachment; secondly, the court must establish whether the act (or a severable part of it) is valid as forming part of a valid regulatory scheme falling under federal jurisdiction; and thirdly, the court must determine whether the impugned provision is sufficiently integrated into that regulatory scheme that it can be upheld by virtue of that relationship.

[64] Dealing with the extent of the encroachment, the right of action created by section 8 is only available to a limited group of persons operating within a defined industry. Its scope of application is confined to patent controversies relating to drug products arising under the narrow conditions set out in the PM(NOC) Regulations. It is further limited to situations created by first persons when they make applications pursuant to subsection 6(1). Thus, the extent of the intrusion is minor (compare *General Motors*, above, at page 673). It is noteworthy that despite having been duly notified, the Attorney General of the provinces or the territories have not seen fit to intervene.

[65] As to the second part of the test, Merck concedes that the PM(NOC) Regulations, including section 6 which entitles first persons to launch prohibition applications and trigger the automatic stay, were validly promulgated pursuant to the *Patent Act* and constitute a valid regulatory scheme falling within Parliament's competence over patents of invention pursuant to subsection 91(22) of the *Constitution Act, 1867*. The only exception is section 8. The question therefore is whether, according to the third part of the test set out in *General Motors*, above, section 8 is sufficiently integrated into the overall scheme to become part of it. In my view, the above reasons for concluding that section 8 is *intra vires* the *Patent Act* are dispositive of this issue.

[66] I would simply add, to further highlight the extent of the connection, that an award of damages under section 8 logically flows from the section 6 prohibition proceedings and would normally be adjudicated by the judge who hears the prohibition application. I refer in particular to subsection 8(5) of the PM(NOC) Regulations which provides that in assessing the amount of the compensation, regard must be had to the conduct of the parties during the prohibition proceedings which contributed to the delay. It is apparent that the only reason section 8 damages are adjudicated in a separate proceeding is that regard had to be had to the right of appeal.

[67] I therefore conclude that the Federal Court Judge correctly held that section 8 comes within subsection 91(22) of the *Constitution Act, 1867* and is as such valid federal delegated legislation.

Jurisdiction

2009 FCA 187 (CanLII)

[68] The question to be answered with respect to jurisdiction is whether the Federal Court Judge erred in holding that he had jurisdiction to hear the section 8 action brought by Apotex. This question must again be assessed on a standard of correctness.

[69] The Federal Court derives its jurisdiction from statute. In order to support a finding of jurisdiction, the following elements must exist (*ITO—International Terminal Operators Ltd. v. Miida Electronics Inc. et al.*, [1986] 1 S.C.R. 752, at page 766):

1. There must be a statutory grant of jurisdiction by the federal Parliament.

2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.

3. The law on which the case is based must be a "law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

[70] Parliament's competence in respect of patents and the existence of a federal body of law relating to patents are not in issue. However, Merck maintains that the first condition is not fulfilled. In my respectful view, subsection 20(2) of the *Federal Courts Act* which provides the Federal Court with concurrent jurisdiction "in all cases . . ., in which a remedy is sought under the authority of an Act of Parliament . . . respecting any patent of invention" is an express statutory grant of jurisdiction which authorizes the Federal Court to hear both section 6 prohibition proceedings and section 8 actions.

[71] Proceedings instituted under section 6 and section 8 of the PM(NOC) Regulations come within this express grant since both provide for a remedy in respect of patents. Section 6 does so by preventing the issuance of an NOC while listed patents referred to by a second person in order to demonstrate bioequivalence remain in effect, and section 8 does so by allowing a second person to recover losses arising from the automatic stay triggered by a first person when the attempt to assert its patent rights fail.

[72] The various cases cited by Merck in support of its view that subsection 20(2) stops short of conferring jurisdiction on the Federal Court with respect to actions undertaken pursuant to section 8 are of no assistance (*R.W. Blacktop Ltd. v. Artec Equipment Co.* (1991), 39 C.P.R. (3d) 432 (F.C.T.D.), at page 439; *Netbored Inc. v. Avery Holdings Inc.*, 2005 FC 490, 272 F.T.R. 131, at paragraph 24; *Aktiebolagert Hassle v. Apotex Inc.*, [1988] 1 F.C. 360 (F.C.T.D.) (*Aktiebolagert Hassle*), at pages 361 to 367; *Innotech Pty Ltd. v. Phoenix Rotary Spike Harrows Ltd.* (1997), 74 C.P.R. (3d) 275 (F.C.A.), at pages 276 and 277). The remedies sought in all those cases arose under the common law and were found to relate primarily to contractual or equitable rights and obligations between the parties rather than to patents of invention.

[73] We are not concerned here with the enforcement of contractual rights. What is in issue is a remedy devised by the Governor in Council pursuant to a regulatory scheme. The situation is closer to that described in *Composers, Authors & Publishers Assoc. of Canada Ltd. v. Sandholm Holdings Ltd. et al.*, [1955] Ex. C.R. 244 (*Sandholm Holdings Ltd.*), where the Court held that it had jurisdiction over a dispute concerning the payment of royalties because the *Copyright Act* [R.S.C. 1927, c. 32] provided a statutory remedy to collect unpaid royalties. Significantly, in *Aktiebolagert*

2009 FCA 187 (CanLII)

Hassle, above, a case on which Merck relies, the Federal Court Trial Division, declined jurisdiction on the basis that claims relating to the payment of licence fees to a patentee were matters of contract. However, the Court explicitly distinguished at page 365 the earlier decision of the Exchequer Court in *Sandholm Holdings Ltd.* on the ground that the *Patent Act* [R.S.C. 1970, c. P-4] unlike the *Copyright Act* did not provide for a statutory remedy to collect unpaid royalties.

[74] In my respectful view, both sections 6 and 8 of the PM(NOC) Regulations provide remedies pursuant to a regulatory scheme aimed at the prevention of infringement, and as such come within the express grant of jurisdiction conferred on the Federal Court by virtue of subsection 20(2) of the *Federal Courts Act*.

[75] Merck made the argument that the jurisdiction of the Federal Court to hear prohibition proceedings rests on paragraph 18(1)(*b*) [as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26] of the *Federal Courts Act* rather than subsection 20(2) (Merck's memorandum, at paragraph 90). In this respect, Merck relies on *Bayer*, above, where this Court held, in adjudicating a procedural matter, that a prohibition application pursuant to section 6 comes within the jurisdiction conferred by paragraph 18(1)(*b*) of the *Federal Courts Act* since it contemplates relief against a federal board. Merck makes the point that the jurisdiction so conferred must be confined to section 6 applications since section 8 actions do not involve a federal board.

[76] No doubt that is so. However, the fact that jurisdiction to hear prohibition proceedings can be found in paragraph 18(1)(*b*) of the *Federal Courts Act* because it contemplates relief against the Minister, as was held in *Bayer*, above, does not alter or diminish the grant of jurisdiction made pursuant to subsection 20(2) with respect to patents of invention. Nothing in that decision suggests that paragraph 18(1)(*b*) operates to exclude the jurisdiction conferred by subsection 20(2).

[77] Nevertheless, Merck's interpretation of the *Bayer* decision seems to have led the Federal Court Judge to look for an express grant of jurisdiction elsewhere than in subsection 20(2) of the *Federal Courts Act*. He found that the authority given to the Governor in Council under paragraph 55.2(4)(*d*) of the *Patent Act* to make regulations "conferring rights of action in <u>any</u> court of competent jurisdiction" (his emphasis) allows the Governor in Council to confer jurisdiction on "any court" by way of regulations and that section 2 of the PM(NOC) Regulations which defines "court" to mean the Federal Court of Canada or superior courts of competent jurisdiction constitutes such a grant (reasons, at paragraphs 63 and 64).

[78] In my respectful view, while paragraph 55.2(4)(*d*) gives the Governor in Council the power to make regulations "conferring rights of action", it does not empower the Governor in Council to confer jurisdiction on courts not already possessed with such jurisdiction. What subsection 55.2(4) envisages is that the Governor in Council may, amongst the courts which are competent to hear such actions, designate the court(s) of its choice. That is what the definition of the word "court" in section 2 of the PM(NOC) Regulations achieves by identifying the Federal Court (which has statutory jurisdiction pursuant to subsection 20(2) of the *Federal Courts Act*) and the superior courts of provinces (which have inherent jurisdiction) as courts of competent jurisdiction to hear matters arising under the PM(NOC) Regulations.

[79] The Federal Court Judge further held that even if the Governor in Council is not empowered

2009 FCA 187 (CanLII)

to grant jurisdiction on courts by way of regulations, the designation of the Federal Court in section 2 of the PM(NOC) Regulations amounts to a statutory grant of jurisdiction. In this respect, he relied on subsection 12(2) of the *Patent Act*, which provides that regulations made under the provisions of the *Patent Act* have the same effect as if they were made under the *Patent Act* itself and subsection 55.2(5) of the *Patent Act* which provides that in the case of a conflict between the PM(NOC) Regulations and the *Patent Act*, the Regulations shall prevail (reasons, at paragraphs 63 and 64).

[80] In my respectful view, this reasoning is incorrect. To the extent that paragraph 55.2(4)(*d*) of the *Patent Act* does not authorize the Governor in Council to confer jurisdiction by way of regulation, subsections 12(2) and 55.2(5) of the *Patent Act* cannot possibly be construed as validating a grant of jurisdiction made pursuant to a regulation (compare *Minister of Health v. The King, Ex p. Yaffe*, [1931] A.C. 494 (H.L.) (*Yaffe*), at pages 501 and 502, *per* Viscount Dunedin; *Trans-Canada Pipe Lines Ltd. v. Provincial Treasurer of Saskatchewan* (1968), 67 D.L.R. (2d) 694 (Sask. Q.B.) (*Trans-Canada*), at pages 700 to 703; *Biolyse*, above, at paragraph 55).

[81] That said, for the reasons given, the Federal Court Judge had to look no further than to subsection 20(2) of the *Federal Courts Act* to hold that the Federal Court has jurisdiction to hear and dispose of both the section 6 prohibition proceedings and the section 8 actions. I therefore conclude that the Federal Court Judge correctly held that he had jurisdiction over the action brought by Apotex pursuant to section 8 of the PM(NOC) Regulations.

<u>Remedy</u>

[82] Two issues arise with respect to remedy. The more significant is the one raised by Apotex by way of cross-appeal as to whether the Federal Court Judge properly rejected the contention that it was entitled to compensation by way of a disgorgement of Merck's profits. In this regard, Apotex relies on the plain and grammatical meaning of the words of section 8 and argues that the Federal Court Judge failed to recognize that the disgorgement of profits wrongly made during the stay period is consistent with the scheme and object of the *Patent Act* and the PM(NOC) Regulations. This issue is one of pure statutory construction which stands to be reviewed on a standard of correctness.

[83] The words of section 8 must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the PM(NOC) Regulations, their object, and the intention of Parliament (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paragraphs 29 and 30, as applied in *Biolyse*, above, at paragraph 43). Where regulations are concerned, the purpose of the enabling statute must also be considered (*Biolyse*, above, at paragraph 47).

[84] The debate turns on the words in subsection 8(4) which authorize the court to provide "for relief by way of damages or profits". The Federal Court Judge identified the issue as follows (reasons, at paragraph 89):

> Why then are the words "or profits" appearing in subsection 8(4)? Apotex argues that they cannot be redundant with "damages"; thus they must mean something else and that something else is Merck's profits. This requires an examination as to how the word "profits" has been used in a patent context.

2009 FCA 187 (CanLII)

[85] After reviewing the *Patent Act* and considering the authorities, the Federal Court Judge noted that a patentee whose patent has been infringed is entitled to an election which can call into play two different measures of profit (reasons, at paragraph 96):

> Thus, where a patent has been infringed, a patentee is entitled to seek, by way of remedy an account (meaning disgorgement of an infringer's profit) as an equitable remedy, or damages as a legal remedy. If damages are selected, one way of measuring damages, if the patentee makes or sells the patented product, is to determine the patentee's lost profit. [Emphasis in the original.]

[86] However, he went on to note that a second person claiming compensation pursuant to subsection 8(4) of the PM(NOC) Regulations is not in the position of a patentee (reasons, at paragraph 97):

> Turning to section 8(4) of the PMNOC Regulations it is immediately apparent that the generic is not a patentee; in fact it escaped charges of infringement of somebody else's patent by demonstrating that the patent was invalid (as in the present case) or not infringed. The generic cannot claim damages or an account of profits for infringement. What the generic can claim is "compensation" for "loss" having been kept off the market for a period of time. That "compensation" takes the form of "damages or profits". The reasonable interpretation of those words "damages or profits" is that the generic can seek, as a measure of its damages in the alternative, the profits that it would have made if it had been able to market its product at an earlier time. [Emphasis in the original.]

[87] Apotex argues that this construction requires that the word "lost" be read in the contested phrase as in "damages or lost profits". According to Apotex, the Federal Court Judge had to take the language of the provision as it is, and the words "damages or profits" do not warrant the narrow scope which he gave to these words.

[88] The Federal Court Judge confronted this argument (reasons, at paragraphs 98 to 101). In particular, he referred to Professor Ruth Sullivan's 5th edition of *Sullivan on the Construction of Statutes*, Markham, Ont.: LexisNexis Canada, 2008, and endorsed the view that "reading down" as opposed to "reading in" is a legitimate technique of statutory interpretation to the extent that a contextual interpretation indicates that a narrow scope was intended. In this case adding the word "lost" narrows the scope of the expression "damages or profits" and therefore "reads down" the provision in a manner that is consistent with the intent of Parliament.

[89] I can detect no error in this reasoning. A contextual reading of section 8 of the PM(NOC) Regulations indicates that "compensation" for the loss resulting from the operation of the automatic stay is to be computed by reference to the loss suffered by the second person by reason of the stay or the profits that it would have made during the period when it was prevented from going to the market. The claim by Apotex that it should be entitled to all the remedies available to a patentee whose patent has been infringed ignores the plain fact that it is not in that position. The compensation provided is for prejudice actually suffered by a second person by reason of the operation of the stay.

[90] In so holding, I reject Apotex' assertion that the disgorgement of Merck's profit is necessary in order to achieve the balance which underlies section 55.2 of the *Patent Act*. In my view, a measure which compels a first person to place the second person in the position in which it would have been, if the operation of the stay had not been triggered, fits well within the contemplated

2009 FCA 187 (CanLII)

balance.

[91] I therefore conclude that the Federal Court Judge came to the correct conclusion when he held that section 8 of the PM(NOC) Regulations does not envisage the disgorgement of a first person's profit.

[92] The other issue relating to remedy pertains to the claim for damages set out in subparagraph 1(a)(ii) of the respondent's further amended statement of claim (reasons, at paragraph 118):

> (a) damages suffered by Apotex in respect of the drug alendronate by reason of the commencement of a proceeding by the Defendants pursuant to the Patented Medicines (Notice of Compliance) Regulations (the "Patent Regulations"), in respect of:
>
> . . .
>
> (ii) lost sales and permanent market share due to the fact that launch by Apotex of its alendronate product was unjustly delayed with the result that two other generic manufacturers, Novopharm Limited ("Novopharm") and Cobalt Pharmaceuticals Inc. ("Cobalt"), launched their alendronate products essentially simultaneously, thus denying Apotex the opportunity to establish a permanent market share advantage in advance of any generic competitor.

[93] The Federal Court Judge, while recognizing that catchwords are not entirely accurate, characterized the claim as being for "future losses" (reasons, at paragraph 119). He described the precise purport of the claim as follows (reasons, at paragraph 120):

> As I understand Apotex's claim, it is saying that during the period from February 3, 2004 to May 26, 2005, the marketplace for this particular product became distorted because two other generics entered the marketplace in that period. Apotex claims that, were it not for Merck's NOC application against Apotex, Apotex could have been first in the marketplace or at least entered the marketplace at about the same time that the other generics did and that Apotex's market share would, thereby, have been larger [than] it now is. Apotex argues that such lesser market share is a matter that permanently endures and is a matter of permanent loss. The loss, says Apotex, may be quantified by experts at the later trial.

[94] In assessing whether the claim came within the ambit of section 8, the Federal Court Judge drew an analogy with the situation where a person suffers an injury by the tortious act of another (reasons, at paragraph 121):

> For instance, a person may be injured in the leg so that, for the rest of that person's life, that person suffers a leg disability. The leg may heal—the person perhaps ought to have sought, but did not, medical attention or remedial therapy. These are matters of quantification and not a matter of injury itself.

[95] Relying on this analogy, the Federal Court Judge held that the claim for lost sales and lost permanent market share beyond May 26, 2005 (i.e. beyond the period contemplated by section 8) was properly advanced, subject to Apotex showing that such losses were not rectified and could not have been rectified within the period. The exact wording of the judgment is as follows (paragraph 2c.):

> Apotex Inc. is entitled to claim damages for lost sales and lost permanent market share as claimed in subparagraphs 1 (a)(ii) of its further amended statement of claim dated October 6, 2008 <u>for a period beyond</u>

2009 FCA 187 (CanLII)

May 26, 2005 provided it is shown in evidence that such loss was not rectified and could not have been rectified before that date. [My emphasis.]

[96] Merck submits that in so concluding the Federal Court Judge gave to section 8 an effect that is clearly not intended. In particular, Merck insists that subsection 8(1) only makes a first person liable for any loss "suffered" during the period. The decision of the Federal Court Judge extends the remedy to damages suffered outside the period.

[97] No one takes issue with the Federal Court Judge's characterization of the claim made by Apotex in its further amended statement of claim. The issue is therefore whether the claim as construed by the Federal Court Judge comes within the words of subsection 8(1). This again gives rise to a pure question of statutory interpretation which stands to be reviewed on a standard of correctness.

[98] As has already been noted, section 8 in its original form was somewhat obscure (see paragraph 45 above). The RIAS which accompanied the 1998 amendment to section 8 indicates that the change was brought in order to provide a clearer indication as to the circumstances in which damages can be awarded. In this respect, the amended version of section 8 makes it clear that:

> **8.** . . . the first person is liable to the second person for any loss suffered during the period
>
> (*a*) beginning on the date, as certified by the Minister, on which a notice of compliance would have been issued in the absence of these Regulations, unless the court is satisfied on the evidence that another date is more appropriate; and
>
> (*b*) ending on the date of the withdrawal, the discontinuance, the dismissal or the reversal. [My emphasis.]

[99] According to the analysis of the Federal Court Judge, the losses claimed by Apotex were caused during the period since that is when Apotex was prevented from occupying the market and obtaining the market share which, based on its claim, it would otherwise have had. No one takes issue with this reasoning. The question is whether the decrease in sales which occurs in future years as a result of this decreased market share comes within section 8. The Federal Court Judge, by allowing the claim for losses "beyond May 26, 2005" to proceed, answered this question in the affirmative.

[100] When regard is had to the broad grant of authority conferred by subsection 55.2(4) of the *Patent Act*, it seems clear that the measure of the compensation which can be awarded under the PM(NOC) Regulations is a matter within the discretion of the Governor in Council. It is also clear that in keeping with the purpose of the PM(NOC) Regulations and the balance which the *Patent Act* seeks to achieve, a range of compensation was open to the Governor in Council in the exercise of this discretion.

[101] In this case, we have the advantage of knowing that in 1998 the Governor in Council focused on this very issue, and chose to limit the measure of the losses which can be compensated by way of damages to those suffered during the period. No issue of principle flows from this. The Governor in Council could have extended the measure of the losses to include those caused during the period, regardless of when they are suffered. However, it did not do that.

2009 FCA 187 (CanLII)

[102] The Governor in Council's clearly expressed intent must be given effect to. This excludes compensation for losses occurring in future years since such losses cannot be said to have been suffered during the period. It follows, for instance, that Apotex' entitlement to damages for lost sales resulting from the alleged decrease in its market share must be confined to sales that can be shown to have been lost within the period. In order to be compensated, the losses must be shown to have been incurred during the period. I therefore conclude that the appeal should be allowed on this limited point.

Costs

[103] Finally, Apotex also challenges by way of its cross-appeal the Federal Court Judge's decision not to award costs in its favour. The Federal Court Judge held that the parties should assume their respective costs. The reason given is that both had "largely" failed to succeed on the issues asserted by them (reasons, at paragraph 123).

[104] Decisions pertaining to costs are discretionary in nature and will only be overturned when the trial Judge failed to give sufficient weight to all relevant considerations, erred in law, or misapprehended the facts (*Schmeiser v. Monsanto Canada Inc.*, 2002 FCA 449, 22 C.P.R. (4th) 455, at paragraph 2).

[105] Apotex argues that the Federal Court Judge misapprehended the facts when he held that success in the action before him was divided. The suggestion appears to be that success should be assessed by counting the issues on which it was successful and as it succeeded on most issue, costs should have been awarded in its favour.

[106] The Federal Court Judge obviously did not evaluate the degree of success that way. He viewed the issue of remedy, and in particular, Apotex' contention that it was entitled to the disgorgement of Merck's profits as a significant part of the debate before him. While there may be different ways to evaluate success, it has not been shown that the Federal Court Judge committed a reviewable error in assessing success as he did.

[107] Apotex also contends that the Federal Court Judge erred by failing to give it an opportunity to be heard on the issue of costs. However, there is no suggestion that Apotex did not have the opportunity to make representations on the issue of costs at the close of the hearing. When a party fails to avail itself of that opportunity, there is no positive obligation to invite submissions on the issue of costs. I see no reason for interfering with the Federal Court Judge's decision on the issue of costs.

[108] For the above reasons, I would dismiss Apotex' cross-appeal with costs computed at the mid-level of Column III of Tariff B [as am. by SOR/2004-283, ss. 30, 31, 32 of the *Federal Courts Rules*, SOR/98-106, r. 1 (as am. *idem*, s. 2)]. I would allow the appeal in part, set aside paragraph 2c. of the judgment rendered by the Federal Court Judge, and giving the judgment which he ought to have given, I would hold that Apotex' claim for damages for lost sales and lost permanent market share must be confined to such losses which can be shown to have been incurred during the section 8 period. I would grant the costs of the appeal in favour of Merck but given the limited success, I would direct that the costs be computed at the mid-level of Column I of Tariff B.

2009 FCA 187 (CanLII)

LAYDEN-STEVENSON J.A.: I agree.

RYER J.A. : I agree.

2009 FCA 187 (CanLII)

SUPERIOR COURT
(Commercial Division)

2013 QCCS 5762 (CanLII)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-042345-120

DATE : November 20, 2013

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

IN THE MATTER OF THE PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF :

AVEOS FLEET PERFORMANCE INC. /
AVEOS PERFORMANCE AÉRONAUTIQUE INC.
-and-
AERO TECHNICAL US, INC.
Insolvent Debtors

-and-

FTI CONSULTING CANADA INC.
Monitor

-and-

THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
Applicant

-and-

WELLS FARGO BANK NATIONAL ASSOCIATION, as holder of a power of attorney
-and-
CRÉDIT SUISSE AG, CAYMAN ISLAND BRANCH, as fondé de pouvoir and administrative agent and collateral agent for the Second Lien Lenders
-and-
AVEOS HOLDING COMPANY, as holder of a power of attorney

-and-

BREOF/BELMONT BAN L.P.
Respondents

-and-

AON HEWITT, as administrator of the pension plans of Aveos Fleet Performance Inc./ Aveos Performance Aéronautique Inc. and the former and retired employees of Aveos Fleet Performance Inc.
Impleaded party

2013 QCCS 5762 (CanLII)

JUDGMENT

INTRODUCTION

[1] Aveos Fleet Performance Inc. ("Aveos") and its related entity Aero Technical US, Inc. applied for and this Court issued an initial order ("Initial Order") under the *Companies' Creditors Arrangement Act*[1] ("C.C.A.A.") on March 19, 2012.

[2] Aveos' operations had largely had been shutdown prior to the C.C.A.A. filing. The remainder of its normal operations were shutdown following the C.C.A.A. filing and most of the remaining employees were laid off.

[3] The present litigation pits the rights of a pension fund to obtain priority for the payment of its deficit against the rights of the Respondent secured lenders ("Secured Lenders") to recover their loans and advances.

[4] The Superintendent of Financial Institutions (the "Superintendent") has filed a motion seeking a declaratory judgment which has been contested by the Secured Lenders. The Superintendent is supported by the pension plan administrator, Aon Hewitt ("Aon").

[5] Aveos has maintained neutrality on the aforementioned issue. However, Aveos has made representations on a secondary issue arising from a recent payment received from Air Canada which, according to the manner in which this payment is applied, could reduce the quantum of the priority treatment sought by the Superintendent.

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[1] R.S.C., 1985, c. C-36.

[6] The Monitor has filed a report but also maintained neutrality.

FACTS

2013 QCCS 5762 (CanLII)

[7] With a view to using court time efficiently and focusing on legal issues, the parties have agreed on the essential facts in a document entitled "Agreed Statement of Facts", the first section of which reads as follows:

"**I. FACTS RELATING TO THE NON-UNION PENSION PLAN:**

1. The Retirement Plan for Employees of Aveos that is the object of the motion (the "**Plan**") is a defined benefit pension plan. It was established by Aveos Fleet Performance Inc. (the "**Company**" or "**Aveos**") effective October 16, 2007;

2. An initial application for registration of a defined benefit plan was filed with the Office of the Superintendent of Financial Institutions ("**OSFI**") on September 5, 2008 and an amended application was filed on December 4, 2008, as appears from the September 5, 2008 cover letter to OSFI, the initial Application for Registration of a Pension Plan, and the revised Application for Registration of a Pension Plan attached en liasse as **Exhibit R-1;**

3. Thereafter, OSFI registered and assigned the Plan federal registration number 57573 and the Plan is governed by the *Pensions Benefits Standards Act* ("**PBSA**") and regulations thereunder;

4. The Plan covers all non-unionized employees of the Company who were employed by Air Canada as of October 15, 2007, who participated in the Air Canada Pension Plan or the Pension Plan for Air Canada Management Employees Formerly Employed by Canadian Airlines International Limited (the "**Air Canada Plans**"), and who became employed by the Company effective October 16, 2007;

5. Thereafter, assets and liabilities of the Air Canada Plans in respect of these employees were transferred from the Air Canada Plans to the Plan;

6. The Plan also provides pension benefits to former non-unionized employees of the Company who were hired after October 16, 2007 and who met the eligibility criteria under the Plan terms;

7. Contributions from both the Company and employees were required to be made to the Plan;

8. The Company was the sponsor and administrator of the Plan from inception until April 5, 2012, as detailed below, when OSFI removed the Company as administrator and named Aon Hewitt as the replacement Plan administrator;

9. As required by the PBSA, actuarial valuation reports for the Plan were prepared by an actuary and filed with OSFI annually;

10. The actuarial valuation report for the Plan as at December 31, 2010, dated June 2011 was prepared by Aon Hewitt Inc. and filed with OSFI in June, 2011 (the "**2010 Valuation Report**") filed as **Exhibit R-2;**

11. The 2010 Valuation Report revealed that as at December 31, 2010 the Plan was 79.4% funded on a solvency basis, and had an adjusted solvency deficiency of $15,297,000. As a result, annual special payments totaling $3,059,400 were required to be paid into the Plan fund in monthly installments in the amount of $254,950;

12. Until the 2010 Valuation Report was filed, Aveos continued to fund in accordance with the report filed the preceding year with respect to the Plan. Aveos made in September 2011 a catch up payment for the deficiency in payments made to the Plan for the first six months of 2011 in accordance with the 2010 Valuation Report. Aveos also made the special payment owed for that month. The 2011 Valuation Report that valued the Plan as at December 31, 2011 was due to be filed by June 30, 2012;

13. Special payments in the amount of $254,950 continued to be paid by the Company to the Plan fund in accordance with the 2010 Valuation Report until the last payment made on March 1, 2012 for the month of January, 2012;

14. In the days leading up to the Initial Order, Aveos employed approximately 2,620 employees working from approximately ten facilities across Canada and operated three main divisions, namely the Airframe, Engine and Component Divisions;

15. Approximately 88% of its workforce in Canada was unionized and represented by the International Association of Machinists and Aerospace Workers (the "**Union**");

16. On the eve of the Initial Order, Aveos ceased the operations of its Airframe Division and notified all other of its employees not to report to work as of March 19, 2012;

17. On March 19, 2012, Aveos and Aero Technical US, Inc. ("**Aero US**" and together with Aveos, the "**Debtors**") made an application

2013 QCCS 5762 (CanLII)

under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and an Initial Order (the "**Initial Order**") was made by the Honourable Mr. Justice Schrager of the Superior Court of Quebec (Commercial Division) (the "**Court**"), granting, inter alia, a stay of proceedings against the Debtors until April 5, 2012, (as extended from time to time thereafter, the "**Stay Period**") and appointing FTI Consulting Canada Inc. as monitor of the Debtors (the "**Monitor**");

2013 QCCS 5762 (CanLII)

18. According to the Initial Order, a charge of $5,000,000.00 was granted in favour of the Debtors' directors, which was reduced to $2,000,000.00 by the Order of May 8, 2012. Paragraph 19 of the Initial Order suspended the making of special payments to the Debtors pension plans, including the Plan, but allowed for the making of normal cost contributions;

19. On March 19 and 20, 2012, all of the Debtors' directors resigned from their positions;

20. On the day following the issuance of the Initial Order, Aveos ceased the operations of its two other divisions, the Engine and Component Divisions, and terminated the employment of its remaining workforce save for a very limited number of key employees;

21. On March 20, 2012, the Court approved the appointment of Jonathan Solursh to act as Chief Restructuring Officer of the Debtors (collectively with R.e.l. Group Inc., the "**CRO**"), who developed and implemented, with the support of the Union and the Secured Lenders (defined below), a Court approved divestiture process (the "**Divestiture Process**");

22. By letter dated April 5, 2012, OSFI appointed Aon Hewitt Inc. as the replacement administrator of the Plan effective April 5, 2012, as appears from a letter produced under Exhibit R-3;

23. The Divestiture Process was approved by this Court on April 20, 2012 and has already resulted in numerous Court approved transactions; practically all if not all of the Debtors' assets have now been sold;

24. By way of letters dated May 10, 2012, the CRO informed OSFI that accruals would cease in respect of the Plan and another Aveos pension plan, being a Defined Contribution Plan ("**DC Plan**") effective May 19, 2012, as appears from said letters produced en liasse under **Exhibit R-4**. The letter respecting the Plan informed OSFI that the Plan had no future;

25. Aveos also had a defined benefit pension plan for union members ("**DB Union Plan**");

26. On May 14, 2012, legal representative for IAMAW informed legal counsel for OSFI that "that there are no longer any active IAMAW members in the (DB Union) Plan. In light of the circumstances, the IAMAW hereby requests that the (DB Union) Plan for IAMAW members be terminated and wound-up." This request was reaffirmed on May 23, 2012 following OSFI's receipt of information that two union employees were still engaged by Aveos;

27. OSFI terminated both the Plan and the DC Plan effective May 19, 2012 and terminated the DB Union Plan effective May 25, 2012, as appears from the letters issued by the OSFI on May 25, 2012 and produced en liasse under **Exhibit R-5**;

28. The following table summarizes the amounts owed in respect of the Plan per month :

Aveos Non Union Pension Plan				
Monthly Period covered	**Accrued on**	**Special payment required**	**Received amount**	**Outstanding**
January 2012	January 1. 2012	254,950.00 $	254,950.00 $	- $
February 2012	February 1, 2012	254,950.00 $		254,950.00 $
March 2012	March 1, 2012	254,950.00 $		254,950.00 $
April 2012	April 1, 2012	254,950.00 $		254,950.00 $
May 2012	May 1, 2012	254,950.00 $		254,950.00 $
June to December 2012	May 19, 2012	1,784,650.00 $		1,784,650.00$
		3,059,400.00 $	254,950.00 $	2,804,450.00 $

29. In respect of the Plan, the outstanding amount owed by the employer on the date of the Initial Order is $509,900. An additional amount of $2,294,550.00 is also owed by the employer upon termination of the Plan for a total of $2,804,450.00 representing amounts owed before and at the date of termination of the Plan for outstanding special payments owing to the Plan for the period ending December 31, 2012. This amount was confirmed by Aveos' counsel, as appears from a letter dated July 13, 2012, produced as **Exhibit R-6**;

30. An actuarial termination report for the Plan as at May 19, 2012 has been prepared by Aon Hewitt and is dated December 19, 2012, filed as **Exhibit R-7**. This report confirms that $2,804,450 in special payments is owing to the Plan in respect of amounts owed during the period January to December, 2012;

2013 QCCS 5762 (CanLII)

31. The termination report for the Plan shows that the Plan has a deficit (i.e., liabilities exceeds the assets of the Plan) of $29,748,200. This report has not yet been approved by OSFI;

32. While a deemed trust attaches to normal cost, special payments and other amounts owed or accrued to a pension plan as at the date of termination, the amount required to be paid by an employer in respect of the remaining deficit is an unsecured claim;

33. Aveos has not deposited the amounts which represent the special contributions owing in a separate bank account;

34. In the event that it is determined that such amounts are payable to the Plan in priority to the security of the Respondents, including the security of the Third Party Secured Lenders detailed below, Aveos does have sufficient funds to pay these special contributions as well as all CCAA Charges;

35. All Company normal cost and employee contributions owed to the Plan have been paid into the Plan fund."

[8] The balance of the Agreed Statement of Facts relates to the Secured Lenders security interests. The Agreed Statement of Facts document contains a summary of the security consisting of fixed charges perfected in favour of the Secured Lenders in Québec, as a hypothec under the Québec Civil Code and in Ontario, Alberta, British Columbia, Nova Scotia, Manitoba and the Northwest Territories as a security interest under the relevant provincial personal property security legislation.

[9] Registration dates confirm the initial perfection of the security in March 2010, except for the Northwest Territories where security was perfected in August 2011.

[10] Copies of the deed of hypothec and the general security agreement were filed in evidence also by consent. These documents confirm the existence of a hypothec and security interest in all present and future movable and personal property.

[11] The parties also agreed to further facts germaine to the submissions concerning the imputation of certain payments made or about to be made by Aveos with funds received from Air Canada, as mentioned above. Also, Aveos' chief restructuring officer, Jonathan Solursh, testified briefly on this subject.

2013 QCCS 5762 (CanLII)

[12] The deficit under the pension plan for non-unionized employees at the time of their transfer from employment with Air Canada to Aveos was approximately $1.7 million.

[13] It was agreed in 2007 that Air Canada would pay this sum to Aveos by way of equal consecutive quarterly instalments of $75,036.00 each on October 30, January 30, April 30 and July 30 of each year until the final payment on January 30, 2014.

[14] Air Canada made no further payment after January 2012 at which time the balance due was $600,288.00 (or 8 x $75,036.00).

[15] Air Canada and Aveos agreed on October 4, 2013 that Air Canada would pay $5,361,499.00 to be held in trust to be distributed to Aveos employees. This sum includes the $600,288.00. The agreement was approved by this Court by order issued on October 11, 2013. The agreement resolved outstanding matters between Air Canada and Aveos with respect to the payments to be made by Air Canada to Aveos regarding the former's pension obligations towards its former employees transferred to Aveos.

[16] While not wishing to admit that the $5,361,499.00 is not subject to its security, the Secured Lenders did not assert any rights that would impede Aveos directing these funds to/or for the benefit of the former employees.

POSITIONS OF THE PARTIES

The Superintendent of Financial Institutions

[17] Though not a creditor of Aveos, the Superintendent maintains that it has sufficient interest or standing to bring this matter before the Court and more specifically to seek relief regarding the deemed trust.

[18] Sections 5(1) and 33.2(1) of the *Pension Benefits Standards Act*[2] ("P.B.S.A.") provide as follows:

> "5(1) The Superintendent, under the direction of the Minister, has the control and supervision of the administration of this Act and has the powers conferred by this Act."

[2] R.S.C. , 1985, c. 32 (2nd Supp.).

2013 QCCS 5762 (CanLII)

"33.2(1) In addition to any other action that the Superintendent may take in respect of a pension plan, the Superintendent may bring against the administrator, employer or any other person any cause of action that a member, former member or any other person entitled to a benefit from the plan could bring."

2013 QCCS 5762 (CanLII)

[19] These enactments provide the standing for the Superintendent regarding the matter before this Court.

[20] None of the other parties involved have contested the Superintendent's standing.

[21] The Superintendent claims that the deemed trust created by Section 8 P.B.S.A. obliges Aveos to pay to the pension plan, or to Aon, the administrator of the pension plan, in priority to Crédit Suisse, the total of the prescribed special payments due to the plan for the period February to December 2012 or, $2,804,450.00.

[22] The relevant sections of the P.B.S.A. regarding the deemed trust are as follows:

"8(1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:

(a) the moneys in the pension fund,

(b) an amount equal to the aggregate of the following payments that have accrued to date:

(i) the prescribed payments, and

(ii) the payments that are required to be made under a workout agreement; and

(c) all of the following amounts that have not been remitted to the pension fund:

(i) amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).

8(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate."

"29(6) If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund:

(a) an amount equal to the normal cost that has accrued to the date of the termination;

(b) the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;

(c) the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;

(d) all of the following amounts that have not been remitted to the pension fund at the date of the termination:

(i) the amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer; and

(e) the amounts of all of the payments that are required to be made under subsection 9.14(2)."

[23] Once the plan was terminated on May 19, 2012, the balance of the prescribed special payments for 2012 became due pursuant to Section 29(6) P.B.S.A. The last payment made by Aveos was in January 2012. Thus, the payments for February to December 2012 totalling $2,804,450.00 are due and subject to the deemed trust.

[24] The Superintendent submits that this sum is protected by the deemed trust and as such ranks in priority to or is not charged or subject to the security in favour of the Secured Lenders.

2013 QCCS 5762 (CanLII)

2013 QCCS 5762 (CanLII)

[25] According to the Superintendent, the distribution of an employer's assets or the fact that an employer company has become subject to the C.C.A.A. or the *Bankruptcy and Insolvency Act*[3] ("B.I.A."), does not override the effect of the deemed trust. The divestiture process put in place by Aveos and the sale of all or almost all of its assets triggered Section 8(2) P.B.S.A. since there has been a "liquidation".

[26] Since the C.C.A.A. provides no scheme of collocation, the deemed trust in Section 8(2) P.B.S.A. continues to apply. Nothing in the C.C.A.A. says that it does not apply. The only specific provisions addressing the deemed trust are found in Sections 6(6) and 36(7) C.C.A.A., which provide, respectively, that no arrangement can be sanctioned nor any asset sale approved unless adequate measures are taken for the payment of "defined contribution provisions" under the P.B.S.A. These provisions are silent on the deemed trust and on prescribed special payments such as the $2,804,450.00 in this case. Given this silence and the fact that Section 8(2) P.B.S.A. is valid federal legislation, it continues to have its effect alongside the C.C.A.A. The Superintendent submits that there is no need to have specific recognition in the C.C.A.A. of the operation of the deemed trust. There is no incompatibility nor any issue of federal paramountcy as in the case of *Indalex*[4]. (In *Indalex*, the provincial law (specifically Section 30(7) of the *Personal Property Security Act*[5] provided that a security interest is subordinate to the deemed trust existing under the equivalent Ontario statute [6].)

[27] Thus, the Superintendent submits that the deemed trust has full effect to withdraw or to subtract the $2,804,450.00 (sometimes hereinafter "$2.8 million") from the ambit of the security of the Secured Lenders.

[28] The fact that the C.C.A.A. does not specifically recognize the priority of the Section 8(2) P.B.S.A. deemed trust is not relevant according to the Superintendent. The cases dealing with deemed trusts in favour of the Crown (particularly *Sparrow*[7] and *Century*[8]*)* do not apply or must be read with caution. The legislator caused the Crown to become an ordinary (unsecured) creditor from the amendments in 2005 (see Section 38 C.C.A.A.). By the same token, the legislator also stated that deemed trusts <u>in favour of the Crown</u> would have no effect except where specifically acknowledged, which is the case for deductions at source of taxes, unemployment insurance premiums and government pension contributions (see Section 37 C.C.A.A.). This legislative scheme and the case law interpreting and applying it is not applicable when considering Section 8(2) P.B.S.A., because the Section 8(2) deemed trust is not in favour of the Crown

[3] R.S.C., 1985, c. B-3.
[4] *Sun Indalex Finance, LLC vs. United Steelworkers*, 2013 SCC 6.
[5] R.S.O., 1990 c. P.10.
[6] *Pension Benefits Act,* R.S.O. 1990 c. P.8.
[7] *Royal Bank of Canada vs. Sparrow Electric Corporation*, [1997] 1 S.C.R. 411.
[8] *Century Services Inc. vs. Canada (P.G.),* [2010] 3 S.C.R. 379.

whose claims under the C.C.A.A. are stated to be ordinary, unless a Crown deemed trust is specifically acknowledged (see Section 37(2) C.C.A.A.).

[29] The Superintendent refutes that the granting of security in favour of the Secured Lenders prior in time to the deemed trust arising, makes it such that the property has already been encumbered, and thus not subject to the deemed trust. According to the Superintendent, the deemed trust's priority exists independently of the date of its creation or the date of perfection of the security held by the Secured Lenders.

[30] The intent of the legislator is to protect the pension plan for the benefit of the employees. Secured creditors should not be in an advantageous position where a company is liquidated under the C.C.A.A. and no plan of arrangement is proposed. On the other hand, the legislator with a view to balancing competing interests limited the deemed trust to actual payments due in a year of winding up and not to the entire actuarial deficit (in this case $29,748,200.00). This is the effect of the amendments in 2010 to the P.B.S.A. [9]

[31] Aside from considerations of rank, the Superintendent also submits that since the monthly payments of $254,950.00 (at least after the Initial Order) were discontinued based on paragraph 19 of the Initial Order. Such order can be amended according to the circumstances.

[32] The underlying rationale of such an order is to enhance a company's liquidity to allow it "breathing room" with a view to helping it move toward a restructuring of its business [10]. It was decided shortly after the Initial Order that none of the employees of Aveos (all of whom had been laid off) would be recalled, and that a process to sell the assets would be put in place. This "divestiture process" was approved by this Court on April 20, 2012. Accordingly, it was a matter of record that Aveos would not continue as the employer even if units of the business enterprise were sold on a going concern basis. In view of the foregoing on May 25, 2012, the Superintendent terminated the pension plan as it was empowered to do under Section 29(2) P.B.S.A.

[33] The Superintendent now submits that the undersigned should amend the Initial Order by eliminating Aveos' right to interrupt the monthly payments of $254,950.00 (at least post-filing) and order Aveos to pay the amount due to the pension fund. Sufficient funds are available to make the payment given the cessation of normal business activity and the asset sales. The rationale for permitting Aveos to cease or interrupt the special payments no longer obtains because of the cessation of normal business activities. Accordingly, the Initial

[9] Statutes of Canada, Chapter 12, 59 Elizabeth II, 2010 (July 12, 2010).

[10] *AbitibiBowater Inc.*, 2009 QCCS 2028 (Mayrand, J.); *Fraser Papers Inc. (Re),* 2009 Can LII 39776 (Pepall, J.); *United Airlines, Inc. (Re)*, (2005) 9 CBR (5th) 159 (Farley, J.).

2013 QCCS 5762 (CanLII)

Order should be amended and Aveos should be ordered to pay, independent of any consideration of the rank of security.

[34] To allow for this outcome, the Superintendent sought and was granted permission to amend the conclusions of its proceedings so as to ask this Court to "issue any other order deemed necessary in the circumstances" with a view to having the undersigned conclude in amending the Initial Order and ordering Aveos to pay the $2,804,450.00 as outlined hereinabove.

2013 QCCS 5762 (CanLII)

Aon Hewitt

[35] Aon is the plan administrator appointed in April 2012 to replace Aveos following the C.C.A.A. filing.

[36] Aon supports the representations of the Superintendent emphasizing that the Section 8(2) P.B.S.A. deemed trust applies to "any" liquidation, thus including a C.C.A.A. liquidation.

[37] Aon adds that the pension legislation is remedial and seeks to protect the employees whose entitlement to the pension proceeds is part of the remuneration for their labour[11]. They are the vulnerable party entitled to protection [12].

Secured Lenders

[38] The Secured Lenders take the position that any deemed trust for the pension special payments is subordinated to their secured rights. In other words, since all of the property of Aveos was, at the time the deemed trust came into existence, charged by the Secured Lenders security, there were no assets that could be subject to the deemed trust or at least any such assets are subject to a prior charge in favour of the Secured Lenders.

[39] The Secured Lenders rely on the Supreme Court of Canada decision in the matter of *Sparrow*[13]. Counsel underlines that the dissenting reasons in *Sparrow* do not differ from the majority on this point, i.e. that property subject to a fixed charge cannot be thereafter impressed with a deemed trust. The minority reasons of Justice Gonthier differed from the majority in that he relied on the license theory to the effect that the security documents in *Sparrow* permitted inventory to be sold in order that deductions at source be paid, so that if they

[11] *Buschau vs. Rogers Communications Inc.,* [2006] 1 S.C.R. 973 at p. 987; *Association provinciale des retraités d'Hydro-Québec vs. Hydro-Québec,* 2005 QCCA 304, para. 40 and 41.
[12] *Sun Indalex Finance, op.cit.,* para. 268, LeBel and Abella (dissenting).
[13] *Royal Bank of Canada vs. Sparrow Electric Corporation*, *op.cit*.

were not paid there was room, notionally for the deemed trust to charge the proceeds of the inventory sales.

2013 QCCS 5762 (CanLII)

[40] *Sparrow* dealt with a deemed trust in favour of the Crown. The legislative amendments to the tax statutes since *Sparrow* underscore that Section 8(2) P.B.S.A. (which reflects pre-*Sparrow* amendment language) does not create priority rights vis-à-vis secured fixed charges. Also, these amendments are the basis for the Secured Lenders' second argument that the deemed trust of Section 8(2) P.B.S.A. does not survive the C.C.A.A. filing.

[41] In this regard, the Secured Lenders submit that the statutory structure is such that certain limited payment obligations under the P.B.S.A. are protected under the C.C.A.A. (and the B.I.A.). Reference is made to Sections 6(6) as well as 37(6) C.C.A.A. (and Sections 81.5 and 81.6 of the B.I.A.). Given this protection following the history of the deemed trust legislation, it is clear, both structurally in the C.C.A.A. (and the B.I.A.) and in terms of the policy intent of the legislator that in the event of insolvency, the deemed trust of Section 8(2) P.B.S.A., for the special payments, will not be given effect, or at least will not trump the rights of secured creditors. The Secured Lenders submit that the Supreme Court has clearly stated that a deemed trust will be given effect in an insolvency estate only to the extent that it is recognized in the applicable insolvency legislation [14].

[42] Lastly, in reply to the Superintendent's argument that, the suspension of special payments in virtue of Section 19 of the Initial Order herein simply be reversed, the Secured Lenders submit that it is not open to the Court at this point to order payment, in effect, retroactively, of the pension special payments. The Secured Lenders invoke three (3) arguments in this regard.

[43] Firstly, the Secured Lenders submit that the special payments due after the March 19, 2012 C.C.A.A. filing represent a pre-filing obligation *albeit* payable in instalments which continued from the pre to the post-C.C.A.A. filing period.

[44] The special payments represent compensation for past services rendered. The services were rendered pre-filing and so was the obligation to remunerate the employee for such service. The crystallization of the obligation after filing does not change this. The Secured Lenders rely on the judgment in *Nortel* of the Ontario Court of Appeal [15].

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[14] *Century Services Inc. vs. Canada (P.G.), op.cit.*

[15] *Sproule vs. Nortel Networks Corporation*, [2009] ONCA 833, para. 20 and 21; see also, *Fraser Papers Inc. (Re), op.cit*.

[45] Secondly, the Secured Lenders say that the Superintendent's argument is based on a false premise that it is unfair to give more protection to Secured Lenders in a liquidation under the C.C.A.A. than they would have if an arrangement was filed under the C.C.A.A. (Section 6(6)) or upon the sale of assets under the C.C.A.A. (37(6)) or in a bankruptcy or receivership (Sections 81.5 and 81.6 B.I.A.).

[46] Here, the Secured Lenders' argument rejoins its principal argument in that the text of the statutes and the intention of the federal legislator in the evolution of the statutory scheme is such that special payments to make good the deficit in the pension plan are not given priority in an insolvency. In this regard, the Secured Lenders rely on dicta of the minority of the Supreme Court of Canada in *Indalex* [16] to postulate that equity should not be used to move the law to where Parliament has clearly refused to move it [17].

[47] Thirdly, the Secured Lenders submit that it is unfair to them at least at this stage to amend the Initial Order and oblige Aveos to make the special payments due for the period February to December 2012.

[48] The Initial Order providing *inter alia* a stay of proceedings and the ability to interrupt the payments to the pension plan has been extended six (6) times since March 19, 2012. This does not include various amendments which have been incorporated into the Initial Order following motions and hearings. There have been twelve (12) asset sales according to the submissions of the Secured Lenders. There have been four (4) distributions of funds produced by these asset sales which distributions have taken place on order of this Court between October 24, 2012 and October 21, 2013. All of the process was public and the Superintendent received notices of all motions. However, neither the Superintendent nor Aon have made any application to change the Initial Order until this time. The last special payment was due on December 2012. The present motion was filed in April 2013.

[49] The Secured Lenders submit that faced with a timely application to amend the Initial Order to oblige Aveos to continue making special payments, they might have strategized differently if faced with an effective subordination of their position to a monthly payment of $250,000.00. The Secured Lenders submit by way of example that in such a scenario that they might have provoked a bankruptcy or a receivership.

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[16] *Sun Indalex Finance, LLC vs. United Steelworkers*, *Op.cit*.

[17] *Sun Indalex Finance, LLC vs. United Steelworkers*, *Op. cit*., (Deschamps, J. and Moldaver, J.), para. 81 and 82.

2013 QCCS 5762 (CanLII)

2013 QCCS 5762 (CanLII)

Aveos

[50] As indicated, Aveos has taken no position on the principal debate concerning the priority as between the Secured Lenders' security and the deemed trust, over the sum of $2,804,450.00.

[51] Aveos has however taken the position that with respect to the sum received from Air Canada, it has the right to use these funds for the benefit of the employees in accordance with its agreement with Air Canada but more significantly to impute payment against specific amounts as it wishes. Accordingly, Aveos has made it known that it intends to use $600,288.00 of the $5,361,499.00 (i.e. the remaining sum Air Canada was contributing to its October 2007 pension deficit) to pay the Aveos special payments for Aveos' pension deficit which were due and unpaid for February and March 2012 in the amount of $254,950.00 each and an additional $90,388.00 on account of the special payment that was due for the month of April 2012. Such payments would operate to reduce the amount of $2,804,450.00 claimed by the Superintendent to be protected by the deemed trust. Accordingly, with such imputation and if the Superintendent is given priority for such sum, it will be reduced to $2,204,162.00.

[52] The Superintendent and Aon contest this imputation so as to preserve their deemed trust for the full amount of $2.8 million.

[53] The Superintendent and Aon submit that Aveos received the fund from Air Canada in trust (for the former employees of Air Canada). In Québec law, absent agreement, it is the debtor that has the right to impute payment. However, the Superintendent and Aon submit that the debtor of the sum of $600,288.00 is Air Canada and not Aveos since this sum represents the balance of special payments due to defray the deficit for the pension plan with regard to former Air Canada employees.

DISCUSSION

[54] One purpose of insolvency law is to provide for a fair distribution of a debtor's assets given that there is not enough money to pay all creditors [18]**.** The preferences accorded certain types of claim created by the laws passed by Parliament reflect policy decisions of the legislator. Parliamant decides what is fair.

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[18] Houlden, Morawetz and Sarra, "*The 2012-2013 Annoted Bankruptcy and Insolvency Act*", Toronto, 2012, p. 2.

2013 QCCS 5762 (CanLII)

[55] The statutory mechanism of the deemed trust to protect sums due to the Crown has been given much attention before the courts. While the law appears settled regarding deemed trusts in favour of the Crown, questions remain concerning deemed trust claims of pension funds.

[56] An understanding of the state of the law and the policy reflected in this law requires a survey of the decisions of the courts considering such laws.

[57] The Superintendent did not urge that Section 8(2) P.B.S.A. creates a true trust. In similar circumstances, analyzing similar statutory language, the Supreme Court of Canada in *Sparrow*[19] stated that the deemed trust is not a real one as the subject matter cannot be identified from the date of the creation of the trust.

[58] Clearly, then, either at common law or in virtue of Article 1260 of the Civil Code of Québec ("C.C.Q."), no real trust exists in the present case since the property subject to the trust is not readily identifiable as funds were not segregated as required by Article 8(1) P.B.S.A., but rather, commingled. This situation is common; thus, the need for the legislator to create the deemed trust in Section 8(2) P.B.S.A. to protect sums due to pension plans.

[59] In *Sparrow*, the Supreme Court of Canada was faced with the deemed trust created by Section 227(4) and 227(5) of the *Income Tax Act* ("I.T.A.") [20] in effect in 1997 which read as follows:

> "(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.
>
> (5) Notwithstanding any provision of the *Bankruptcy Act,* in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount
>
> (a) deemed by subsection 9(4) to be held in trust for Her Majesty […]
>
> shall be deemed to be separate from and form no part of the estate in liquidation, assignment , receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate."

[60] The text is similar to Section 8 P.B.S.A. It should be noted that Section 8(2) P.B.S.A. has not been amended since 1997.

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[19] *Royal Bank of Canada vs. Sparrow Electric Corporation, op.cit.*, para. 31.

[20] R.S.C. , 1985, c. 1 (5th Supp.).

[61] In *Sparrow*, the secured creditor held perfected security interests over the debtors' inventory in virtue of the *Alberta Personal Property Security Act*[21] and Section 178 (now 427) of the *Bank Act*[22].

[62] Gonthier, J. while in dissent agreed with the basic analysis of Iacobucci, J. writing for the majority, that property validly encumbered by security was not attachable by the deemed trust under the I.T.A. [23].

[63] Iacobucci, J. for the majority was explicit on the competition of the deemed trust with the security interests:

> "The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer." [24]

[64] Following *Sparrow*, Sections 227(4) and 227(5) I.T.A. were replaced by 227(4) and 227(4.1)[25] wherein language was added which was subsequently characterized by the Supreme Court as follows:

> 'It is apparent from these changes that the intent of Parliament when drafting Section 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect." [26]

[65] Similar amendments were brought in 1998 to the *Canada Pension Plan Act*[27] and the *Employment Insurance Act*[28] and in 2000 to the *Excise Tax Act*[29]. What is noteworthy in this legislative evolution, is that no similar amendments to overcome *Sparrow* were ever brought to Section 8(2) P.B.S.A.

[66] In the present case, when the deemed trust for the special payments arose, the property of Aveos was encumbered by fixed charges in favour of the

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[21] S.A. 1988 c. P-4.05.
[22] R.S.C. 1985 c. B-1.
[23] Gonthier, J. at para. 39 and Iacobucci, J. at para. 98 to 99.
[24] *Ibid*.
[25] S.C. 1998, c.19.
[26] *First Vancouver Finance vs. M.N.R.*, [2002] 2 S.C.R. 720, para. 28.
[27] R.S.C. , 1985, c. C-8; amendments at S.C. 1998 c. 19.
[28] S.C. 1996, c. 23; amendments at S.C. 1998 c. 19.
[29] R.S.C. , 1985, c. E-15; amendments at S.C. 2000 c. 30.

2013 QCCS 5762 (CanLII)

Secured Lenders. Those fixed charges were created in 2010, except for the security in the Northwest Territories which was perfected in 2011. The deemed trust arose either upon the liquidation of Aveos (which would not have been before the C.C.A.A. filing on March 19, 2012) or at the earliest when a special payment became due following the actuarial valuation report filed in June 2011. Even if the obligation to make the special payments was somehow retroactive to December 31, 2010 (which was not argued by the Superintendent), the fixed charges in favour of the Secured Lenders were already perfected at such date. Moreover, Aveos made the special payments up to and including January 2012 so it is difficult to deem the trust prior to any payments being in default.

2013 QCCS 5762 (CanLII)

[67] Consequently, this Court agrees with the Secured Lenders first position that their security was created before any deemed trust for the $2.8 million could have existed. Since the assets were already charged, any deemed trust under Section (8)(2) P.B.S.A. is at best subordinate to the security of the Secured Lenders.

[68] This Court also agrees with the Secured Lenders second position, that is that the deemed trust to protect or give preferential treatment to the pension special payments is not effective in a C.C.A.A. proceeding at least where secured creditors with prior perfected security are not paid in full, for the reasons which follow.

[69] In the *Century*[30] case, the Supreme Court was called upon to consider whether a statutory deemed trust created under the *Excise Tax Act*[31] would be given effect in a C.C.A.A. matter.

[70] The deemed trust created under Section 222(3) of the *Excise Tax Act* operated "despite (…) any other enactment of Canada (except the Bankruptcy and Insolvency Act)". Section 18.3(1) C.C.A.A. (as it then read) negated the effect of any deemed trust in favour of the Crown except those created under the I.T.A., the *Canada Pension Plan Act* and the *Employment Insurance Act* all for source deductions.

[71] After examining the legislative history, Deschamps, J. writing for the majority, held that Parliament did not intend for the C.C.A.A. to protect the Crown's deemed trust priority for GST claims payable under the *Excise Tax Act*. Deschamps, J. stated that where Parliament's intent is to protect deemed trust claims in insolvency matters, Parliament clearly states so. Absent an express statutory basis for concluding that GST claims enjoy preferred treatment under the C.C.A.A. (or the B.I.A.), no such protection exists[32]. Fish, J. writing minority reasons was even more explicit that the protection of a deemed trust claim in an

[30] *Century Services Inc. vs. Canada (P.G.), op.cit.*
[31] *Op.cit.*
[32] *Century Services Inc. vs. Canada (P.G.), op.cit.*, para. 45.

insolvency requires a statutory provision creating the trust and a provision in the B.I.A. or C.C.A.A. explicitly preserving the effective operation of the deemed trust [33].

[72] In the present case, while Section 8(2) P.B.S.A. creates the deemed trust, there is no provision of the C.C.A.A. that confirms or preserves it.

[73] Parliament has enacted such "preserving" provisions for deductions at source in Section 37(2) C.C.A.A. (see also Section 86(2) B.I.A.). This is a *Sparrow* legacy amendment. There is no such preservation for the Section 8(2) P.B.S.A. deemed trust.

[74] The Superintendent seeks to distinguish *Century* because there, the confirming provisions recognizing the deemed trust were necessary given that Parliament made the Crown an ordinary creditor in insolvencies in 2005. This is now reflected in Section 37(1) C.C.A.A. Thus, it was necessary for Parliament to specifically recognize the Crown deemed trusts for source deductions in Section 37(2) C.C.A.A. lest they be subsumed by Section 37(1) C.C.A.A. and treated as ordinary claims. Since the Section 8(2) P.B.S.A. deemed trust was never rendered ineffective by insolvency legislation (such as Section 37(1) C.C.A.A.) than there is no need for specific confirmation in the C.C.A.A., argues the Superintendent.

[75] Whatever allure this logic may contain, the reasoning of Deschamps, J. and Fish, J. in *Century* does not appear restricted to considerations of Crown deemed trust though that is the factual background of the case. Deschamps, J. is explicit in referring to the "general rule that deemed trusts are ineffective in insolvency" [34].

[76] More significantly, however, to indicate the intention of the legislator not to preserve the Section 8(2) P.B.S.A. deemed trust, are the 2009 amendments to the C.C.A.A. (and the B.I.A.). Sections 6(6) and 36(7) C.C.A.A. provide that an arrangement may only be sanctioned or an asset sale approved by the court, if provision is made for the payment of certain enumerated pension obligations including obligations under the P.B.S.A. These obligations do not however include special payments but rather are limited to deductions from employee salaries and normal cost contributions of the employer (neither of which is in issue in the present case). Similar protection was given in the B.I.A. for bankruptcy liquidations and receivership sales (see Sections 81.5 and 81.6 B.I.A.).

[77] The protection of Section 6(6) C.C.A.A. is not extended specifically to Section 8(2) P.B.S.A. or generally to special payments for actuarial deficits.

[33] *Ibid,* para. 96.
[34] *Ibid,* para. 45.

2013 QCCS 5762 (CanLII)

Moreover, in the next seminal case of the Supreme Court of Canada dealing with deemed trusts in insolvency, Deschamps, J., in the matter of *Indalex* [35], quotes from the report of Parliament's Standing Committee on Banking, Trading and Commerce to conclude that Parliament considered giving special protection to pension plan members in matters of insolvency but chose not to [36].

[78] The deemed trust in Indalex was a deemed trust under the *Pension Benefits Act* (Ontario) [37] which is legislation similar to the P.B.S.A.

[79] Given that the liquidation of Aveos took place in a C.C.A.A. context and that this statute provides no order of collocation or preference, provincial priorities continue to apply [38].

[80] In Ontario, as disclosed in the *Indalex* case, Section 30(7) of the *Personal Property Security Act* [39]*,* subordinates security interests to the deemed trust created by the *Pension Benefits Act* [40]. Counsel for the Superintendent conceded that there is no equivalent provision in Québec provincial law that would give priority to the deemed trust in the present case. Accordingly, there is no basis for a priority claim for the Section 8(2) deemed trust based on Québec law.

[81] The Superintendent argues that it is unfair that Secured Lenders have a better rank in a C.C.A.A. liquidation vis-à-vis the pension than they would have otherwise. This however is not the case. Section 6(6) C.C.A.A. and Sections 81.5 and 81.6 B.I.A. are in harmony. The special payments are not protected and would not have priority over the rights of a secured lender in any scenario: bankruptcy, receivership or C.C.A.A. regime.

[82] The Superintendent also submits that Parliament's intent should also be gleaned from the amendments to the P.B.S.A. in 2009 limiting the deemed trust to the actual payment deficit and not to the whole actuarial deficiency (see Sections 29(6.2) and 29(6.5) P.B.S.A.) The actuarial deficit of the Aveos non-unionized pension plan is approximately $29,748,200.00. This argument is not however logically helpful to extend the protection of Section 8(2) P.B.S.A. to special payments due by a company under C.C.A.A protection. It is plausible that such an amendment was motivated by Parliament's desire not to subordinate

[35] *Sun Indalex Finance, LLC vs. United Steelworkers, op.cit.*
[36] *Sun Indalex Finance, LLC vs. United Steelworkers*, *op.cit.,* para. 81 and 82.
[37] R.S.O. 1990, Chapter P-8.
[38] *Sun Indalex Finance, LLC vs. United Steelworkers, op.cit,* para. 51 and 52.
[39] *Op.cit.*
[40] Nevertheless, it was held in *Indalex* that any deemed trust would be superseded by the priority accorded to the interim (debtor in possession) lender by the C.C.A.A. judge because of the doctrine of federal paramountcy.

2013 QCCS 5762 (CanLII)

or dilute ordinary creditors by a mutli-million dollar pension claim. In any event, the argument does not bolster the position vis-à-vis secured claims.

[83] The Superintendent legitimately poses the rhetorical question of what use is the deemed trust? Certainly it is useful for the protection of special payments but only vis-à-vis creditors who do not hold security over the assets of the debtor company which was perfected prior to the deemed trust attaching to the assets.

[84] The beneficiaries of the pension plan may be vulnerable as the Superintendent and Aon submit and as such merit protection for their pension entitlements as a matter of public policy [41]. However, the balance of competing policies is a matter for Parliament whose task is to define policy priorities and to reflect such choices in statutes. As Fish, J. stated in *Century,* legislative discretion belongs to Parliament alone and is not to be exercised by the judiciary [42].

[85] Finally, the Superintendent submitted that paragraph 19 of the Initial Order of March 19, 2011, permitting Aveos to interrupt the payments of the pension plan should be abrogated and that Aveos should be ordered to pay the $2,804,450.00 to the pension fund.

[86] In this regard, an issue arises as to whether the special payments constitute pre or post-filing obligations. Of course, if the obligation is a pre-filing obligation (*albeit* payable in instalments after filing) then it is arguable such amounts be the subject of a proof of claim in an arrangement and not be paid after the C.C.A.A. filing.

[87] The reason advanced that the obligation is pre-filing is that pension entitlement is part of the consideration or remuneration for labour services rendered by employees which in this case were all rendered pre-filing. The undersigned does not think it is necessary to characterize the special payments as pre or post-filing to decide this point in the circumstances of this case.

[88] The interruption of payments to the pension plan has been allowed by C.C.A.A. courts when necessary to enhance liquidity to promote the survival of a company in financial distress [43]. In *Nortel* [44], the company was being put through a sales process and did not appear to be able to continue its normal business operations.

[41] *Monsanto Canada Inc. vs. Superintendent of Financial Services*, [2004] 3 S.C.R. 152.
[42] *Century Services Inc. vs. Canada (P.G.), op.cit.,* para. 95.
[43] *Sproule vs. Nortel Networks Corporation, op. cit.,* para. 45 and 46; *AbitibiBowaters, op.cit.,* para. 49 and 50.
[44] *Sproule vs. Nortel Networks Corporation, op. cit.*

2013 QCCS 5762 (CanLII)

[89] The situation in the present case was not essentially different on March 19, 2012. However, the unfolding of the facts made it clear in short order that Aveos would not continue in business. Employees were not recalled to continue anything akin to normal business activity. The sales or divestiture process was approved by this Court on April 20, 2012. There were a number of sales and four (4) distributions of funds to the Secured Lenders between October 24, 2012 and October 21, 2013. The Superintendent was or should have been fully aware of the situation. However, no application was brought by the Superintendent or by Aon to vary the Initial Order as sought herein.

[90] Had an application been brought, the Secured Lenders could have decided on a course of action which may have included provoking a bankruptcy or a receivership.

[91] While the undersigned would not go so far as to say that priorities cannot be revisited following a sale, vesting order and distribution as did Campbell, J. recently in *Grant Forest*[45], I do believe that the Court should be extremely hesitant to alter the Initial Order, retroactively, after such a long period of time has elapsed and salient events in the C.C.A.A. process have occurred. As Farley, J. said :

> "Come back relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question." [46]

[92] The Initial Order was renewed six (6) times. The Superintendent has been on the service list. It is not sufficient to reserve one's rights. These rights must be exercised. Where a failure to exercise those rights, may cause prejudice to other parties, those rights, though not time barred by statute, may be subject to an estoppel in virtue of the doctrine of laches in common law or as a result of the doctrine of "fin de non-recevoir" [47] in civil law.

[93] It should also be noted that even in its petition for declaratory relief filed in April 2013, the Superintendent did not seek a modification of the Initial Order. The issue arose at the hearing.

[94] In the circumstance described above, the Superintendent's delay in seeking a modification to the Initial Order appears unreasonable given that the

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[45] *Grant Forest Products Inc. (Re),* 2013 ONSC 5933.

[46] *MuscleTech Research and Development Inc.,* (2006) 19 C.B.R. (5th) 54; see also *Re White Birch Paper Holding Company (Arrangement relatif),* 2012 QCCS 1679, para. 245.

[47] *Banque Nationale du Canada vs. Soucisse et al.*, [1981] 2 S.C.R. 339; see *also Baronet Inc. (Arrangement*), 2008 QCCS 288 (Parent, J.) where a three-month delay in a comeback motion was not considered unreasonable.

2013 QCCS 5762 (CanLII)

other parties, particularly the Secured Lenders have relied on that Initial Order, in good faith.

[95] Accordingly, in the opinion of the undersigned, the Superintendent is barred from seeking an amendment to the Initial Order at this time to, in effect, retroactively reverse the power of Aveos to interrupt the pension payments and to order Aveos to pay to the pension fund the $2,804,450.00.

[96] Given the conclusion on the priorities over the special payment of $2.8 million it is not strictly necessary to decide whether Aveos may impute $600,288.00 against the $2.8 million.

[97] However, should it become necessary for the parties, the Court will adjudicate on the question.

[98] In Québec law the general principle set out by Article 1569 C.C.Q. is that a debtor has the right to impute payment. Various exceptions and qualifications set out in the C.C.Q. do not apply to the present circumstances.

[99] Here it is agreed that Aveos received the $5.3 million from Air Canada in trust. The Superintendent and Aon plead that if the debtor is not Aveos, but rather Air Canada (who was liable to make the special payments to defray its pension deficit) then it is Air Canada and not Aveos that may impute the payment.

[100] In the opinion of the undersigned, though Air Canada may have been the debtor vis-à-vis Aveos in virtue of the agreement of 2007 (or even the October 2013 agreement), once in receipt of the funds, Aveos is the debtor vis-à-vis the former employees and thus has the right to impute payment.

[101] Even if Aveos holds the funds in trust, Aveos nevertheless has the right to impute payment of these funds since in Québec law, the trustee has "the control and exclusive administration of the trust patrimony" and "has the exercise of all of the rights pertaining to the patrimony" (Article 1278 C.C.Q). The undersigned would include in those rights, the right to impute payment as foreseen by Article 1569 C.C.Q.

[102] Accordingly this Court will declare as such in the conclusions of this judgment.

2013 QCCS 5762 (CanLII)

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE COURT :

[103] **DISMISSES** the Motion for a Declaratory Judgment of the Superintendent of Financial Institutions;

[104] **DECLARES** that the rights of the Respondent secured lenders in virtue of their security rank in priority to the deemed trust created by Section 8(2) of the *Pension Benefits Standards Act* for the special payments due by Aveos Fleet Performance Inc. and aggregating $2,804,450.00.

[105] **DECLARES** that Aveos Fleet Performance Inc. has the right to impute payment of the sum of $600,288.00 forming part of the funds received or to be received from Air Canada in the amount of $5,361,499.00 as follows:

105.1. To the instalments for special payments to the Superintendent of Financial Institutions with respect to the pension plan for non-unionized employees of Aveos Fleet Performance Inc. for February 2012 ($254,950.00), March 2012 ($254,950.00) and April 2012 ($90,388.00);

[106] **THE WHOLE**, with costs against the Superintendent of Financial Institutions and Aon Hewitt.

2013 QCCS 5762 (CanLII)

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Dates of Hearing: October 21 and 22, 2013

2013 QCCS 5762 (CanLII)

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

DATE: June 26, 2015

BY THE HONOURABLE STEPHEN W. HAMILTON

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED:

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
Petitioners

And
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUS MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED
Mises-en-cause

And
FTI CONSULTING CANADA INC.
Monitor

And

2015 QCCS 3064 (CanLII)

2015 QCCS 3064 (CanLII)

HER MAJESTY IN RIGHT OF NEWFOUNLAND AND LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS,

THE ATTORNEY GENERAL OF CANADA,

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254,

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285,

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, AS REPRESENTATIVES OF THE SALARIED/NON-UNION EMPLOYEES AND RETIREES
Objecting parties

JUDGMENT ON THE MOTION OF THE WABUSH CCAA PARTIES TO GRANT PRIORITY TO THE INTERIM LENDER CHARGE AND TO SUSPEND THE PAYMENT OF CERTAIN PENSION AMORTIZATION PAYMENTS AND POST-RETIREMENT EMPLOYEE BENEFITS (#144), AND RELATED MATTERS

INTRODUCTION

[1] These proceedings raise essentially three issues:

1. Can and should the Court order that the charge in favour of the interim lender rank ahead of the statutory deemed trusts for payments due by the debtors to the pension plan?

2. Can and should the Court suspend the debtors' obligation to pay the special amortization payments to the pension plan?

3. Can and should the Court suspend the debtors' obligation to pay the other post-employment benefits for the retirees?

BACKGROUND

The parties

[2] On May 20, 2015, the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc. and the Mises-en-cause Wabush Mines (a joint venture of Wabush Iron and Wabush Resources), Arnaud Railway Company and Wabush Lake Railway

Company Limited (the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the *Companies' Creditors Arrangement Act*[1] (CCAA), which was granted on that date by the Court (the "Wabush Initial Order").

2015 QCCS 3064 (CanLII)

[3] Prior to the filing of the motion, Wabush Mines operated the iron ore mine and processing facility located near the Town of Wabush and Labrador City, Newfoundland and Labrador, and the port facilities and a pellet production facility at Pointe-Noir, Québec. Arnaud and Wabush Lake Railway are both federally regulated railways that are involved in the transportation of iron ore concentrate from the Wabush mine to the Pointe-Noir port.

The pension plans and other post-employment benefits

[4] The Wabush CCAA Parties have two defined benefit pension plans for their employees:

- The pension plan for salaried employees at the Wabush mine and the Pointe-Noire port hired before January 1, 2013, called the Contributory Pension Plan for Salaried Employees of Wabush Mines JV, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company; and

- The pension plan for unionized hourly employees at the Wabush mine and Pointe-Noire port, called the Pension Plan for Bargaining Unit Employees of Wabush Mines JV, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company.

[5] Wabush Mines is the administrator of both plans.

[6] Because some of the employees covered by the plans work in Newfoundland and Labrador and because others work in federally regulated industries, the plans are subject to regulatory oversight by both the federal pension regulator, the Office of the Superintendent of Financial Institutions ("OSFI"), and the provincial regulator in Newfoundland and Labrador, the Superintendent of Pensions (the "N&L Superintendent").

[7] The monthly normal cost payments for the plans for 2015 based on a valuation as at January 1, 2014 are $50,494.83 for the hourly plan and $41,931.25 for the salaried plan, for a total monthly normal cost payment of $92,46.08. All monthly normal cost payments in respect of the plans for January through April, 2015 have been paid in full.

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1 R.S.C. 1985, c. C-36, as amended.

[8] The plans are underfunded. Based on estimate received from the Wabush CCAA Parties' pension consultant, the Wabush CCAA Parties believe the estimated wind-up deficiencies for the plans as at January 1, 2015 to be a total of approximately $41.5 million, consisting of approximately $18.2 million for the salaried plan and approximately $23.3 million for the hourly plan.

2015 QCCS 3064 (CanLII)

[9] The Wabush CCAA Parties are required to pay monthly amortization payments based on the 2014 valuation of $393,337.00 for the hourly plan and $273,218.58 for the salaried plan, for a total monthly amortization payment of $666,555.58. All monthly amortization payments in respect of the plans for January through April, 2015 have been paid in full, save for a shortfall of approximately $130,000.

[10] In addition to the monthly amortization payments, the Wabush CCAA Parties are also required to make a lump sum "catch-up" amortization payment for the plans estimated to be approximately $5.5 million due in July 2015.

[11] The Wabush CCAA Parties currently provide other post-employment benefits ("OPEBs"), including life insurance and health care, to former hourly and salaried employees hired before January 1, 2013, which vary based on whether retirees were formerly members of a bargaining unit or were non-unionized salaried employees.

[12] As of December 31, 2014, accumulated benefits obligations for the OPEBs totalled approximately $52.1 million. The premiums required to fund the foregoing OPEBs are approximately $182,000 a month.

[13] In addition to the foregoing, there is a supplemental retirement arrangement plan for certain current and former salaried employees of Wabush Mines JV. The obligations under this plan are approximately $1.01 million.

The Interim Financing

[14] Prior to filing the motion for the issuance of an initial order, the Wabush CCAA Parties entered into the Interim Financing Term Sheet with Cliffs Mining Company (the "Interim Lender"). The Interim Lender is a subsidiary of the ultimate parent of the Wabush CCAA Parties.

[15] The cash flow statement filed with the motion for the issuance of an initial order showed that the Wabush CCAA Parties had run out of cash and and were not anticipating any receipts from operations other than two small rental payments, with the result that they needed the Interim Financing to continue even their limited operations for the duration of the CCAA process.

[16] The Interim Financing Term Sheet provided that the Interim Lender would advance a maximum principal amount of US$10,000,000 to provide for short-term liquidity needs of the Wabush CCAA Parties while they are under CCAA protection. The

2015 QCCS 3064 (CanLII)

Interim Lender's obligation to advance funds is subject to a number of conditions and covenants, including the following:

- The Interim Lender will have a charge in the principal amount of CDN$15,000,000 which will have priority over all charges against the Wabush CCAA Parties' property except for certain specified charges;[2] and
- The Wabush CCAA Parties will not make any special payments in relation to the pension plans or any payments in respect of OPEBs.[3]

CCAA proceedings

[17] As a result of the foregoing, the Wabush CCAA Parties asked the Court as part of the Wabush Initial Order on May 20, 2015 to approve the Interim Financing Term Sheet and to create the Interim Lender Charge, but not to give the Interim Lender Charge priority over the existing secured creditors until they had the chance to be heard.

[18] The Monitor filed its Fifth Report in which it recommended that the Court approve the Interim Financing Term Sheet and the granting of the Interim Lender Charge.

[19] Based on the evidence presented at the hearing on May 20, 2015,[4] the Court granted the Wabush Initial Order, including the approval of the Interim Financing Term Sheet and the create of the Interim Lender Charge ranking after the existing secured creditors.

[20] The Wabush Initial Order provided for a comeback hearing on June 9, 2015.

[21] On May 29, 2015, the Wabush CCAA Parties filed their ''Motion for the issuance of an order in respect of the Wabush CCAA parties (1) granting priority to certain CCAA charges, (2) approving a Sale and Investor Solicitation Process *nunc pro tunc*, (3) authorizing the engagement of a Sale Advisor *nunc pro tunc*, (4) granting a Sale Advisor Charge, (5) amending the Sale and Investor Solicitation Process, (6) suspending the payment of certain pension amortization payments and post-retirement employee benefits, (7) extending the stay of proceedings, (8) amending the Wabush Initial Order accordingly", in which they sought various conclusions including (1) an order granting priority to the Interim Lender Charge over all charges against the Wabush CCAA

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2 Sections 7(1) and 8(2) of the Interim Financing Term Sheet

3 Section 25(h), which does specify that the Wabush CCAA Parties shall be entitled to make normal cost payments under defined benefit plans.

4 The Court heard the evidence of Clifford Smith, an officer of the Wabush CCAA Parties, and Nigel Meakin, a representative of the Monitor.

2015 QCCS 3064 (CanLII)

Parties' property, subject to certain exceptions not relevant here, and (2) an order suspending the payment of the special payments and the OPEBs.

[22] In addition, the Wabush CCAA Parties sent a letter on May 29, 2015 to 2,092 retirees and to the union representatives to advise them of the hearing on June 9, 2015 and to advise them that they would present on June 9, 2015 requests that the Interim Lender Charge be given priority over the deemed trusts relating to pension payments and that the special payments and the payment of the OPEBs be suspended.

[23] Prior to the comeback hearing, the Wabush CCAA Parties and the Monitor received various notices of objection, which can be classified into two categories as follows:

(a) the first category of notices of objection were filed on behalf of (1) the Administration Portuaire de Sept-Îles/Sept-Iles Port authority ("SIPA"), (2) the Iron Ore Company of Canada ("IOC"), and (3) MFC Industrial Ltd., and pertained to the reservation of certain contractual rights;

(b) the second category of notices of objection were filed on behalf of (1) the N&L Superintendent, (2) OSFI, (3) United Steelworkers Locals 6254 and 6285 (the "Union"), and (4) Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson in their personal capacity and as the proposed representatives of all non-union employees and retirees of the Wabush CCAA Parties. These notices of objection will be described more fully below.

[24] On June 9, 2015, the Court granted the Wabush comeback motion in part and issued an order, which reserved the rights of SIPA, IOC and MFC as follows:

> [10] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if 'any, of the Administration Portuaire de Sept-Îles/Sept-Iles Port Authority (hereinafter the "SIPA"), vis à vis the Wabush CCAA Parties, including: (i) the rights of the SIPA, acting as successor in the rights of the National Harbours Board, pursuant to the agreement referred to and communicated as Exhibit O-1 in support of SIPA's Notice of objection dated April 13, 2015; and (ii) the rights of SIPA, acting as successor in the rights of the Canada Ports Corporation, pursuant to the agreement referred to and communicated as Exhibit O-7 in support of SIPA's Notice of objection already filed in the Court record and dated April 13, 2015;
>
> [11] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if any of the Iron Ore Company of Canada or its related companies (hereinafter the "IOC"), vis-à-vis the Wabush CCAA Parties, including, but not limited to, the rights pursuant to the Subscription Agreement dates August 3, 1959 referred to

in IOC's Notice of objection already filed in the Court record and dated April 13, 2015;

[12] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if any, of MFC Industrial Ltd. ("MFC") if any, vis-à-vis the Wabush CCAA Parties, including pursuant to an Amendment and Consolidation of Mining Leases dated September 2, 1959 and related sub-leases (as amended from time to time) as it relates to the property of Wabush CCAA Parties.

[13] **RESERVES** the right of IOC, SIPA and of MFC to raise any such rights at a later stage if need be;

2015 QCCS 3064 (CanLII)

[25] The Court scheduled a hearing on June 22, 2015 to deal with the remaining requests of the Wabush CCAA Parties in relation to the priority of the Interim Lender Charge and the suspension of the special payments and the OPEBs:

[6] **RESERVES** the rights of Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions, the Syndicat des Métallos, Section Locale 6254, the Syndicat des Métallos, Section 6285 and the Attorney General of Canada to contest the priority of the Interim Lender Charge over the deemed trust(s) as set out in the Notices of Objection filed by each of those parties in response to the Motion, which shall be heard and determined at the hearing schedules on June 22, 2015;

[...]

[21] **ORDERS** the request by the Wabush CCAA Parties for an order for the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015;

[22] **ORDERS t**he request by Wabush CCAA Parties for an order for the suspension of payment by the Wabush CCAA parties of the annual lump sum "catch-up" payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015;

[23] **ORDERS** the Wabush CCAA Parties' request for an order for the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries

hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015;

2015 QCCS 3064 (CanLII)

THE POSITION OF THE OBJECTING PARTIES

[26] Prior to the hearing on June 22, 2015, the parties exchanged outlines of their respective arguments. The four retirees also filed the "Motion for an order appointing the Petitioners-Mises-en-cause as representative of salaried/non-union and retired employees of the Wabush CCAA Parties" seeking to be appointed as representatives of salaried/non-union and retired employees of the Wabush CCAA Parties and to seek funding for their counsel. This motion was granted by consent on June 22, 2015.

[27] The positions taken by the objecting parties can be summarized as follows:

Objection Raised/Objecting Parties	N&L S.	OSFI	Union	Non-union retirees
Suspension of Amortization Payments	Objects	Objects*	Objects	Object**
Suspension of OPEBs	—	—	Objects	Object
Superpriority of Interim Lender Charge	Objects*	Objects	Objects	—

* Not in the notice of objection, but in the written argument

** In the notice of objection and the written argument, but partly withdrawn at hearing

[28] Moreover, in its notice of objection and written argument, the Union requests that that one officer from each of the two locals be designated by the Court as the persons responsible for responding to questions from unionized retirees of the Wabush CCAA Parties and providing them with information about their rights and recourses, and that those persons be funded by the Wabush CCAA Parties.

N&L Superintendent

[29] The N&L Superintendent objects to the Wabush CCAA Parties' request for a suspension of the special payments. He argues that the suspension of the special payments sought by the Wabush CCAA Parties contravenes Sections 32 and 61(2) of the Newfoundland and Labrador *Pension Benefits Act, 1997*[5] (the "N&L Act").

[30] He does not raise any objection with respect to the suspension of the OPEBs.

[31] In his notice of objection, the N&L Superintendent also reserved his right to raise additional objections. In his written argument, he adds an argument with respect to the

5 SNL 1996, c. P-4.01, as amended.

priority of the Interim Lender Charge, which he also claims would contravene Sections 32 and 61(2) of the N&L Act.

[32] In addition to the foregoing, the N&L Superintendent also claims in its written argument that the Wabush CCAA Parties are in a conflict of interest when it comes to the administration of the pension plans, and suggests that other, less stringent financing alternatives would have been available.

[33] Finally, the N&L Superintendent further claims that additional information with regards to paragraphs 83 to 91 of the Wabush Comeback Motion needs to be divulged in order for it to be able to properly carry out its statutory duties under the N&L Act, including to assess the financial status of the plans. However, at the hearing, representations were made that information had been provided and no specific order was sought. The Court reserves the N&L Superintendent's rights in this regard.

2015 QCCS 3064 (CanLII)

OSFI

[34] In its notice of objection, OSFI objects solely to the granting of the priority of the Interim Lender Charge, and only inasmuch as this would result of a priming rank over the normal cost payments owing to the pension plans which benefirt from priority under Sections 8 and 36(2) of the *Pension Benefits Standards Act, 1985*[6] ("PBSA").

[35] In its written argument, OSFI instead invokes the statutory deemed trust in connection with outstanding special payments.

[36] OSFI now also challenges the suspension of the special payments on the basis that the Wabush CCAA Proceedings would not constitute a restructuring, but rather a liquidation.

[37] According to OSFI, the impact of the deemed trust is to render any and all amount owing to the pension plans inalienable and exempt from seizure, such that, as a result, the Interim Lender Charge could not obtain a security on those assets.

The Union

[38] In its notice of objection, the Union opposes the suspension of both the special payments and the OPEBs, and seeks an order that the Wabush CCAA parties be forced to make such payments notwithstanding the terms of the Interim Financing Term Sheet.

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6 R.S.C. 1985, c. 32 (2nd Supp.), as amended.

[39] In doing so, the Union insists on the hardship such a suspension would cause for the retirees, whose claims are alimentary in nature.

[40] The Union also asks the Court to preserve the rank of the deemed trust for amounts owing to the pension plans, and seeks to have this deemed trust rank ahead of or equal with the Interim Lender Charge.

[41] The notice of objection and the written argument also argue for the appointment of a representative to handle the numerous queries of union members.

2015 QCCS 3064 (CanLII)

Non-union retirees

[42] In their notice of objection, the non-union retirees object to the suspension of the OPEBs and the special payments sought by the Wabush CCAA Parties on the basis of the significant prejudice such relief would cause to the retirees.

[43] In their written argument, they argue that such a suspension would in fact amount to a disclaimer or resiliation of agreements, subject to the provisions of Section 32 CCAA, which it is argued were not respected in the case at hand.

[44] They add that the conditions of the Interim Lender Term Sheet should not allow the Wabush CCAA Parties to circumvent the requirements of said Section 32 CCAA.

[45] At the hearing, they indicated that they objected most strenuously to the suspension of the OPEBs, because of the impact on the retirees. They indicated that they would not object to a short-term suspension of the special payments, until the Wabush CCAA Parties collected the tax refunds they were expecting and therefore had funds other than the Interim Financing with which to make the special payments.

POSITION OF THE WABUSH CCAA PARTIES

[46] The Wabush CCAA Parties argue that they do not have any funds or any source of funds and therefore that they need the Interim Financing.

[47] They also argue that even with the Interim Financing, they do not have any funds available to continue to pay the special payments or any of the OPEBs, as the Interim Financing Term Sheet prohibits such payments.

[48] On the law, they argue that the deemed trusts created under the PBSA and the N&L Act are not effective to protect the special payments or the OPEBs in the CCAA context. As a consequence, the Interim Lender Charge requested by the Wabush CCAA Parties does not prime any security under the PBSA or the N&L Act. Further, since those payments are unsecured and relate to pre-filing services, there is no reason for the Wabush CCAA Parties to make those payments.

[49] They therefore argue that the Court should exercise its discretion to give the Interim Lender Charge priority over the deemed trusts and to suspend the obligation to pay the special payments and the OPEBs.

2015 QCCS 3064 (CanLII)

POSITION OF THE MONITOR

[50] The Monitor filed its Seventh Report for purposes of the comeback hearing.

[51] In its report, it supports the position taken by the Wabush CCAA Parties.

[52] Its legal argument supports the legal argument put forward by the Wabush CCAA Parties.

ISSUES IN DISPUTE

[53] The issues in dispute can be outlined as follows;

(a) Can and should the Court order that the Interim Lender Charge rank ahead of all encumbrances, including statutory deemed trusts?

(b) Can and should the Court suspend the Wabush CCAA Parties' obligation to pay the special payments?

(c) Can and should the Court suspend the Wabush CCAA Parties' obligation to pay the OPEBs?

ANALYSIS

[54] The three issues have significant overlaps. The Court will nevertheless analyze them sequentially, and will adopt its previous reasoning to the extent it is relevant.

1. Super-priority of the Interim Lender Charge

General

[55] What is at issue is the conflict between the super-priority of the interim lender charge under Section 11.2 CCAA and the statutory deemed trusts created by Section 8 PBSA and Section 32 of the N&L Act.

[56] Section 11.2 CCAA allows the Court, after considering the factors set out in Section 11.2(4) CCAA, to create an interim lender charge and to give that charge priority over the claim of any secured creditor of the debtor:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an <u>order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company</u>, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) <u>The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.</u>
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) <u>In deciding whether to make an order, the court is to consider, among other things</u>,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;
> >
> > (b) how the company's business and financial affairs are to be managed during the proceedings;
> >
> > (*c*) whether the company's management has the confidence of its major creditors;
> >
> > (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> >
> > (*e*) the nature and value of the company's property;
> >
> > (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
> >
> > (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.
>
> (Emphasis added)

[57] OSFI and the N&L Superintendent, supported by the Union, argue that Section 11.2 CCAA does not allow the Court to give the interim lender charge priority over the deemed trusts in pension matters created by their respective legislations.

2015 QCCS 3064 (CanLII)

2015 QCCS 3064 (CanLII)

[58] The argument put forward by OSFI and the N&L Superintendent is essentially that the employer is deemed to hold the amounts in trust, and therefore they are not "part of the company's property" and cannot be charged under Section 11.2 CCAA.

[59] The Wabush CCAA Parties argue that there is a conflict between the legislation creating the deemed trusts and the CCAA and that the CCAA must prevail:

- The CCAA prevails over the PBSA as a matter of statutory interpretation of two pieces of federal legislation, and
- The CCAA prevails over the N&L Act because of the constitutional doctrine of federal paramountcy.

[60] Because the arguments are different with respect to the PBSA and the N&L Act, the Court will deal with them separately.

[61] These are not new issues. The courts, including the Supreme Court, have been called upon to deal with the effect of federal and provincial deemed trusts in the insolvency context on numerous occasions. There have also been a number of statutory amendments, some designed to overturn the results of judgments.

[62] Because of the urgency of rendering judgment in this matter, the Court will not embark on an exhaustive analysis of all of these judgments and amendments.

Effectiveness of the PBSA deemed trust in CCAA proceedings

[63] OSFI relies on Sections 8(1) and (2) and 36(2) of the PBSA, which provide as follows:

> **8.** (1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (*a*) to (*c*) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:
>
> (*a*) the moneys in the pension fund,
>
> (*b*) an amount equal to the aggregate of the following payments that have accrued to date:
>
> (i) the prescribed payments, and
>
> (ii) the payments that are required to be made under a workout agreement; and

(*c*) all of the following amounts that have not been remitted to the pension fund:

(i) amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).

(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

36. (2) Any agreement or arrangement to assign, charge, anticipate or give as security

(*a*) any benefit provided under a pension plan, or

(*b*) any money withdrawn from a pension fund pursuant to section 26

is void or, in Quebec, null.

(Emphasis added)

[64] The deemed trust created by Section 8 PBSA is intended to cover all amounts due by the employer to the pension fund. These would include the normal payments, as well as the special payments.

[65] Section 8(1) PBSA requires the employer to keep the required amounts separate and apart from its own moneys, and deems the employer to hold them in trust. In the present matter, the required amounts have not been kept separate and apart and the assets subject to the trust have been comingled with other assets. Pursuant to the decision of the Supreme Court in *Sparrow Electric*, the consequence is that the trust created by Section 8(1) PBSA does not exist because the subject-matter of the trust cannot be and never was identifiable.[7]

[66] As a result, the relevant provision is Section 8(2) PBSA which provides that the amount shall be deemed to be separate and apart, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

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7 *Royal Bank of Canada* v. *Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, par. 28.

2015 QCCS 3064 (CanLII)

[67] However, Section 8(2) PBSA only applies "[i]n the event of any liquidation, assignment or bankruptcy of an employer". It attaches to any property which lawfully belongs to the employer when the triggering event occurred.[8]

2015 QCCS 3064 (CanLII)

[68] The issue of the triggering event could be determinative in the present case. If the triggering event has not occurred, then there is no deemed trust and no obstacle to the Court granting the priority required by the Interim Lender.

[69] It is clear that there has been no assignment or bankruptcy in the present matter. Further, there is no liquidation under Part XVIII of the *Canada Business Corporations Act*[9] or equivalent provincial legislation. A CCAA proceeding does not appear to trigger the application of Section 8(2) PBSA. However, OSFI argues that these CCAA proceedings are really a liquidation, because it is very likely that the ongoing sale process will result in the sale of all of the assets of the Wabush CCAA Parties.

[70] In interpreting the word "liquidation" in Section 8(2) PBSA, and in particular whether it includes a liquidation under the CCAA,[10] the Court will consider more generally how the deemed trust under Section 8(2) PBSA is dealt with under the CCAA.

[71] It must be emphasized at the outset that the deemed trust under Section 8(2) PBSA is not a deemed trust in favour of the Crown. This is a fundamental distinction. Section 37(1) CCAA, which renders all deemed trusts in favour of the Crown ineffective in the CCAA context, subject to certain exceptions, has no application to the deemed trust under Section 8(2) PBSA. As a result, many of the cases cited to the Court, which deal with the effectiveness of deemed trusts in favour of the Crown, must be applied with caution in the present circumstances.

[72] In particular, the Wabush CCAA Parties rely on language in the Supreme Court's judgment in *Century Services*[11] that must be read carefully. Justice Deschamps refers in paragraph 45 to "the general rule that deemed trusts are ineffective in insolvency". There is no such general rule, other than Section 37(1) CCAA (and Section 67(2) of the *Bankruptcy and Insolvency Act*[12]) which applies only to deemed trusts in favour of the Crown. She begins the paragraph with a reference to the predecessor of Section 37(1) CCAA and she refers throughout the paragraph to Crown claims and Crown priorities. She must be referring to Crown deemed trusts in that sentence as well. Justice Fish's comments in paragraph 95 must be similarly limited. The Court respectfully disagrees

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8 *Ibid*, par. 38.
9 R.S.C. 1985, c. C-44, as amended.
10 In *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762, par. 66, Justice Schrager (then of this Court) leaves open the possibility that the liquidation of Aveos under the CCAA may have triggered Section 8(2) PBSA.
11 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379.
12 R.S.C. 1985, c. B-3, as amended.

with Justice Schrager in *Aveos*[13] on this issue and concludes that there is no general rule that deemed trusts in favour of anyone other than the Crown are ineffective in insolvency. Deemed trusts will be interpreted restrictively as exceptions to the general principle that the assets of the debtor are available for all of the creditors,[14] but there is no general rule that they are ineffective.

[73] However, other provisions of the CCAA deal expressly with pension obligations. Sections 6(6) and 36(7) CCAA were added to the CCAA in 2009. They provide that an arrangement can only be sanctioned or an asset sale approved by the Court, if provision is made for the payment of certain enumerated pension obligations, including deductions from employee salaries and normal cost contributions of the employer, but not including special payments.

[74] It is difficult to reconcile Sections 6(6) and 36(7) CCAA with a broad interpretation of Section 8(2) PBSA. Why would the legislator give specific protection to the normal payments by amending the CCAA in 2009 if the deemed trust protecting not only the normal payments but also the special payments was effective in the CCAA context? Why would the legislator not protect the special payments under Sections 6(6) and 36(7) CCAA if they were already protected under a deemed trust? What happens to the deemed trust for the special payments if there is an arrangement or an asset sale? Because both statutes were adopted by the same legislator, we must try to determine the legislator's intent.

[75] In *Century Services*, the Supreme Court was faced with a conflict between the deemed trust for GST and the CCAA. Justice Deschamps adopted "a purposive and contextual analysis to determine Paliament's true intent".[15] She concluded that the deemed trust for GST did not apply in a CCAA proceeding, even though the language in the *Excise Tax Act*[16] provided that the deemed trust was effective notwithstanding any law of Canada other than the BIA. She attached importance to the "internal logic of the *CCAA*".[17]

[76] Moreover, in *Indalex*, Justice Deschamps referred to the conclusions of a Parliamentary committee which had considered extending the protection afforded the beneficiaries of pension plans. The committee made the policy decision not to extend that protection. Justice Deschamps concluded that "courts should not use equity to do what they wish Parliament had done through legislation."[18]

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13 *Aveos*, *supra* note 10, par. 74-75.
14 *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, par. 141-142.
15 *Century Services*, *supra* note 11, par. 44.
16 R.S.C. 1985, c. E-15, as amended.
17 *Century Services*, *supra* note 11, par. 46.
18 *Sun Indalex Finance, LLC* v. *United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 272, par. 81-82. See also *Aveos*, *supra* note 10, par. 77.

2015 QCCS 3064 (CanLII)

2015 QCCS 3064 (CanLII)

[77] The Court therefore adopts the following reasoning to resolve the conflict in the present case:

> Given that the pension provisions of the *BIA* and *CCAA* came into force much later than s. 8 of the *PBSA*, normal interpretation would require that the later legislation be deemed to be remedial in nature. Likewise, since those provisions of the *BIA* and *CCAA* are the more specific provisions, normal interpretation would take them to have precedence over the general. Finally, the limited scope of the protection given to pension claims in the *BIA* and the *CCAA* would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional protection. In enacting *BIA* subs. 60(1.5) and 65.13(8) and ss. 81.5 and 81.6 and *CCAA* subs. 6(6) and 37(6), while not amending subs. 8(2) of the *PBSA* (by adding explicit priority language or by removing the insolvency trigger), Parliament demonstrated the intent that pension claims would have protection in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*.[19]
>
> (Emphasis added)

[78] For all of these reasons, the Court concludes that Parliament's intent is that federal pension claims are protected in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*, notwithstanding the potentially broader language in the PBSA.

[79] In the alternative, the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Section 8(2) PBSA such that there has been no triggering event.

[80] Either way, the Court concludes that the deemed trust under Section 8(2) PBSA does not prevent the Court from granting priority to the Interim Lender Charge, if the conditions of Section 11.2 CCAA are met.

Effectiveness of the N&L Act deemed trust in CCAA proceedings

[81] The N&L Superintendent relies on the combined effect of Sections 32 and 61(2) of the N&L Act:

> **32.** (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that
>
> (a) the money in the pension fund;

[19] Sam Babe, "What About Federal Pension Claims? The Status of *Pension Benefits Standards Act, 1985* and *Pooled Registered Pension Plans Act* Deemed Trust Claims in Insolvency" (2013), 28 N.C.D.Rev. 25, p. 30.

(b) an amount equal to the aggregate of

(i) the normal actuarial cost, and

(ii) any special payments prescribed by the regulations, that have accrued to date; and

(c) all

(i) amounts deducted by the employer from the member's remuneration, and

(ii) other amounts due under the plan from the employer that have not been remitted to the pension fund

are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

(4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).

61. (1) On termination of a pension plan, the employer shall pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including

(a) an amount equal to the aggregate of

(i) the normal actuarial cost, and

(ii) special payments prescribed by the regulations,

that have accrued to the date of termination; and

2015 QCCS 3064 (CanLII)

> (b) all
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer that have not been remitted to the pension fund at the date of termination.
>
> (2) Where, on the termination, after April 1, 2008, of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.
>
> (Emphasis added)

[82] The key provision, Section 32(2) of the N&L Act, is virtually identical to Section 8(2) PBSA. As a result, much of the analysis set out above applies here as well.

[83] However, the analysis takes a different turn once one reaches the conclusion that it is difficult to reconcile the broad deemed trust under Section 32(2) of the N&L Act with the more limited protection under Section 6(6) and 36(7) CCAA.

[84] This is a conflict between provincial legislation and federal legislation. Constitutional doctrine instructs the courts to try to interpret the federal and provincial legislation in such a way as to avoid the conflict, but this is not the same exercise as trying to find the intent of a single legislator who adopted conflicting pieces of legislation.

[85] For the purposes of this analysis, the Court will assume that the N&L Act is valid and is intended to be effective in an insolvency context. This means that the province granted greater protection to pension obligations than the federal legislator recognized in the CCAA. The principles of interpretation set out above do not apply to resolve a conflict between a federal statute and a provincial statute. There is no basis for interpreting the statutes in such a way as to make them consistent.

[86] There is also a potential conflict with respect to the priority of the interim Lender Charge: under Section 11.2 CCAA, the Court can create an interim lender charge over all of the debtor’s property and give it priority over all other charges, except that the province has created a deemed trust which, if it is effective, subtracts assets from the debtor’s property and makes them unavailable to be charged in favour of the interim lender.

[87] The question is therefore whether the province can create such a charge that could prevent the Court from granting priority to an interim lender charge.

2015 QCCS 3064 (CanLII)

2015 QCCS 3064 (CanLII)

[88] The Supreme Court in *Indalex* held in the circumstances of that case, that the interim lender charge had priority over the provincial deemed trust by reason of the application of the doctrine of federal paramountcy, because the CCAA's purpose would be frustrated without the interim lender charge.[20] The trial judge in *Indalex* had rejected the deemed trust and therefore had not considered the doctrine of paramountcy. However, in granting the interim lender charge, he had considered the factors in Section 11.2(4) CCAA and had concluded that the interim lender charge was necessary and in the best interest of *Indalex* and its stakeholders. The Supreme Court held that these findings were sufficient for paramountcy to apply.

[89] As a result, the Court can give priority to the Interim Lender Charge over the deemed trust under the N&L Act if the test for federal paramountcy is met. The Court will consider the paramountcy issue as part of its analysis of the factors under Section 11.2(4) CCAA.

Factors under Section 11.2(4) CCAA

[90] Section 11.2(4) CCAA sets out a non-exhaustive list of the factors the Court should consider before it creates an interim lender charge:

> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;
> >
> > (b) how the company's business and financial affairs are to be managed during the proceedings;
> >
> > (*c*) whether the company's management has the confidence of its major creditors;
> >
> > (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> >
> > (*e*) the nature and value of the company's property;
> >
> > (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
> >
> > (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[20] *Indalex*, *supra* note 18, par. 60. See also *White Birch*, *supra* note 14, par. 217; *Timminco ltée (Arrangement relatif à)*, 2014 QCCS 174, par. 85.

2015 QCCS 3064 (CanLII)

[91] The Court already considered those factors when it decided to create the Interim Lender Charge on May 20, 2015.

[92] In his Fifth Report dated May 19, 2015, the Monitor provided the following comments on the factors listed in Section 11.2(4) CCAA:

> *The period during which the company is expected to be subject to proceedings under the CCAA*
>
> (a) While the deadline for the submission of binding offers pursuant to the SISP has yet to be set, based the Wabush May 18 Forecast and preliminary discussions regarding the potential timeline for the completion of the SISP, it is believed that the Interim Financing Term Sheet provides sufficient liquidity to enable the Wabush CCAA Parties to complete the SISP;
>
> *How the company's business and affairs are to be managed during the proceedings*
>
> (b) The Wabush CCAA Parties' senior personnel and Boards of Directors remain in place to manage the business and affairs of the Wabush CCAA Parties. The Wabush CCAA Parties and their management will also have the benefit of the expertise and experience of their legal counsel and the Monitor;
>
> *Whether the company's management has the confidence of its major creditors*
>
> (c) The largest creditors of the Wabush CCAA Parties are affiliated companies who the Monitor understands to have confidence in the Wabush CCAA Parties' management. Other major creditors include the pension plans described in the May 19 Motion, employee groups in respect of other post-retirement benefits and various contract counterparties. None of the major creditors has to date expressed any concern to the Monitor in respect of the Wabush CCAA Parties' management;
>
> *Whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company*
>
> (d) Based on the Wabush May 18 Forecast, without the Interim Facility the Wabush CCAA Parties would be unable to pay their obligations, maintain their assets or complete the SISP. The Wabush CCAA Parties and the Monitor are of the view that approval of the Interim Facility would likely enhance the prospects of generating recoveries for stakeholders, whether through a sale or a restructuring plan;
>
> *The nature and value of the company's property*
>
> (e) The Wabush CCAA Parties' assets are described in the May 19 Motion, and consist primarily of real estate, equipment, inventory and income tax receivables. The value of the Wabush CCAA Parties' property will be determined through the

SISP. Nothing has come to the attention of the Monitor in respect of the nature of the Wabush CCAA Parties' property that, in the Monitor's view, ought to be given particular consideration in connection with the Interim Lender Charge;

Whether any creditor would be materially prejudiced as a result of the proposed Charge

(f) The proposed Interim Facility will provide the Wabush CCAA Parties the opportunity to complete the SISP and to maximize recoveries for stakeholders. Borrowings under the Interim Financing Term Sheet are limited to a maximum of US$10 million. The Interim Lender Charge secures only the Interim Financing Obligations and is limited to $15 million. The Monitor is of the view that any potential detriment caused to the Wabush CCAA Parties' creditors by the Interim Lender Charge should be outweighed by the benefits that it creates; and

Other potential considerations

(g) The Monitor has researched the terms of recent interim financings based on information publicly available, a summary of which is attached hereto as Appendix C. Based on this research and Monitor's experience, the Monitor believes that the terms of the Interim Financing Term Sheet are in line with or better than market. The Monitor is of the view that the Interim Financing Term Sheet represents the best alternative available in the circumstances that would provide access to financing within the necessary timeframe.

[93] In his testimony before the Court on May 20, 2015, Clifford Smith testified that the Wabush CCAA Parties had attempted to obtain financing elsewhere, but that only a related party was willing to provide financing.

[94] The Court makes the following findings:

- The Sale and Investor Solicitation Process (SISP) is in the interests of the Wabush CCAA Parties and their stakeholders because it should lead to greater recovery;
- Without new financing, the Wabush CCAA Parties do not have enough cash to complete the SISP. The cash flow projection attached to the Fifth Report shows the Wabush CCAA Parties running out of cash in the week ending May 22, 2015;
- Without new financing, it is therefore likely that the Wabush CCAA Parties will go bankrupt;
- The Wabush CCAA Parties and the Monitor have not identified any other sources of new financing;

2015 QCCS 3064 (CanLII)

- The terms and conditions of the Interim Financing are reasonable, and the security is limited to the amount of the new financing.

2015 QCCS 3064 (CanLII)

[95] This is sufficient for the Court to conclude that the Interim Financing should be approved and the Interim Lender Charge should be granted with priority over the deemed trust under the PBSA, if it is effective in the CCAA context.

[96] With respect to the deemed trust under the N&L Act, there is the added issue of whether giving effect to the deemed trust would frustrate the federal purpose under the CCAA. Under the Interim Lender Term Sheet, the super-priority is a condition precedent to the Interim Lender's obligation to advance the funds. That condition will not be met if the Court gives effect to the deemed trust under the N&L Act, which puts the financing at risk.

[97] The objecting parties argue that the Court's jurisdiction to make appropriate orders should not be ousted by the terms of the Interim Lender Term Sheet. However, there is nothing peculiar about this provision in the Interim Lender Term Sheet. The importance of the super-priority to interim lenders has consistently been recognized by the courts. As stated by the Supreme Court in *Indalex*:

> … case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries.[21]
>
> (Emphasis added)

[98] Similarly, Justice Morawetz stated in *Timminco*:

> [49] In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders, including CEP and USW.[22]
>
> (Emphasis added)

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[21] *Indalex*, *supra* note 18, par. 59

[22] *Timminco Limited (Re)*, 2012 ONSC 948, par. 49. This passage was quoted with approval in *White Birch*, *supra* note 14, par. 215.

2015 QCCS 3064 (CanLII)

[99] The objecting parties also plead that the Interim Lender is related to the Wabush CCAA Parties and therefore has interests which might be different than those of an arm's length lender.

[100] However, there is no evidence that gives credence to the suggestion that the Interim Lender will advance funds without the super-priority. To the contrary, the attorney representing the Interim Lender made it clear at the hearing that there would be no advance of funds if the super-priority was not confirmed. Further, the Court is not satisfied that it has the jurisdiction to order the Interim Lender to advance the funds on terms other than those that it has accepted.

[101] In all of these circumstances, the Court concludes that giving effect to the deemed trust under the N&L Act carries a serious risk of frustrating the CCAA process. The Court therefore concludes that the doctrine of federal paramountcy is engaged, and it concludes that the N&L Act is not effective to that extent.

[102] The Court will therefore order that the Interim Lender Charge shall have priority over the deemed trusts under the PBSA and the N&L Act.

2. Suspension of special payments

[103] Further, the Wabush CCAA Parties asked that their obligation to make the special payments to the pension plans be suspended.

[104] The Courts have consistently recognized a jurisdiction to suspend the obligation to make special payments and OPEB payments "when necessary to enhance liquidity to promote the survival of a company in financial distress."[23]

[105] Several reasons underlie the existence of this jurisdiction.

[106] First, the normal pension payments that the employer is required to make relate to the current services rendered by the current employees and the Court's jurisdiction to affect those payments is limited by the principle that the debtor must pay for current services. However, the special payments relate to a deficit that has accumulated in the pension plan. Pension benefits are deferred compensation for services that were provided by the retiree while he or she was an employee.[24] As a result, the special

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[23] *Aveos*, *supra* note 10, par. 88. See also *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 764, par. 94-100; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 2028, par. 27, 31-32; *Papiers Gaspésia Inc., Re*, 2004 CanLII 40296 (QC CS), par. 87-92; *Collins & Aikman Automotive Canada Inc. (Re)*, 2007 CanLII 45908 (ON SC), par. 90-92; *Fraser Papers Inc. (Re)*, 2009 CanLII 39776 (ON SC), par. 20; *Timminco Limited (Re)*, 2012 ONSC 506, par. 61-63.

[24] *IBM Canada Limited* v. *Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, par. 4.

payments relate to services provided to the employer before the filing, and as such, they can be qualified as pre-filing obligations.[25]

2015 QCCS 3064 (CanLII)

[107] Second, the special payments are unsecured in the CCAA context. Sections 6(6) and 36(7) create a priority in the CCAA context for the normal payments but not for the special payments. As discussed above, the deemed trust under Section 8(2) PBSA has no effect in a CCAA proceeding, and the deemed trust under Section 32(2) of the N&L Act, in purporting to create a security interest not recognized under the CCAA, is not effective to the extent that it conflicts with the CCAA.[26]

[108] As a result, the payment of the special payments would constitute payments to an unsecured pre-filing creditor, which could be qualified as preferential in the sense that no other unsecured pre-filing creditor is being paid.

[109] In any event, even without this characterization, the courts have a broad discretion under the CCAA to render orders that are necessary to allow the debtor to make a proposal to its creditors.

[110] In the exercise of this discretion, it is important to consider the facts.

[111] The special payments for the two plans are made up of monthly amortization payments in the amount of $666,555.58 per month and a lump sum "catch-up" amortization payment of approximately $5.5 million due in July 2015.

[112] The Wabush CCAA Parties do not have the funds available to make these payments. The cash flow statements filed with the Court show that the Wabush CCAA Parties need the funds from the Interim Financing to meet their current obligations other than the special payments. The Interim Lender Term Sheet expressly requires the Wabush CCAA Parties not to make any special payments. As a result, forcing the Wabush CCAA Parties to make the special payments would lead to a default under the Interim Financing and a likely bankruptcy.[27]

[113] The objecting parties criticize the position taken by the Interim Lender in prohibiting the payment of the special payments.

[114] However, the position taken by the Interim Lender in this file is consistent with the position taken by other interim lenders in other files:

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25 *White Birch*, *supra* note 23, par. 97; *Fraser Papers*, *supra* note 23, par. 20; *Sproule* v. *Nortel Networks Corporation*, 2009 ONCA 833, par. 20-21. In *Aveos*, *supra* note 10, par. 86-88, Justice Schrager concluded that this characterization was not necessary for the court to have jurisdiction to suspend the payments.

26 *Indalex*, *supra* note 18, par. 56.

27 See a similar argument in *Collins & Aikman*, *supra* note 23, par. 91-92; *Fraser Papers*, *supra* note 23, par. 21;

> [55] *Fairfax* [the interim lender] a indiqué au Tribunal que ce financement avait été octroyé pour financer les activités courantes de *Bowater* et ne pouvait ainsi être utilisé pour payer les cotisations d'équilibre aux régimes de retraite. Le financement est aussi sujet au respect de différents ratios de solvabilité.[28]

2015 QCCS 3064 (CanLII)

[115] Moreover, the Interim Lender's position makes sense as a commercial matter. Why should the Interim Lender advance funds that will be used to pay someone else's debt, particularly one which is pre-filing and unsecured? It is the Interim Lender's intention to fund the Wabush CCAA Parties with the amount required to get them through the SISP so that they can repay the loan. It is not in the Interim Lender's interest to fund preferential payments to unsecured pre-filing creditors. The language cited above about the harsh commercial realities of interim financing applies here as well.

[116] Moreover, the Court is being asked to suspend the obligation to make the special payments, and is not being asked to alter the collective agreement or extinguish the obligation to pay these amounts.[29]

[117] As a result, the beneficiaries of the pension plans would not be prejudiced by this suspension. The wind-up deficiencies for the two pension plans as at January 1, 2015 are estimated to be a total of approximately $41.5 million. The purpose of the special payments is to reduce that deficiency and to improve the situation over time such that the beneficiaries will receive the full amounts to which they are entitled. The suspension of the special payments means that their position is not improved, but it is not worsened. Their debt remains and benefits from whatever priority it is entitled to at law.

[118] For all of these reasons, the Court will order the suspension of the special payments to the pension funds.

3. Suspension of the OPEBs

[119] The Wabush CCAA Parties currently provide OPEBs, including life insurance and health care, to former hourly and salaried employees.

[120] As of December 31, 2014, accumulated benefits obligations for the OPEBs totalled approximately $52.1 million. The premiums required to fund the foregoing OPEBs are approximately $182,000 a month.

[121] In addition to the foregoing, there is a supplemental retirement arrangement plan for certain current and former salaried employees of Wabush Mines JV. The obligations under this plan are approximately $1.01 million.

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[28] *AbitibiBowater*, *supra* note 23, par. 55. See also *Ivaco Inc. (Re)*, 2006 CanLII 34551 (Ont.C.A.), par. 17; *Fraser Paper*, *supra* note 23, par. 23.

[29] Section 33 CCAA; *Syndicat national de l'amiante d'Asbestos inc.* c. *Mine Jeffrey inc.*, [2003] R.J.Q. 420 (C.A.), par. 57-58.

[122] The Wabush CCAA Parties do not have any funding available to continue to pay any of the foregoing OPEBs, as the Interim Financing Term Sheet prohibits such payments. They seek an order from the Court suspending the payment of the OPEBs *nunc pro tunc* to the Wabush Filing Date.

[123] The reasoning as to the existence and the exercise of the discretion to suspend these payments is much the same as for the special payments. The Wabush CCAA Parties do not have the funds to make the payments, and the Interim Lender Term Sheet does not allow them to make these payments. These amounts relate to services provided pre-filing and they are unsecured. They are in a sense even less secured than the special payments because the deemed trusts created by the PBSA and the N&L Act do not purport to cover these payments.

[124] The retirees plead that there are two important differences.

[125] First, the amount at issue is only $182,000 per month. The retirees suggest that the Wabush CCAA Parties should be able to find this amount somewhere. The Wabush CCAA Parties continue to argue that they do not have the funds with which to make these payments, and the Interim Lender Term Sheet in any event prevents them from making these payments. Given the cash flow statement filed with the Court and the language of the Interim Lender Term Sheet, the Court accepts that the Wabush CCAA Parties do not have the funds.

[126] The second difference pleaded by the retirees is that they suffer a clear prejudice. The OPEBs are provided through an insurance policy, and if the Wabush CCAA Parties fail to pay the premium, the policy will be cancelled, leaving the retirees with no health insurance and only a claim against the insolvent Wabush CCAA Parties. The Court assumes this to be correct and accepts that this will cause hardship to the retirees.

[127] The retirees argue that this is equivalent to a disclaimer or resiliation of the insurance contract by the Wabush CCAA Parties, which is invalid because the formalities under Section 32(1) CCAA were not followed, and the test under Section 32(4) CCAA for the Court to authorize the disclaimer or resiliation was not met. Section 32(4)(c) provides that one of the factors to be considered is "whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement."

[128] This argument does not withstand scrutiny.

[129] There is a tri-partite relationship. The employer has obligations to the beneficiaries, and has entered into an insurance policy with the insurer so that the insurer provides those benefits to the beneficiaries. If the employer stops paying the premiums, the insurer will terminate the insurance policy. This does not affect the

2015 QCCS 3064 (CanLII)

employer's obligations to the beneficiaries,[30] but the beneficiaries will be left with an insolvent debtor instead of the insurer.

2015 QCCS 3064 (CanLII)

[130] However, the contract that is being terminated is the contract between the Wabush CCAA Parties and the insurer for the benefit of the beneficiaries. The counter-party is the insurer. It is not suggested that the insurer will suffer any significant financial hardship as a result of the termination of the contract. The contract between the Wabush CCAA Parties and the beneficiaries is not being terminated.

[131] Moreover, the Wabush CCAA Parties are not disclaiming or resiliating the contract. The Wabush CCAA Parties are seeking authorization to stop paying under a contract, just as they have undoubtedly stopped paying under a number of other contracts. When the debtor defaults, the counter-party has a number of options, including terminating the contract. Even if termination by the counter-party is the likely result, as in this case, it does not mean that the debtor has disclaimed or resiliated the contract. Otherwise, the debtor would have to follow the formalities and pass the test in Section 32 CCAA every time it defaulted under a contract.

[132] At the end of the day, the answer is the same as for the special payments, and the payment of the OPEBs should also be suspended.[31]

[133] The Court is very mindful of the hardship that the suspension of the OPEB payments and the termination of the insurance policy will cause to the beneficiaries. Unfortunately, that hardship appears to be inevitable. Even if the Court ordered the Wabush CCAA Parties to keep paying the premium during the SISP, that would be only a temporary solution and it is very likely if not inevitable that following the conclusion of the SISP, the Wabush CCAA Parties will cease their operations and the insurance policy will be terminated.

4. Breach of fiduciary duties

[134] The objecting parties also pleaded that Wabush Mines is in a situation of conflict of interest because it is both the administrator of the pension plans and one of the Wabush CCAA Parties seeking relief with respect to the pension plans.

[135] The PBSA and the N&L Act allow the employer to act as administrator, and the insolvency of the employer inevitably leads to the type of potential conflict in which Wabush Mines finds itself.

[136] Consistent with the views expressed by the Supreme Court in *Indalex*, the Court concludes that the giving of notice to the regulators, the Union and the retirees, the postponement of the hearing from June 9, 2015 to June 22, 2015 to allow the objecting

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[30] *Ibid*, par. 58.

[31] See also *White Birch*, *supra* note 23, par 40.

parties to present their arguments, and the consent to the motion presented by the four retirees for a representation order allowing them to represent all salaried/non-union employees and retirees and related beneficiaries at the expense of the Wabush CCAA Parties, all show that the employer acted in good faith in a way consistent with its fiduciary duties to the beneficiaries of the pension plans.[32]

2015 QCCS 3064 (CanLII)

5. Representation order sought by the Union

[137] The Union requests that one officer from each of the two locals be designated by the Court as the persons responsible for responding to questions from unionized retirees of the Wabush CCAA Parties and providing them with information about their rights and recourses. Further, the Union asks that those persons be funded by the Wabush CCAA Parties.

[138] The individuals that the Union proposes are officers of the two locals. The Union is essentially asking the Court to designate these individuals and to order that a portion of their salary be paid by the Wabush CCAA Parties. At the present time, the Union estimates that the two individuals spend one half of their time responding to calls, although that time seems to be decreasing. The admissions filed in lieu of the testimony of Frank Beaudin refer to the volume of calls received by the Union since the May 29, 2015 letter was sent to the retirees.

[139] The Monitor is a Court officer whose duties include providing information of this nature. However, the Court also recognizes that the Union has received and will continue to receive calls from the unionized retirees. It is appropriate for the Union to provide information to its retired members and to designate specific individuals to provide the information in order to ensure that there is consistency in the information provided.

[140] However, this is not a matter that requires the intervention of the Court. The Union can handle matters of communications with its former members without a Court order. The Union does not seek an order that it be authorized to represent these unionized retirees. If the Union were to make such a motion, the Court would have to consider whether there is a potential conflict between the current employees and the retirees.

[141] Further, the Court does not consider it appropriate that the Wabush CCAA Parties be ordered to pay part of the salary of the two individuals. They are salaried union officers. Providing information of this nature is within their functions.

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[32] *Indalex*, *supra* note 18, par. 73.

[142] For these reasons, the Union’s motion will be dismissed.

FOR THESE REASONS, THE COURT:

[143] **DISMISSES** the contestations by Her Majesty in right of Newfoundland and Labrador, represented by the Superintendent of Pensions, the Attorney General of Canada and the Syndicat des Métallos, Section Locale 6254 and the Syndicat des Métallos, Section Locale 6285 to the priority of the Interim Lender Charge over deemed trusts, as set out in paragraph 47 of the Wabush Initial Order, as amended on June 9, 2015, and **CONFIRMS** the priority of the Interim Lender Charge over deemed trusts, as set out in paragraph 47 of the Wabush Initial Order, as amended on June 9, 2015;

[144] **ORDERS** the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date;

[145] **ORDERS** the suspension of payment by the Wabush CCAA parties of the annual lump sum “catch-up” payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date;

[146] **ORDERS** the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date.

[147] **DISMISSES** the Motion to Modify the Initial Order presented by the Syndicat des Métallos, Section Locale 6254 and the Syndicat des Métallos, Section Locale 6285;

[148] **WITHOUT COSTS**.

STEPHEN W. HAMILTON, J.S.C.

2015 QCCS 3064 (CanLII)

2015 QCCS 3064 (CanLII)

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Hearing date: June 22, 2015

2015 QCCS 3064 (CanLII)

Francine Bourdon, Lise Chamberland, Gudrun Deumié, Yvon Laprade, Shirley Smith and Michel Tanguay *Appellants*

v.

Stelco Inc. *Respondent*

and

Superintendent of Financial Services *Intervener*

INDEXED AS: BOUCHER *v.* STELCO INC.

Neutral citation: 2005 SCC 64.

File No.: 30299.

Hearing and Judgment: June 10, 2005.

Reasons delivered: November 10, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Pensions — Pension plans — Partial wind up of pension plan — Wind up report approved by Ontario's Superintendent of Financial Services granting early retirement benefits to plan members employed in Ontario and deferred pensions to members employed in Quebec — Superintendent's decision not contested in Ontario — Quebec members instead bringing action based on employment contract in Quebec to claim early retirement benefits — Whether Quebec Superior Court may rule on conclusions sought in action.

Civil procedure — Exception to dismiss action — Res judicata — Issue estoppel — Partial wind up of pension plan — Wind up report approved by Ontario's Superintendent of Financial Services granting early retirement benefits to plan members employed in Ontario and deferred pensions to members employed in Quebec — Superintendent's decision not contested in Ontario — Quebec members instead bringing action based on employment contract in Quebec to claim early retirement benefits — Whether action inadmissible in light of civil

Francine Bourdon, Lise Chamberland, Gudrun Deumié, Yvon Laprade, Shirley Smith et Michel Tanguay *Appelants*

c.

Stelco Inc. *Intimée*

et

Surintendant des services financiers *Intervenant*

RÉPERTORIÉ : BOUCHER *c.* STELCO INC.

Référence neutre : 2005 CSC 64.

N° du greffe : 30299.

Audition et jugement : 10 juin 2005.

Motifs déposés : 10 novembre 2005.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Pensions — Régimes de retraite — Liquidation partielle du régime de retraite — Rapport de liquidation approuvé par le surintendant des services financiers de l'Ontario et octroyant une pension anticipée aux participants du régime employés en Ontario et une pension différée aux participants employés au Québec — Décision du surintendant non contestée en Ontario — Participants québécois intentant plutôt une action au Québec basée sur le contrat de travail pour obtenir une pension anticipée — La Cour supérieure du Québec peut-elle se prononcer sur les conclusions de cette action?

Procédure civile — Moyens de non-recevabilité — Chose jugée — Préclusion découlant d'une question déjà tranchée — Liquidation partielle du régime de retraite — Rapport de liquidation approuvé par le surintendant des services financiers de l'Ontario et octroyant une pension anticipée aux participants du régime employés en Ontario et une pension différée aux participants employés au Québec — Décision du surintendant non contestée en Ontario — Participants québécois intentant plutôt une action au Québec basée sur le contrat de travail

2005 SCC 64 (CanLII)

law principles relating to res judicata and common law principles relating to estoppel — Civil Code of Québec, S.Q. 1991, c. 64, art. 3137.

Private international law — Jurisdiction of Quebec courts — Doctrine of forum non conveniens — Partial wind up of pension plan — Wind up report approved by Ontario's Superintendent of Financial Services granting early retirement benefits to plan members employed in Ontario and deferred pensions to members employed in Quebec — Superintendent's decision not contested in Ontario — Quebec members instead bringing action based on employment contract in Quebec to claim early retirement benefits — Whether Superior Court had to decline jurisdiction based on doctrine of forum non conveniens — Civil Code of Québec, S.Q. 1991, c. 64, art. 3135.

The respondent, S, set up a single pension plan for all its employees in Canada, regardless of their place of work. The plan was governed by the laws of Ontario. In 1990, as part of a reorganization, S closed three plants in Quebec. Several of the laid-off employees, including the appellants, sought to obtain pension benefits. Ontario's Superintendent of Pensions then ordered a partial wind up of the plan and approved the partial wind up report, which provided for early retirement benefits for plan members employed in Ontario only. For the appellants, all of whom were members employed in Quebec, the report applied Quebec law and the entire amount of the pension was accordingly deferred until the normal age of retirement. The appellants did not institute proceedings in Ontario to contest that decision but instead brought an action in Quebec that was based on contracts of employment. They claimed to be entitled to early retirement benefits on the basis that the plan was subject to Ontario law. The trial judge began by recognizing that the Superior Court had jurisdiction, but dismissed the appellants' action on the merits, holding that early retirement benefits were limited to plan members employed in Ontario. The majority of the Court of Appeal affirmed the trial judge's decision both on the issue of jurisdiction and on the merits.

Held: The appeal should be dismissed.

The appellants' action is inadmissible. Under the interprovincial framework agreement on pension plans, which applied to S's plan, Ontario's Superintendent of Financial Services was expressly entitled to exercise all

pour obtenir une pension anticipée — Vu les règles de la chose jugée en droit civil et celles de la préclusion en common law, l'action est-elle irrecevable? — Code civil du Québec, L.Q. 1991, ch. 64, art. 3137.

Droit international privé — Compétence des tribunaux québécois — Doctrine du forum non conveniens — Liquidation partielle du régime de retraite — Rapport de liquidation approuvé par le surintendant des services financiers de l'Ontario et octroyant une pension anticipée aux participants du régime employés en Ontario et une pension différée aux participants employés au Québec — Décision du surintendant non contestée en Ontario — Participants québécois intentant plutôt une action au Québec basée sur le contrat de travail pour obtenir une pension anticipée — La Cour supérieure devait-elle décliner compétence en vertu de la doctrine du forum non conveniens? — Code civil du Québec, L.Q. 1991, ch. 64, art. 3135.

L'intimée S a établi un régime de retraite unique pour l'ensemble de ses employés au Canada, sans égard à leur lieu de travail. Le régime est régi par la loi de l'Ontario. En 1990, dans le cadre d'une réorganisation, S ferme trois usines au Québec. Plusieurs des salariés mis à pied, dont les appelants, cherchent à obtenir des prestations de retraite. Le surintendant des régimes de retraite de l'Ontario décrète alors la liquidation partielle du régime et approuve le rapport de liquidation partielle, qui ne prévoit l'octroi d'une pension anticipée qu'aux participants employés en Ontario. À l'égard des appelants, tous des participants employés au Québec, le rapport applique la règle québécoise et n'accorde donc qu'une pension dont le versement total est différé à l'âge normal de la retraite. Les appelants n'engagent aucune procédure en Ontario pour contester cette décision, mais intentent plutôt, au Québec, une action basée sur des contrats de travail. Ils allèguent avoir droit aux prestations de retraite anticipée en raison de l'assujettissement du régime au droit de l'Ontario. En première instance, le juge reconnaît d'abord la compétence de la Cour supérieure, mais rejette les prétentions des appelants sur le fond, concluant que les prestations de retraite anticipée étaient réservées aux participants employés en Ontario. La Cour d'appel, à la majorité, confirme cette décision tant sur la question de la compétence que sur le fond.

Arrêt : Le pourvoi est rejeté.

L'action des appelants est irrecevable. En vertu de l'accord-cadre interprovincial sur les régimes de retraite, applicable au régime de S, le surintendant des services financiers de l'Ontario avait expressément le

2005 SCC 64 (CanLII)

the powers conferred by the Ontario legislature and to make any necessary decisions for the administration and wind up of the plan, such as verifying and approving the benefits payable to each plan member, including those employed in Quebec. The Superintendent's decision was not contested in Ontario and is final. In light of the civil law principles relating to *res judicata* and the common law principles relating to estoppel, the appellants cannot contest that decision indirectly by means of this action. [20] [26-28] [31]

droit d'exercer tous les pouvoirs conférés par la législature ontarienne et prendre toute décision nécessaire à l'administration et à la liquidation du régime, notamment vérifier et approuver les prestations payables à chaque participant, y compris ceux employés au Québec. La décision du surintendant n'a pas été contestée en Ontario et est finale. Vu les règles de la chose jugée en droit civil et les règles de la préclusion en common law, les appelants ne peuvent contester indirectement cette décision par le truchement de la présente action. [20] [26-28] [31]

At this stage of the proceedings, from the perspective of Quebec law, the conditions for applying the principle of *res judicata* have been met. The Superintendent had jurisdiction to make the decision, and the three necessary elements of identical cause, object and parties are present. If it were heard by a Quebec court, the main debate between the parties would concern a question that has already been settled by the Superintendent, and the court could not allow the action without varying or quashing his decision. [32]

Dans l'état actuel des procédures, au regard du droit québécois, les conditions d'application du principe de l'autorité de la chose jugée sont remplies. Le surintendant avait compétence pour rendre la décision et les trois identités nécessaires de cause, d'objet et de parties existent. S'il était entendu devant un tribunal québécois, le débat principal entre les parties porterait sur une question déjà tranchée par le surintendant, et le tribunal ne pourrait faire droit à l'action sans réviser ou annuler la décision du surintendant. [32]

Insofar as a decision of an administrative body created by the Ontario legislature is in issue, in a case within that body's jurisdiction under Ontario law, applying the common law rules governing issue estoppel would lead to the same result. In short, the appellants' failure to make use of the usual means of redress, together with the situation in which any other decision would place S, militates against the court's exercise of its residual discretion to decline to apply estoppel. S could find itself in the strange position of having to comply with the Superintendent's decision under Ontario law while at the same time being required to execute a Quebec judgment to the contrary. Such a result could call into question the benefit calculations for all the retirees and the measures taken to ensure the plan's solvency. [33-34]

Dans la mesure où la décision d'un organisme administratif créé par la législature de l'Ontario est en cause, dans une affaire dont le règlement incombe à cet organisme suivant le droit de l'Ontario, l'application des règles de common law sur la préclusion découlant d'une question déjà tranchée (*issue estoppel*) conduirait au même résultat. Enfin, l'omission des appelants d'utiliser les voies de recours habituelles, de même que la situation dans laquelle toute autre décision placerait S, militent contre l'exercice du pouvoir discrétionnaire résiduel d'un tribunal de ne pas donner effet à la préclusion. S pourrait en effet se trouver dans l'étrange situation de devoir se conformer à la décision du surintendant en vertu de la loi de l'Ontario tout en étant tenue d'exécuter un jugement québécois contraire. Un tel résultat pourrait remettre en cause le calcul des prestations de l'ensemble des retraités et les mesures prises pour assurer la solvabilité du régime de retraite. [33-34]

Finally, even if the Quebec courts had found that it was still legally possible to contest the Superintendent's decision, a proper application of the doctrine of *forum non conveniens* would have justified them in declining jurisdiction in the circumstances. An Ontario court would naturally be in a better position to review the decision of the Ontario body that is responsible for administering the plan, if only to reduce the risk of conflicting decisions and to adhere to the principle of administration set out in the memorandum of reciprocal agreement, especially in that the challenge by the Quebec plan members could affect the plan as a whole and the rights of the other members. [36] [38]

Enfin, même si les tribunaux québécois avaient conclu qu'il était encore juridiquement possible de remettre en cause la décision du surintendant, une application correcte de la doctrine du *forum non conveniens* les aurait justifiés de décliner compétence dans les circonstances. Un tribunal de l'Ontario serait naturellement mieux placé pour réviser la décision de l'organisme ontarien chargé de l'administration du régime, ne serait-ce que pour réduire le risque de décisions contradictoires et pour respecter le principe d'administration prévu par l'accord de réciprocité, d'autant plus que la contestation des participants québécois pourrait affecter l'ensemble du régime et les droits des autres participants. [36] [38]

2005 SCC 64 (CanLII)

2005 SCC 64 (CanLII)

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APPEAL from a judgment of the Quebec Court of Appeal (Robert C.J.Q. and Nuss and Morin JJ.A.), [2004] R.J.Q. 807 (*sub nom. Bourdon v. Stelco. Inc.*), 241 D.L.R. (4th) 266, 39 C.C.P.B. 214, [2004] Q.J. No. 1842 (QL), affirming a judgment of Durocher J. (2000), 26 C.C.P.B. 20, [2000] Q.J. No. 6735 (QL), rejecting the appellants' action. Appeal dismissed.

POURVOI contre un arrêt de la Cour d'appel du Québec (le juge en chef Robert et les juges Nuss et Morin), [2004] R.J.Q. 807 (*sub nom. Bourdon c. Stelco Inc.*), 241 D.L.R. (4th) 266, 39 C.C.P.B. 214, [2004] J.Q. n° 1842 (QL), qui a confirmé la décision du juge Durocher (2000), 26 C.C.P.B. 20, [2000] J.Q. n° 6735 (QL), qui avait rejeté l'action des appelants. Pourvoi rejeté.

Claude Tardif, *Gaétan Lévesque* and *Stéphane Forest*, for the appellants.

Claude Tardif, *Gaétan Lévesque* et *Stéphane Forest*, pour les appelants.

Chantal Masse, *Timothé R. Huot* and *Rachel Ravary*, for the respondent.

Chantal Masse, *Timothé R. Huot* et *Rachel Ravary*, pour l'intimée.

Deborah McPhail, for the intervener.

Deborah McPhail, pour l'intervenant.

English version of the judgment of the Court delivered by

Le jugement de la Cour a été rendu par

LEBEL J. —

LE JUGE LEBEL —

I. Introduction

1 This appeal concerns an action that was brought against the respondent, Stelco Inc. ("Stelco"), by the appellants, who are laid-off employees, to claim early retirement benefits. The issue in the case at bar, which is more than a question of contract performance, relates to the exercise of jurisdiction by the Quebec Superior Court in respect of a 1997 decision in which Ontario's Superintendent of Pensions approved the partial wind up of Stelco's pension plan. At the hearing, I concurred in dismissing the appellants' action, but for reasons that differ in part from those of the Quebec Court of Appeal. In my view, the Superior Court should have declined to rule on the conclusions sought in this action. Both the inadmissibility of the action — which is contrary to the civil law principle of *res judicata* and to the common law principle of issue estoppel — and the principles of *forum non conveniens* justify dismissing a proceeding that is likely to become an impermissible collateral attack on the Superintendent's decision.

Le présent pourvoi fait suite à l'action intentée contre l'intimée, Stelco Inc. (« Stelco »), par les appelants, des employés mis à pied, pour obtenir des prestations de retraite anticipée. Davantage qu'un problème d'exécution de contrat, la présente espèce soulève la question de l'exercice de la compétence de la Cour supérieure du Québec à l'égard d'une décision du surintendant des régimes de retraite de l'Ontario approuvant, en 1997, la liquidation partielle du régime de retraite de Stelco. J'ai été d'accord à l'audience pour confirmer le rejet de l'action des appelants, mais pour des motifs qui diffèrent en partie de ceux de la Cour d'appel du Québec. À mon avis, la Cour supérieure devait refuser de statuer sur les conclusions de cette action. Tant l'irrecevabilité de cette demande, contraire à la règle de la chose jugée en droit civil, et à celle de la préclusion (*issue estoppel*) en common law, que les principes du *forum non conveniens* justifient le rejet d'une procédure susceptible de devenir une contestation indirecte inadmissible de la décision du surintendant.

A. *Origin of the Case*

A. *L'origine du litige*

2 Stelco, a major manufacturing company, operated commercial and industrial establishments in

Stelco, une entreprise manufacturière importante, a exploité des établissements commerciaux

2005 SCC 64 (CanLII)

2005 SCC 64 (CanLII)

several provinces of Canada, including Quebec. In 1940, it set up a single pension plan for all its employees in Canada, regardless of their place of work. At the time of the events that gave rise to the case at bar, s. 21 of the plan then in effect stipulated that the plan was governed by the laws of Ontario. The same section also provided that the termination or wind up of the plan would be carried out in accordance with Ontario's *Pension Benefits Act*, R.S.O. 1990, c. P.8:

SECTION 21

Applicable Law

(a) This Plan shall be construed and interpreted in accordance with the laws of the Province of Ontario.

(b) In the event of the termination or windup of the Plan such windup will be carried out in accordance with the provisions of the Pension Benefits Act of Ontario.

3 After the pension plan came into effect, the provincial legislatures gradually enacted legislation on supplemental pension plans. These similarly constructed statutes establish a legal framework for such plans and set up mechanisms for overseeing their management, ensuring their solvency and, if need be, overseeing the wind up of a plan. To avoid subjecting interprovincial plans such as that of Stelco to multiple administrative controls, the provincial governments of Canada agreed on the importance of reciprocity in overseeing them. In substance, their memorandums of reciprocal agreement recognize as a majority "administrator" the regulatory authority of the province in which the majority of the employees participating in a supplemental pension plan work. A memorandum of reciprocal agreement entrusts the oversight of the plan, and decisions on the management and wind up of the plan, to this regulatory authority.

4 The memorandum of reciprocal agreement that is relevant to this appeal was signed in 1968

et industriels dans plusieurs provinces canadiennes, dont le Québec. En 1940, elle a établi un régime de retraite unique pour l'ensemble de ses employés au Canada, sans égard à leur lieu de travail. Au moment où surviennent les événements à l'origine du présent litige, l'art. 21 du régime alors en vigueur prévoit que ce dernier est régi par la loi de l'Ontario. Ce même article stipule aussi que la cessation ou la liquidation du régime s'effectueront conformément à la *Loi sur les régimes de retraite* de l'Ontario, L.R.O. 1990, ch. P.8 :

[TRADUCTION]

ARTICLE 21

Droit applicable

a) Le présent régime est interprété conformément aux lois de la province d'Ontario.

b) En cas de cessation ou de liquidation du régime, la liquidation a lieu conformément aux dispositions de la Loi sur les régimes de retraite de l'Ontario.

Après l'entrée en vigueur du régime de retraite, les législatures provinciales ont graduellement adopté des législations sur les régimes complémentaires de retraite. Ces lois, conçues de manière assez semblable, établissent le cadre juridique de ces régimes et instituent des mécanismes de surveillance de leur gestion, de leur solvabilité et de leur liquidation, le cas échéant. Pour éviter d'assujettir un régime interprovincial comme celui de Stelco à des contrôles administratifs multiples, les gouvernements provinciaux du Canada se sont entendus sur l'importance de la réciprocité dans la surveillance de ces régimes. En substance, leurs accords multilatéraux de réciprocité ont reconnu un statut d'« administrateur » majoritaire à l'autorité réglementaire de la province où travaillent la majeure partie des employés participant à un régime complémentaire de retraite. L'accord de réciprocité confie la surveillance du régime et la prise de décisions sur sa gestion et sa liquidation à cette autorité réglementaire.

L'accord multilatéral de réciprocité pertinent pour les besoins du pourvoi est intervenu en 1968

by the Quebec Pension Board ("Régie des rentes du Québec"), the Pension Commission of Ontario, and Alberta's Superintendent of Pensions. Most of the provinces eventually signed it. The memorandum of agreement stipulates that the major authority exercises its own powers and the powers that the minor authorities delegate to it with respect to a plan. In the case of Stelco's plan, the major authority within the meaning of the memorandum of reciprocal agreement was the Pension Commission of Ontario; the major authority is now the Superintendent of Financial Services, who for the last few years has been exercising the duties of the Superintendent of Pensions. This memorandum of agreement was still in effect when the problems that ultimately gave rise to this case began.

entre la Régie des rentes du Québec, la Commission des rentes de l'Ontario et le surintendant des rentes de l'Alberta. La plupart des provinces y ont adhéré par la suite. Il stipule que l'autorité majoritaire exerce ses propres pouvoirs et ceux que les autorités minoritaires lui délèguent à l'égard d'un régime. Dans le cas du régime de Stelco, l'autorité majoritaire au sens de l'accord multilatéral était la Commission des rentes de l'Ontario; il s'agit désormais du surintendant des services financiers de l'Ontario, qui exerce depuis quelques années les fonctions de surintendant des régimes de retraite. Cet accord s'appliquait toujours lorsque commencèrent les problèmes qui provoquèrent éventuellement le présent litige.

5

In 1990, as part of a reorganization of its operations, Stelco decided to close three plants in Quebec. The closures resulted in the elimination of jobs. Some of the laid-off employees sought to obtain pension benefits. Ontario's Superintendent of Pensions then ordered a partial wind up of the company's pension plan in order to determine and guarantee the pension benefits of the laid-off employees. Stelco contested the partial wind up of the plan and appealed to the Divisional Court of Ontario ((1994), 115 D.L.R. (4th) 437). After losing its case in that court and in the Ontario Court of Appeal ((1995), 126 D.L.R. (4th) 767), the employer was denied leave to appeal to this Court. Consequently, on March 28, 1996, the Superintendent ordered the partial wind up of the plan, on specified dates, with respect to certain classes of employees affected by plant closures. The fact that the appellants were members of the groups of employees affected by that decision is not in issue.

En 1990, dans le cadre de la réorganisation de ses activités, Stelco décida de fermer trois usines au Québec. Ces fermetures entraînèrent des suppressions d'emplois. Un certain nombre des salariés mis à pied cherchèrent à obtenir des prestations de retraite. Le surintendant des régimes de retraite de l'Ontario décréta alors la liquidation partielle du régime de retraite pour déterminer et garantir les prestations de retraite des employés mis à pied. Stelco contesta la possibilité d'une liquidation partielle du régime et interjeta appel devant la Cour divisionnaire de l'Ontario ((1994), 115 D.L.R. (4th) 437). Après avoir essuyé des échecs devant ce tribunal et la Cour d'appel de l'Ontario ((1995), 126 D.L.R. (4th) 767), l'employeur se vit refuser l'autorisation d'en appeler devant notre Cour. En conséquence, le 28 mars 1996, le surintendant ordonna la liquidation partielle du régime à des dates précises à l'égard de certaines catégories d'employés touchés par les fermetures d'usines. Nul ne conteste l'appartenance des appelants aux groupes d'employés visés par cette décision.

6

Further to that order, an actuarial firm prepared a wind up report, which the company submitted to the Superintendent of Pensions in January 1997. According to the appellants' record, the employees concerned, including the appellants, each received a personalized statement indicating the pension benefits they would receive. On January 29, 1997, the Superintendent approved the partial wind up

À la suite de cette ordonnance, des actuaires préparèrent un rapport de liquidation que la société transmit en janvier 1997 au surintendant des régimes de retraite. Selon le dossier d'appel, les employés visés, y compris les appelants, reçurent un relevé individuel précisant les prestations de retraite qu'ils recevraient. Le 29 janvier 1997, le surintendant approuva le rapport de liquidation

2005 SCC 64 (CanLII)

report, including the description and calculation of the benefits awarded to each employee.

partielle, y compris la description et le calcul des prestations accordées à chaque employé visé.

7 That approval is at the heart of the case. To understand the nature of the problem, it will be necessary to briefly review the provisions of the Ontario and Quebec legislation on supplemental pension plans that apply to early retirement. The appellants, who were employed in facilities in Quebec when they were laid off, had not yet reached the normal age of retirement under the laws of either Ontario or Quebec.

Cette approbation se situe à l'origine immédiate du litige. Pour comprendre la nature du problème, il faut examiner brièvement les dispositions des lois ontarienne et québécoise sur les régimes complémentaires de retraite applicables à la retraite prise avant l'âge normal. En effet, les appelants, employés dans des établissements situés au Québec au moment de leur mise à pied, n'avaient atteint l'âge normal de la retraite ni en vertu de la loi ontarienne ni selon la loi québécoise.

8 At that time — and this is still the case today — the legislation of Quebec and Ontario treated employees pensioned off before the normal age of retirement quite differently. Under Quebec's *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1, such employees are entitled to benefits that they will not receive until they reach the normal age of retirement. Ontario's legislation provides for the possibility of receiving early retirement benefits in such cases. Under s. 74 of the *Pension Benefits Act*, a plan member whose age plus total years of membership equals at least 55 has the right to receive early retirement benefits. In other words, when a pension plan to which the Quebec legislation applies is wound up in whole or in part, the employee's benefits will be deferred. Under Ontario's legislation, if a plan member meets the 55-year requirement, he or she will receive benefits immediately.

À cette époque — comme aujourd'hui encore d'ailleurs —, les lois du Québec et de l'Ontario traitaient fort différemment les employés mis à la retraite avant l'âge normal. En vertu de la *Loi sur les régimes complémentaires de retraite* du Québec, L.R.Q., ch. R-15.1, ces employés ont droit à des prestations qu'ils ne toucheront qu'à l'âge normal de la retraite. Pour sa part, la loi ontarienne prévoit plutôt la possibilité de prestations anticipées en pareil cas. En effet, l'art. 74 de la *Loi sur les régimes de retraite* reconnaît au participant dont l'âge et le nombre total d'années de participation atteint 55 le droit à une pension anticipée. En d'autres mots, en cas de liquidation totale ou partielle d'un régime de retraite assujetti à la loi québécoise, le salarié voit ses prestations différées. Suivant la loi ontarienne, s'il satisfait à l'exigence d'un total de 55 années, le participant touche immédiatement des prestations.

9 The partial wind up report provided for early retirement benefits for plan members employed in Ontario only. For members employed in Quebec, the report applied Quebec law and the entire amount of the pension was accordingly deferred until the normal age of retirement.

Le rapport de liquidation partielle ne prévoyait l'octroi d'une pension anticipée qu'aux participants employés en Ontario. À l'égard des participants employés au Québec, le rapport appliquait la règle québécoise et n'accordait donc qu'une pension dont le versement total était différé à l'âge normal de la retraite.

10 Although they were notified that they would only receive deferred pensions, the appellants did not institute proceedings to contest the Superintendent's decision to approve the report. All that can be found in the appellants' record are some copies of a few exchanges of correspondence with Stelco's lawyers, in which these employees

Bien qu'ils eurent été informés qu'on ne leur accorderait qu'une pension différée, les appelants n'engagèrent aucune procédure pour contester la décision du surintendant d'approuver le rapport. Le dossier d'appel contient tout au plus des copies d'échanges de correspondance avec les avocats de Stelco dans lesquels ces employés exprimaient leur

2005 SCC 64 (CanLII)

2005 SCC 64 (CanLII)

expressed their disagreement with the assessment of their entitlements to benefits. In their view, since Stelco's plan provided that it was subject to Ontario law and was to be administered in that province, they should have received early retirement benefits. Despite these criticisms, Stelco applied the wind up report as approved by the Superintendent.

désaccord avec l'évaluation de leurs droits à des prestations. À leur avis, puisque le régime de Stelco prévoyait son assujettissement au droit de l'Ontario et son administration dans cette province, ils auraient dû toucher une pension anticipée. Malgré ces critiques, Stelco appliqua tel quel le rapport de liquidation approuvé par le surintendant.

11

In October 1998, the appellants joined forces in an action against Stelco. In these proceedings, which took the form of an action based on contracts of employment, they claimed to be entitled to early retirement benefits on the basis that the plan was subject to Ontario law. Stelco maintained that only plan members employed in Ontario were entitled to early retirement benefits, and asked that the suit be dismissed.

En octobre 1998, les appelants se réunirent dans une action contre Stelco. Dans cette procédure, qui prit la forme d'une action basée sur des contrats de travail, ils alléguèrent avoir droit aux prestations de retraite anticipée en raison de l'assujettissement du régime au droit de l'Ontario. Stelco maintint que seuls les participants employés en Ontario avaient droit à la pension anticipée et demanda le rejet de la poursuite.

B. *Judicial History*

B. *L'historique judiciaire*

1. Quebec Superior Court

1. La Cour supérieure du Québec

12

The appellants first lost in the Superior Court: (2000), 26 C.C.P.B. 20. Durocher J. began by recognizing that the Quebec Superior Court had jurisdiction over the appellants' action. He then decided that he had to rule on the merits, and dismissed their claims. In his view, even though the plan was subject to Ontario law, the appellants were not entitled to receive early retirement benefits. Only plan members employed in Ontario were so entitled. To his mind, Ontario's *Pension Benefits Act* itself limited this benefit to pensioners who had been employed in Ontario. The appellants then appealed to the Quebec Court of Appeal.

Les appelants essuyèrent une première défaite devant la Cour supérieure : (2000), 26 C.C.P.B. 20. Le juge Durocher reconnut d'abord la compétence de la Cour supérieure du Québec sur l'action des appelants. Il décida alors qu'il devait se prononcer sur le fond et il rejeta leurs prétentions. Selon lui, malgré l'assujettissement du régime à la loi ontarienne, ils n'avaient aucun droit aux prestations de retraite anticipée. Seuls les participants employés en Ontario pouvaient toucher une pension anticipée. À son avis, les dispositions mêmes de la *Loi sur les régimes de retraite* de l'Ontario réservaient cet avantage aux retraités qui avaient été employés en Ontario. Les appelants se pourvurent alors devant la Cour d'appel du Québec.

2. Quebec Court of Appeal

2. La Cour d'appel du Québec

13

The Quebec Court of Appeal was divided on the outcome of the appeal: (2004), 241 D.L.R. (4th) 266. Robert C.J.Q. would have allowed the appeal and the action. Morin and Nuss JJ.A. agreed, but for different reasons, that the appeal should be dismissed.

La Cour d'appel du Québec se divisa quant au sort du pourvoi : [2004] R.J.Q. 807. Le juge en chef Robert aurait accueilli l'appel et l'action. Pour des motifs différents, les juges Morin et Nuss s'entendirent pour rejeter le pourvoi.

14

According to Robert C.J.Q., the Superior Court had jurisdiction to hear the appellants' action. Although it was in fact an action based on contracts

Selon le juge en chef du Québec, la Cour supérieure avait compétence sur l'action intentée par les appelants. En effet, il s'agissait d'une action basée

2005 SCC 64 (CanLII)

of employment, those contracts had, as is permitted under Quebec private international law, been made subject to Ontario law. Disagreeing with the Superior Court, the Chief Justice concluded that a proper interpretation of the Ontario legislation did not permit the advantage of early retirement benefits to be limited to plan members employed in Ontario. It was also his view that such a conclusion was not an impermissible collateral attack on the decision of Ontario's Superintendent of Pensions. The Superintendent had granted the appellants the minimum benefits provided for under Quebec law; he had not decided that they could not receive fuller benefits under Ontario law. Moreover, Robert C.J.Q. was of the view that the Quebec Court of Appeal had held in a previous decision, *J.J. Newberry Canadian Ltd. v. Régie des rentes du Québec*, [1986] R.J.Q. 1884, that courts of original general jurisdiction have jurisdiction to interpret the provisions of a pension plan and a statute relating to the eligibility of pension plan members for benefits. He would therefore have found in favour of the appellants in their action.

sur des contrats de travail. Cependant, comme le permet le droit international privé du Québec, ces contrats avaient été assujettis au droit de l'Ontario. En désaccord avec la Cour supérieure, le Juge en chef concluait qu'une interprétation correcte de la loi ontarienne ne permettait pas de réserver l'avantage de la retraite anticipée aux participants employés en Ontario. À son avis également, une telle conclusion ne constituait pas une contestation indirecte inadmissible de la décision du surintendant des régimes de retraite de l'Ontario. Celui-ci avait accordé aux appelants les avantages minimaux prévus par la loi québécoise, mais n'avait pas décidé qu'ils ne pouvaient pas recevoir des prestations supérieures en vertu du droit de l'Ontario. De plus, selon son opinion, un arrêt antérieur de la Cour d'appel du Québec, *J.J. Newberry Canadian Ltd. c. Régie des rentes du Québec*, [1986] R.J.Q. 1884, avait décidé que le tribunal de droit commun demeurait compétent pour interpréter les dispositions d'un régime et d'une loi sur l'admissibilité des participants aux prestations d'un régime de retraite. En conséquence, il aurait fait droit aux conclusions de l'action des appelants.

15 Morin J.A. took a completely different approach to the legal issues in the appeal and to the consequences of resolving them. He concluded that the Quebec Superior Court lacked jurisdiction. In his view, the proceedings amounted to an application for judicial review of, or a disguised appeal from, the decision of Ontario's Superintendent of Pensions on the payments owed following the partial wind up of Stelco's pension plan. The action, as brought, could not be allowed without first reversing the Superintendent's decision. The issues raised by the appellants should have been raised by way of administrative appeals to the Pension Commission and actions in the Divisional Court of Ontario. The applicability of Ontario law to the plan barred the Quebec courts from exercising jurisdiction. In the alternative, he recognized, as Durocher J. had, that the Ontario legislation limited early retirement benefits to plan members employed in Ontario. For these reasons, he concluded that the appeal should be dismissed. Although Nuss J.A. concurred with Robert C.J.Q. regarding the jurisdiction of the Superior Court, he nevertheless concluded that the

Le juge Morin analysa de manière complètement différente les questions juridiques en jeu et les conséquences de leur règlement. Il conclut à l'absence de compétence de la Cour supérieure du Québec. Selon lui, la procédure engagée équivalait à une demande de contrôle judiciaire ou à un appel déguisé de la décision du surintendant des régimes de retraite de l'Ontario sur les paiements exigibles à la suite de la liquidation partielle du régime de retraite de Stelco. Telle qu'intentée, l'action ne pouvait être accueillie sans que la décision du surintendant ne soit infirmée au préalable. Les questions soulevées par les appelants auraient dû faire l'objet d'appels administratifs et de recours devant la Commission des régimes de retraite et la Cour divisionnaire de l'Ontario. L'assujettissement du régime à la loi ontarienne écartait la compétence des tribunaux québécois. Subsidiairement, il reconnut, comme le juge Durocher, que la loi ontarienne réservait la retraite anticipée aux participants employés en Ontario. Pour ces motifs, il conclut au rejet de l'appel. En accord avec le juge en chef Robert sur la compétence de la Cour

appeal should be dismissed because he agreed with Morin J.A. that early retirement benefits were limited to plan members employed in Ontario. The case was then brought before this Court.

supérieure, le juge Nuss rejeta néanmoins l'appel, se rangeant à l'avis du juge Morin que les prestations de retraite anticipée étaient réservées aux participants employés en Ontario. L'affaire a été ensuite portée devant notre Cour.

II. Analysis

II. Analyse

A. *Identification of the Issues*

A. *L'identification des questions en litige*

16

The outcome of this appeal depends on an accurate identification of the decisive legal issues in the case. The hearing before this Court was largely devoted to a debate on the definition and characterization of the issues in dispute. Far more than questions of contract law or private international law, the case raises, first and foremost, issues of procedure, administrative law, and judicial review. It should be noted here that the parties have not raised the question of the application of a collective agreement or the exercise of a concurrent arbitral jurisdiction in relation to the rights in issue and the individuals claiming them.

Le sort du présent pourvoi dépend d'une identification correcte des questions juridiques décisives en l'espèce. L'audience devant notre Cour a d'ailleurs porté en grande partie sur la définition et la qualification des problèmes en cause. Beaucoup plus que des questions relevant du droit des contrats ou du droit international privé, cette affaire soulève en premier lieu des problèmes de procédure, de droit administratif et de contrôle judiciaire. Il importe ici de noter que les parties ne soulèvent pas la question de l'application d'une convention collective ou de l'exercice d'une compétence arbitrale concurrente à l'égard des droits en jeu et des personnes qui les allèguent.

17

According to the appellants, the determinative issues in this appeal relate primarily to the law of contracts and to the application of the rules governing the conflict of laws. They submit that their action, which is based on contracts of employment and in which they claim a right to the benefits provided for in those contracts, is within the jurisdiction of the Quebec courts. The pension plan incorporated into the contracts of employment is subject to the laws of Ontario as the result of a choice which is valid under the rules of Quebec private international law. Under Ontario law, the appellants have the exact same benefits as plan members employed in Ontario. The appellants argue that the decision of Ontario's Superintendent of Pensions regarding the benefits payable upon winding up the plan is not binding on the Quebec courts, which may themselves rule on the proper interpretation of Ontario law. On this issue, the appellants cite the reasons of Robert C.J.Q. and the decision in *Newberry*.

Pour les appelants, les questions déterminantes dans le cadre du présent appel se rattachent surtout au droit des contrats et à la mise en œuvre des règles de conflits de lois. Selon leurs prétentions, leur action basée sur des contrats de travail et réclamant des avantages prévus par ceux-ci relève de la compétence des tribunaux québécois. Le régime de retraite intégré dans ces contrats de travail est assujetti au droit de l'Ontario par suite d'un choix valable au regard du droit international privé du Québec. Le droit ontarien reconnaît aux appelants des avantages identiques à ceux des participants employés en Ontario. Selon leur argumentation, la décision du surintendant des régimes de retraite de l'Ontario concernant les prestations payables à la suite de la liquidation du régime ne lie pas les tribunaux québécois, qui peuvent se prononcer sur l'interprétation correcte de la loi ontarienne. Les appelants s'en rapportent sur ce point à l'opinion du juge en chef Robert et à l'arrêt *Newberry*.

18

Stelco contests, first, the contention that the benefits claimed under the plan and under Ontario law are payable. It contends that there is nothing in the

Stelco conteste d'abord l'exigibilité des avantages réclamés en vertu du régime et de la loi ontarienne. D'après ses prétentions, on ne retrouve

2005 SCC 64 (CanLII)

2005 SCC 64 (CanLII)

plan indicating an intention to grant identical benefits to all members without regard for their place of employment. It also submits that the relevant statutory provisions limit early retirement benefits to Ontario plan members. In addition, after discussing the powers of interpretation of the Régie des rentes du Québec and its counterpart administrative bodies in Ontario, Stelco contends that, at any rate, the Superior Court should have declined jurisdiction. The appellants are challenging final decisions regarding the administration and wind up of the pension plan that were made by the competent administrative authorities even though they have not availed themselves of the administrative appeals or legal proceedings that are available in such cases.

nulle part dans le régime l'intention d'accorder des avantages identiques à tous les participants sans égard à leur lieu de travail. Elle plaide aussi que les dispositions législatives pertinentes réservent la retraite anticipée aux seuls participants ontariens. De plus, après examen des pouvoirs d'interprétation de la Régie des rentes du Québec et des organismes administratifs correspondants de l'Ontario, Stelco soutient que, de toute manière, la Cour supérieure aurait dû décliner compétence. En effet, les appelants remettent en cause des décisions finales prises par les autorités administratives compétentes à l'égard de l'administration et de la liquidation du régime de retraite alors qu'ils n'ont pas utilisé les appels administratifs ou les recours judiciaires disponibles en pareil cas.

19

Despite all the attempts to sidestep it, the question of the nature and effect of the Superintendent's decision remains the central issue in this appeal. It must be resolved before a ruling can be made on either the admissibility of the appellant's action or the attitude the Quebec courts should adopt toward the exercise of their jurisdiction. A decision on this issue that is contrary to the appellants' submissions would imply that the Quebec courts must decline jurisdiction. Indeed, the appellants' action would become inadmissible. There is thus no need to consider the merits of the parties' arguments concerning the interpretation of the Ontario legislation. I will therefore focus my analysis on this issues of admissibility and jurisdiction.

En dépit de tous les efforts pour la contourner, la question de la nature et de l'effet de la décision du surintendant demeure centrale pour le sort du présent pourvoi. On ne peut se prononcer ni sur la recevabilité de l'action des appelants ni sur l'attitude que les tribunaux québécois devraient adopter à l'égard de l'exercice de leur compétence sans la résoudre. Trancher la question contrairement aux prétentions des appelants implique que les cours du Québec doivent décliner compétence. L'action des appelants devient d'ailleurs même irrecevable. Il est alors inutile d'examiner au fond les prétentions des parties quant à l'interprétation de la loi ontarienne. J'axerai donc mon analyse sur la question de la recevabilité et celle de la compétence.

B. *The Interprovincial Agreement on the Administration of Pension Plans*

B. *L'accord interprovincial sur la gestion des régimes de retraite*

20

When analysing the issues raised by the appellants' action, we must bear in mind the importance of the agreement entered into by most of the provinces regarding the administration of supplemental pension plans. The proceeding in the instant case relates to an important aspect of Canadian federalism, namely the intergovernmental agreements designed to ensure that the provinces cooperate with each other in exercising their legislative powers so as to permit people to move and trade to flow freely within the Canadian political space (see J. Poirier, "Les ententes intergouvernementales et

Dans l'analyse des problèmes que pose l'action des appelants, il faut demeurer conscient de l'importance de l'accord intervenu entre la plupart des provinces sur la gestion des régimes complémentaires de retraite. En effet, la procédure entamée dans la présente affaire touche à un aspect important de la vie du fédéralisme canadien, celui des accords intergouvernementaux visant à assurer la coopération entre les provinces dans l'exercice de leurs pouvoirs législatifs afin de permettre la mobilité des personnes et la fluidité des échanges dans l'espace politique canadien (voir J. Poirier, « Les

la gouvernance fédérale: aux confins du droit et du non-droit", in J.-F. Gaudreault-DesBiens and F. Gélinas, eds., *The States and Moods of Federalism* (2005), 441). The framework agreement on pension plans is one such agreement. Recognizing that the same companies maintain a presence in multiple provinces, this agreement organizes the exercise of provincial powers in this area by endorsing reciprocal delegations of administrative functions. The appellants' action thus tends toward reducing the effectiveness of these administrative mechanisms and compromising their application. Under this framework agreement, the competent authorities in Ontario were given responsibility for overseeing the administration of Stelco's pension plan. When confronted with the problem of partially winding up this plan, they made decisions that included a determination and calculation of plan members' benefits. In conducting a legal analysis of the situation, these decisions cannot simply be disregarded. They are a reality. The appellants have never contested them in Ontario. Can they now do so indirectly by means of this action? Bearing in mind the importance of these decisions, I will now analyse the nature and legal framework of Stelco's pension plan.

ententes intergouvernementales et la gouvernance fédérale : aux confins du droit et du non-droit », dans J.-F. Gaudreault-DesBiens et F. Gélinas, dir., *Le fédéralisme dans tous ses états* (2005), 441). L'accord-cadre sur les régimes de retraite représente un exemple de ces ententes. Reconnaissant la réalité de la présence des mêmes entreprises dans plusieurs provinces, cet accord aménage l'exercice des pouvoirs provinciaux dans ce domaine par l'acceptation de délégations mutuelles des fonctions administratives. L'action des appelants tend ainsi à diminuer l'efficacité de ces mécanismes de gestion et à en compromettre la mise en œuvre. En vertu de cet accord-cadre, les organismes compétents en Ontario devenaient l'autorité chargée de la surveillance de l'administration du régime de retraite de Stelco. Confrontés au problème de la liquidation partielle de ce régime, ils ont pris des décisions portant notamment sur la détermination et le calcul des prestations des participants. On ne saurait faire simplement abstraction de ces décisions dans l'analyse juridique de la situation. Elles existent. Les appelants ne les ont jamais contestées en Ontario. Peuvent-ils maintenant le faire indirectement par le véhicule de la présente contestation? Tenant compte de l'importance de ces décisions, j'analyserai maintenant la nature et l'encadrement juridique du régime de retraite de Stelco.

C. *The Nature and Legislative Framework of Stelco's Pension Plan*

C. *La nature du régime de retraite de Stelco et son encadrement législatif*

21

Quebec law treats pension plans such as Stelco's as contracts. Section 6 of the *Supplemental Pension Plans Act* states this explicitly:

Le droit du Québec assimile à des contrats les régimes de retraite comme ceux de Stelco. L'article 6 de la *Loi sur les régimes complémentaires de retraite* prévoit d'ailleurs expressément cette qualification :

6. A pension plan is a contract under which retirement benefits are provided to the member, under given conditions and at a given age, the funding of which is ensured by contributions payable either by the employer only, or by both the employer and the member.

Every pension plan, with the exception of insured plans, shall have a pension fund into which, in particular, contributions and the income derived therefrom are paid. The pension fund shall constitute a trust patrimony appropriated mainly to the payment of the refunds and

6. Un régime de retraite est un contrat en vertu duquel le participant bénéficie d'une prestation de retraite dans des conditions et à compter d'un âge donnés, dont le financement est assuré par des cotisations à la charge soit de l'employeur seul, soit de l'employeur et du participant.

À moins qu'il ne soit garanti, tout régime de retraite doit avoir une caisse de retraite où sont notamment versés les cotisations ainsi que les revenus qui en résultent. Cette caisse constitue un patrimoine fiduciaire affecté principalement au versement des remboursements

2005 SCC 64 (CanLII)

pension benefits to which the members and beneficiaries are entitled.

(See also *T.S.C.O. of Canada Ltd. v. Châteauneuf*, [1995] R.J.Q. 637 (C.A.), at pp. 675, 704 and 706; *Pierre Moreault Ltée v. Sauvé*, [1997] R.J.Q. 44 (C.A.), at pp. 46-47.)

22 Stelco's pension plan is part of the contracts of employment between the company and its employees or of their employer-employee relationship. The appellants' action must therefore be regarded as being based on a contract of employment within the meaning of art. 3149 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"). Since this question was not argued, I need not consider the validity of this characterization in the law of the other provinces or the scope of its application with regard to the plan as a whole.

23 As I mentioned above, this plan applied from its inception to employees working in a number of provinces. Like all plans of the same nature, Stelco's plan gradually became subject to restrictive statutory and regulatory frameworks, such as those established by Quebec's *Supplemental Pension Plans Act* and Ontario's *Pension Benefits Act* (see *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at paras. 13-14, *per* Deschamps J.; *The Mercer Pension Manual* (loose-leaf), vol. 1, at pp. 1-6 and 1-7).

24 In short, these statutory and regulatory schemes are intended primarily to ensure the continued solvency of the plans so that their members will receive the anticipated benefits when they retire. The schemes also ensure that special care is taken to review any amendments to a plan as well as the terms and conditions of the wind up of a plan. I need not discuss the complex reporting and approval mechanisms set up for this purpose or the scope of the powers of intervention — which can go as far as placing plans under trusteeship — of the public bodies responsible for overseeing supplemental pension plans. Using a variety of means, the administrative authorities responsible for

et prestations auxquels ont droit les participants et bénéficiaires.

(Voir aussi *T.S.C.O. of Canada Ltd. c. Châteauneuf*, [1995] R.J.Q. 637 (C.A.), p. 675, 704 et 706; *Pierre Moreault Ltée c. Sauvé*, [1997] R.J.Q. 44 (C.A.), p. 46-47.)

Ce régime de retraite fait partie des contrats d'emploi liant Stelco et ses employés ou des rapports de salariat établis entre eux. L'action des appelants doit donc être considérée comme fondée sur un contrat de travail au sens de l'art. 3149 du *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* »). Vu l'absence de débat sur cette question, je n'ai pas à examiner la validité de cette qualification dans le droit des autres provinces ni la portée de son application à l'égard de l'ensemble du régime.

Comme je l'ai mentionné précédemment, ce régime s'appliquait dès l'origine à des employés travaillant dans plusieurs provinces. Comme tous ceux de même nature, le régime de Stelco s'est donc trouvé graduellement assujetti à des cadres législatifs et réglementaires contraignants, comme ceux établis par la *Loi sur les régimes complémentaires de retraite* du Québec et la *Loi sur les régimes de retraite* de l'Ontario (voir *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, [2004] 3 R.C.S. 152, 2004 CSC 54, par. 13-14, la juge Deschamps; *The Mercer Pension Manual* (feuilles mobiles), vol. 1, p. 1-6 et p. 1-7).

En bref, ces systèmes législatifs et réglementaires veulent en premier lieu assurer la solvabilité continue des régimes afin que les participants reçoivent à terme les prestations prévues. Ils apportent aussi une attention particulière à l'examen de toute modification d'un régime et à celui des conditions et modalités de sa liquidation. Je n'ai pas à revenir ici sur les mécanismes complexes d'établissement de rapports et d'obtention d'approbations ainsi mis en place ni sur l'étendue des pouvoirs d'intervention — qui peuvent aller jusqu'à la mise en tutelle d'un régime — des organismes publics auxquels est confiée la surveillance des régimes complémentaires de retraite. Selon des modalités

2005 SCC 64 (CanLII)

overseeing supplemental pension plans exercise similar functions.

diverses, les autorités administratives chargées de la surveillance des régimes complémentaires de retraite exercent des fonctions analogues.

25

The similarity of these oversight mechanisms, like the need for effective oversight of supplemental pension plans, doubtlessly facilitated the signing by the provinces of Canada of the memorandum of reciprocal agreement in issue. The parties to the memorandum of agreement have agreed to give the "major" authority full powers of oversight over an interprovincial pension plan. Section 2 affirms the contracting parties' intent to delegate extensive oversight and decision-making powers to the major authority:

> The major authority for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.

La similitude de ces mécanismes de surveillance, comme la nécessité d'une surveillance efficace des régimes complémentaires de retraite, a sans doute facilité la conclusion de l'accord multilatéral de réciprocité en cause par les provinces canadiennes. Les parties à l'accord ont accepté de confier à l'organisme « majoritaire » la surveillance complète d'un régime de retraite interprovincial. L'article 2 confirme la volonté des parties contractantes de déléguer des pouvoirs de surveillance et de décision étendus à l'autorité majoritaire :

> L'autorité majoritaire de chaque régime exerce à la fois ses propres fonctions et pouvoirs statutaires et les fonctions et pouvoirs statutaires de chaque autorité minoritaire de ce régime.

D. *The Scope of the Powers of Ontario's Superintendent of Financial Services*

D. *L'étendue des pouvoirs du surintendant des services financiers de l'Ontario*

26

The delegation mentioned above, which applied to Stelco's pension plan, accordingly conferred on Ontario's Superintendent of Financial Services the authority to make any necessary decisions for the administration and wind up of the plan. The memorandum of agreement expressly granted him the right to exercise all the powers conferred by the Ontario legislature. On this point, it should be noted that s. 249 of the *Supplemental Pension Plans Act* authorizes such agreements. Moreover, the validity of the delegations of authority resulting from the Memorandum of Reciprocal Agreement has never been contested. It is therefore necessary to refer to the Ontario legislation to determine the scope of the powers delegated to the Superintendent in the context of the partial wind up of Stelco's plan.

Applicable au régime de Stelco, la délégation mentionnée précédemment conférait ainsi au surintendant des services financiers de l'Ontario le pouvoir de prendre toute décision nécessaire à l'administration et à la liquidation du régime. L'accord lui reconnaissait expressément le droit d'exercer tous les pouvoirs conférés par la législature ontarienne. Sur ce point, il convient de rappeler que l'art. 249 de la *Loi sur les régimes complémentaires de retraite* autorise la conclusion d'un tel accord. De plus, la validité des délégations de pouvoir découlant de l'Accord multilatéral de réciprocité n'a jamais été contestée. Il faut donc s'en rapporter à la législation de l'Ontario pour déterminer l'étendue des pouvoirs délégués au surintendant dans le cadre de la liquidation partielle du régime de Stelco.

27

In this regard, Ontario's *Pension Benefits Act* is clear. It gives the Superintendent the authority to verify and approve the benefits payable to each plan member. On the one hand, s. 70(1) of the Act requires the plan administrator to submit to the Superintendent a wind up report that sets out, *inter alia*, the benefits payable to the plan members:

À cet égard, la *Loi sur les régimes de retraite* de l'Ontario est claire. Elle confère au surintendant le pouvoir de vérifier et d'approuver les prestations payables à chaque participant. D'une part, le par. 70(1) de la loi oblige l'administrateur du régime à soumettre au surintendant un rapport de liquidation qui indique notamment les prestations payables aux participants :

2005 SCC 64 (CanLII)

70.—(1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(d) such other information as is prescribed.

On the other hand, s. 70(2) prohibits any payment being made out of the pension fund before the Superintendent approves the wind up report, except for the continuation of pension benefit payments that commenced before the wind up:

(2) No payment shall be made out of the pension fund in respect of which notice of proposal to wind up has been given until the Superintendent has approved the wind up report.

(3) Subsection (2) does not apply to prevent continuation of payment of a pension or any other benefit the payment of which commenced before the giving of the notice of proposal to wind up the pension plan or to prevent any other payment that is prescribed or that is approved by the Superintendent.

The corollary to this rule can be found in s. 70(4), which prohibits the administrator of a pension plan from making payments that have not been authorized by the Superintendent:

(4) An administrator shall not make payment out of the pension fund except in accordance with the wind up report approved by the Superintendent.

Any plan administrator who makes a payment in violation of these provisions is liable to penal sanctions under ss. 109 and 110 of the Act.

28 The existence of these statutory rules applicable to the administration and wind up of the plan disposes of the arguments the appellants have drawn from the 1986 decision in *Newberry*. In that case, the Court of Appeal held that the Régie des rentes du Québec did not have the authority to intervene

70 (1) L'administrateur d'un régime de retraite, lorsque ce régime doit être totalement ou partiellement liquidé, dépose un rapport de liquidation qui indique ce qui suit :

a) l'actif et le passif du régime de retraite;

b) les prestations qui seront fournies aux participants, aux anciens participants ou aux autres personnes aux termes du régime de retraite;

c) les méthodes d'attribution et de répartition de l'actif du régime de retraite, et la méthode de détermination des priorités pour le paiement des prestations;

d) les autres renseignements prescrits.

D'autre part, le par. 70(2) interdit tout paiement sur la caisse de retraite avant que le surintendant n'ait approuvé le rapport de liquidation, sauf s'il s'agit de poursuivre le versement de prestations de retraite entrepris avant la liquidation :

(2) Aucun paiement n'est effectué sur la caisse de retraite qui a fait l'objet d'un avis d'intention de liquider tant que le surintendant n'a pas approuvé le rapport de liquidation.

(3) Le paragraphe (2) n'a pas pour effet d'empêcher la continuation du paiement d'une pension ou de toute autre prestation si ce paiement a commencé avant la remise de l'avis d'intention de liquider le régime de retraite, ou d'empêcher tout autre paiement qui est prescrit ou qui est approuvé par le surintendant.

Le corollaire de cette règle se retrouve au par. 70(4), qui défend à l'administrateur d'un régime de retraite de faire des paiements non autorisés par le surintendant :

(4) Un administrateur ne fait des paiements sur la caisse de retraite qu'en conformité avec le rapport de liquidation approuvé par le surintendant.

Le paiement effectué en contravention de ces dispositions expose l'administrateur à des sanctions pénales suivant les art. 109 et 110 de la loi.

L'existence de ces règles législatives applicables à la gestion et à la liquidation du régime permet d'écarter les arguments des appelants tirés de l'arrêt *Newberry*, prononcé en 1986. Dans cette affaire, la Cour d'appel a décidé que la Régie des rentes du Québec ne possédait pas le pouvoir de s'immiscer

2005 SCC 64 (CanLII)

2005 SCC 64 (CanLII)

in the parties' contractual relationship and that legal debate in this respect was a matter for the civil courts (p. 1894). Based on that decision, the appellants submit that the Superintendent could not rule on the application of s. 74 of Ontario's *Pension Benefits Act*. With respect, the statutory provisions cited above expressly confer such authority, the exercise of which is binding on the pension plan administrator. By virtue of a delegation of authority that has never been contested or revoked, these provisions applied to plan members employed in Quebec.

dans les relations contractuelles des parties et que les débats juridiques sur ces matières relevaient des tribunaux civils (p. 1894). S'appuyant sur cet arrêt, les appelants plaident que le surintendant ne pouvait se prononcer sur l'application de l'art. 74 de la *Loi sur les régimes de retraite* de l'Ontario. Avec égards, les dispositions législatives précitées confèrent expressément un tel pouvoir, dont l'exercice lie l'administrateur du régime de retraite. En vertu d'une délégation de pouvoirs qui n'a jamais été contestée ni révoquée, ces dispositions s'appliquaient aux participants employés au Québec.

29

It should also be noted that the decision in *Newberry* was based on a narrow view of the interpretative powers of administrative tribunals and bodies from which this Court has since clearly distanced itself. It will suffice to mention a few recent decisions, all of which recognize the need for an expansive and flexible interpretation of these interpretative and decision-making powers: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11. From this perspective, a consideration of the precedential value of *Newberry* requires some circumspection, if the decision does in fact continue to be relevant. I see no need to analyse this question any further. This appeal does not concern the review of a situation governed by Quebec law. Nor does it concern either the interpretation of the provisions setting out procedures for submitting administrative questions relating to the application of Quebec's *Supplemental Pension Plans Act* (s. 254) to the civil courts or a review of the mechanics and scope of appeals against, or judicial review of, decisions relating to the application of that Act.

Il importe aussi de souligner que ce jugement reposait sur une vision étroite des pouvoirs d'interprétation des tribunaux et organismes administratifs, dont la jurisprudence de notre Cour s'est clairement dissociée depuis. Il suffit de mentionner quelques arrêts récents qui reconnaissent tous la nécessité d'une interprétation large et souple de ces pouvoirs d'interprétation et de décision : *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929; *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, 2003 CSC 54; *Vaughan c. Canada*, [2005] 1 R.C.S. 146, 2005 CSC 11. Dans cette perspective, la valeur de l'arrêt *Newberry*, comme précédent, serait sujette à caution, si tant est qu'il demeure pertinent. Je ne crois pas utile d'analyser davantage la question. En effet, le présent pourvoi n'a pas pour objet l'examen d'une situation qui serait régie par le droit québécois. Il ne porte pas non plus sur l'interprétation des dispositions prévoyant certaines procédures de renvoi aux tribunaux civils des questions administratives relatives à l'application de la *Loi sur les régimes complémentaires de retraite* du Québec (art. 254) ou sur l'étude des modalités et de l'étendue de l'appel ou du contrôle judiciaire des décisions relatives à l'application de cette loi.

30

The instant case concerns a decision of the Superintendent of Pensions, who, pursuant to powers clearly delegated to him in the memorandum of reciprocal agreement, denied early retirement benefits to plan members employed in Quebec. As the Superintendent of Financial Services pointed out in his argument, it was necessary to consider the situations of all plan members when

Nous nous trouvons ainsi devant une décision du surintendant des régimes de retraite qui a refusé des prestations de retraite anticipée aux participants employés au Québec en vertu de pouvoirs clairement délégués par l'accord multilatéral de réciprocité. Comme l'a d'ailleurs souligné le surintendant des services financiers dans sa plaidoirie, il lui a fallu considérer la situation de tous les

calculating the benefits owed to each one of them, and to assess the impact of paying those benefits on the financial stability of the plan and the protection of the benefits to be paid. The approval of the wind up report left the employer no choice. Under the Act, it could not even pay benefits other than in accordance with the Superintendent's decision. Serious difficulties accordingly arose in relation to the effect of the decision on the legal proceedings instituted by the appellants in Quebec. These difficulties concerned, first, the very admissibility of the action in light of the principles relating to *res judicata* in civil law and issue estoppel at common law, and the principles of public law applicable to the role of the courts. The principles in question discourage collateral attacks on judicial or quasi-judicial decisions in order to preserve the finality of the decisions. In the alternative, a proper application of the principle of *forum non conveniens*, under art. 3135 *C.C.Q.*, would at any rate have led the Quebec Superior Court to decline jurisdiction.

participants pour calculer les prestations dues à chacun et déterminer l'impact du versement de celles-ci sur l'équilibre financier du régime et la protection des prestations payables à terme. L'approbation du rapport de liquidation ne laissait aucun choix à l'employeur. La loi lui interdisait même de verser des prestations autrement qu'en conformité avec la décision du surintendant. De graves difficultés se posaient donc quant à l'effet de cette décision sur l'instance engagée par les appelants au Québec. Ces difficultés touchaient d'abord à la recevabilité même du recours suivant les règles relatives à la chose jugée en droit civil et à la préclusion (*issue estoppel*) en common law, et aux règles de droit public applicables à l'activité des tribunaux. Ces règles visent, en effet, à décourager la contestation incidente ou indirecte de décisions judiciaires ou assimilées afin de préserver leur caractère définitif. Subsidiairement, l'application correcte du principe du *forum non conveniens*, en vertu de l'art. 3135 *C.c.Q.*, aurait de toute manière amené la Cour supérieure du Québec à décliner compétence.

E. *The Finality of the Decision of Ontario's Superintendent of Pensions and the Admissibility of the Appellants' Action*

E. *Le caractère final de la décision du surintendant des régimes de retraite de l'Ontario et la recevabilité de l'action des appelants*

31 As I mentioned above, I do not question the Quebec Superior Court's jurisdiction to hear an action in which benefits are claimed under a contract of employment in the absence of any debate regarding the existence and exercise of an arbitral jurisdiction under the relevant labour legislation. However, the action must be admissible in law. The right to retirement benefits claimed by the appellants exists only if the payment of early retirement benefits is authorized by the Superintendent. The action against Stelco has no legal basis except insofar as the employer is authorized and required to pay the benefits claimed. The employer may not pay them unless such payment is authorized by the Superintendent's decision approving the wind up report. In the absence of such an authorization, the debt claimed from the employer does not exist. The early retirement benefits cannot be claimed if the Superintendent's decision still applies. The problem cannot be circumvented by presuming that it does not exist. I repeat that no appeal or judicial

Je ne mets pas en doute la compétence de la Cour supérieure du Québec sur une action en réclamation de prestations prévues par un contrat de travail en l'absence de tout débat sur l'existence et l'exercice d'une compétence arbitrale en vertu de la législation du travail pertinente, comme je l'ai signalé précédemment. Encore faut-il que l'action soit recevable en droit. Le droit aux prestations de retraite allégué par les appelants n'existe que si le paiement des prestations de retraite anticipée est autorisé par le surintendant. L'action contre Stelco ne possède de base juridique que dans la mesure où l'employeur peut et doit payer les prestations réclamées. L'employeur ne peut verser celles-ci que s'il y est autorisé par la décision du surintendant approuvant le rapport de liquidation. Faute d'une telle autorisation, la créance invoquée contre lui n'existe pas. Les prestations de retraite anticipée ne peuvent être réclamées si la décision du surintendant demeure applicable. Le problème ne peut être contourné en présumant son inexistence. Je le

2005 SCC 64 (CanLII)

review proceedings have been instituted in Ontario. In order to consider the merits of the appellants' action, the Quebec courts would now have to treat the decision as if it were already non-existent or invalid, or quash it themselves.

rappelle, aucune procédure d'appel ou de contrôle judiciaire n'a été engagée en Ontario. Pour examiner au fond la validité de la demande des appelants, il faudrait maintenant que les tribunaux québécois traitent cette décision comme si elle était déjà inexistante ou invalide ou qu'ils l'annulent eux-mêmes.

32

At this stage of the proceedings, from the perspective of Quebec law, the problem is one of *res judicata*. The three necessary elements of identical cause, object and parties are present. The conditions for applying this principle pursuant to art. 2848 *C.C.Q.* and the case law have been met (see *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440). The Superintendent had jurisdiction to make the decision. The Quebec action implicitly requires a review of the question of the right to pension benefits, on which the Superintendent has already ruled. Moreover, the appellants were parties to the process before the Superintendent. The content of the wind up report and the benefit calculations were sent to them, and it was open to them to raise any objections they might have had. Lastly, the principle of *res judicata* applies not only to the decisions of courts, but also to the decisions of administrative tribunals and bodies (see J.-C. Royer, *La preuve civile* (3rd ed. 2003), at pp. 567-68). In the instant case, the main debate between the parties thus concerns a question that was already settled by the Superintendent, since the action cannot succeed unless his decision is varied or quashed. In this context, the principle of *res judicata*, which is in fact codified for the purposes of Quebec private international law in art. 3137 *C.C.Q.*, bars the suit even if Quebec law applies to this aspect of the case.

Dans l'état actuel des procédures, au regard du droit québécois, il s'agit d'un problème de chose jugée. Les trois identités nécessaires de cause, d'objet et de parties existent. Les conditions d'application de ce principe sont remplies conformément à l'art. 2848 *C.c.Q.* et à la jurisprudence (voir *Rocois Construction Inc. c. Québec Ready Mix Inc.*, [1990] 2 R.C.S. 440). Le surintendant avait compétence pour rendre la décision. L'action québécoise exige implicitement un nouvel examen de la question du droit aux prestations de retraite que le surintendant a déjà tranchée. De plus, les appelants étaient parties à la procédure devant le surintendant. Le contenu du rapport de liquidation et le calcul des prestations leur ont été communiqués et ils pouvaient soulever des objections, s'ils en avaient. Enfin, la règle de la chose jugée s'applique non seulement aux décisions des tribunaux judiciaires, mais aussi à celles des tribunaux ou organismes administratifs (voir J.-C. Royer, *La preuve civile* (3e éd. 2003), p. 567-568). En l'espèce, le débat principal entre les parties porterait ainsi sur une question déjà tranchée par le surintendant, puisqu'il ne pourrait être fait droit à l'action sans réviser ou annuler la décision de ce dernier. Dans ce contexte, le principe de la chose jugée, que l'art. 3137 *C.c.Q.* codifie d'ailleurs en droit international privé québécois, fait obstacle à la demande en justice, à supposer que le droit québécois s'applique à cet aspect de l'affaire.

33

Insofar as a decision of an administrative body created by the Ontario legislature is in issue, in a case within that body's jurisdiction under Ontario law, the common law rules governing issue estoppel lead to the same result regarding the admissibility of the action. This Court recently considered the conditions for this type of estoppel in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, and *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63. In *City*

Dans la mesure où la décision d'un organisme administratif créé par la législature de l'Ontario est en cause, dans une affaire dont le règlement incombe à cet organisme suivant le droit de l'Ontario, les règles de common law sur la préclusion découlant d'une question déjà tranchée (*issue estoppel*) conduiraient à une même solution quant à la recevabilité de l'action. Notre Cour a examiné récemment les conditions d'existence de cette forme de préclusion dans les arrêts *Danyluk c. Ainsworth*

2005 SCC 64 (CanLII)

of Toronto, Arbour J., citing the reasons of Binnie J. in *Danyluk*, set out three preconditions for issue estoppel:

> Issue estoppel is a branch of *res judicata* (the other branch being *cause of action* estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). [Emphasis in original; para. 23.]

34 These three preconditions are met in the case at bar. The issue, that is, the principal object of the case, is the same as the one decided by the Superintendent. The parties were also involved in the approval procedure for the partial wind up. And the decision that was rendered is final in nature. Also, in my view, the facts of the instant case would not justify the courts in exercising their residual discretion to decline to apply estoppel. Not only the appellants' failure to make use of the usual means of redress — appeal or judicial review — but also the situation in which any other decision would place the respondent, militates against this. Stelco could find itself in the strange position of having to comply with the Superintendent's decision under Ontario law while at the same time being required to execute a Quebec judgment to the contrary, at least with regard to former plan members from Quebec. As the intervener points out, such a result could call into question the benefit calculations for all the retirees and the measures taken to ensure the plan's solvency.

35 The situation in which the respondent could find itself if the principles of *res judicata* or issue

Technologies Inc., [2001] 2 R.C.S. 460, 2001 CSC 44, et *Toronto (Ville) c. S.C.F.P., section locale 79*, [2003] 3 R.C.S. 77, 2003 CSC 63. Dans l'arrêt *Ville de Toronto*, la juge Arbour, s'appuyant d'ailleurs sur les motifs du juge Binnie dans *Danyluk*, énonçait trois conditions préalables d'existence de la préclusion découlant d'une question déjà tranchée :

> La préclusion découlant d'une question déjà tranchée est un volet du principe de l'autorité de la chose jugée (l'autre étant la préclusion fondée sur la *cause d'action*), qui interdit de soumettre à nouveau aux tribunaux des questions déjà tranchées dans une instance antérieure. Pour que le tribunal puisse accueillir la préclusion découlant d'une question déjà tranchée, trois conditions préalables doivent être réunies : (1) la question doit être la même que celle qui a été tranchée dans la décision antérieure; (2) la décision judiciaire antérieure doit avoir été une décision finale; (3) les parties dans les deux instances doivent être les mêmes ou leurs ayants droit (*Danyluk c. Ainsworth Technologies Inc*., [2001] 2 R.C.S. 460, 2001 CSC 44, par. 25 (le juge Binnie)). [Souligné dans l'original; par. 23.]

Ces trois conditions se trouvent ici réunies. La question, qui est d'ailleurs l'objet principal du litige, est la même que celle tranchée par le surintendant. Elle oppose des parties qui ont également participé à la procédure d'approbation de la liquidation partielle. Enfin, la décision prise a un caractère final. J'estime par ailleurs que les faits de l'espèce ne justifieraient pas l'exercice du pouvoir discrétionnaire résiduel du tribunal de ne pas donner effet à la préclusion. Non seulement l'omission des appelants d'utiliser les voies de recours habituelles — l'appel ou le contrôle judiciaire —, mais aussi la situation dans laquelle toute autre décision placerait l'intimée, militent contre un tel exercice. Stelco pourrait en effet se trouver dans l'étrange situation de devoir se conformer à la décision du surintendant en vertu de la loi de l'Ontario tout en étant tenue d'exécuter un jugement québécois contraire, du moins à l'égard d'anciens participants du Québec. Enfin, comme le souligne l'intervenant, un tel résultat pourrait remettre en cause le calcul des prestations de l'ensemble des retraités et les mesures prises pour assurer la solvabilité du régime de retraite.

La situation dans laquelle pourrait se trouver l'intimée si ce n'était l'application des règles de la

2005 SCC 64 (CanLII)

2005 SCC 64 (CanLII)

estoppel were not applied illustrates the danger of a collateral attack and of the failure to avail oneself in a timely manner of the recourses against decisions of administrative bodies or courts of law that are available in the Canadian legal system. The stability and finality of judgments are fundamental objectives and are requisite conditions for ensuring that judicial action is effective and that effect is given to the rights of interested parties. Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions (*City of Toronto*, at paras. 33-34), which Arbour J. likened to a form of abuse of process (para. 34) (see also: *Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708, 2002 SCC 72, at paras. 73-76). In the case at bar, the type of action brought by the appellants necessarily entailed an impermissible collateral attack on the Superintendent's decision, as can be seen from the analysis regarding *res judicata*. Consequently, the action was inadmissible.

F. *Forum Non Conveniens*

36 In the alternative, if, in the circumstances of the instant case, the Quebec courts had found that it was still legally possible to contest the Superintendent's decision, a proper application of the doctrine of *forum non conveniens* would have justified them in declining jurisdiction. As we know, after a period of uncertainty and debate, the civil law of Quebec recognized the existence and applicability of this doctrine in the implementation of its conflict of laws rules (G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at pp. 308-12). Moreover, the Quebec legislature expressly accepted the doctrine by codifying it in art. 3135 *C.C.Q.*:

> **3135.** Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it

chose jugée ou de la préclusion illustre le danger d'une contestation incidente et du défaut d'exercer en temps utile les recours que connaît le système judiciaire canadien contre la décision d'un organisme administratif ou d'une cour de justice. La stabilité et le caractère définitif des jugements constituent des objectifs fondamentaux et des conditions de l'efficacité de l'action judiciaire comme de l'effectivité des droits des intéressés. Le droit judiciaire et le droit administratif modernes ont graduellement établi des mécanismes d'appel divers, voire des procédures élaborées de contrôle judiciaire, pour réduire les possibilités d'erreur ou d'injustice. Encore faut-il que les parties sachent les utiliser à bon escient et en temps opportun. À défaut, la jurisprudence ne permettra pas, en règle générale, la contestation indirecte d'une décision devenue finale (*Ville de Toronto*, par. 33-34), que la juge Arbour assimilait d'ailleurs à une forme d'abus de procédure (par. 34) (voir aussi : *Québec (Procureur général) c. Laroche*, [2002] 3 R.C.S. 708, 2002 CSC 72, par. 73-76). En l'espèce, le type de recours exercé par les appelants emportait nécessairement la contestation indirecte inadmissible de la décision du surintendant, comme le montre d'ailleurs l'analyse relative à l'autorité de la chose jugée. En conséquence, le recours était irrecevable.

F. *Le forum non conveniens*

Subsidiairement, dans les circonstances de l'espèce, si les tribunaux québécois concluaient qu'il est encore juridiquement possible de remettre en cause la décision du surintendant, une application correcte de la doctrine du *forum non conveniens* les justifierait de décliner compétence. On sait qu'après une période d'incertitude et de controverse, le droit civil québécois a reconnu l'existence et l'application de cette doctrine dans la mise en œuvre de ses règles en matière de conflits de lois (G. Goldstein et E. Groffier, *Droit international privé*, t. I, *Théorie générale* (1998), p. 308-312). Le législateur québécois l'a d'ailleurs expressément acceptée en la codifiant à l'art. 3135 *C.c.Q.* :

> **3135.** Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette

considers that the authorities of another country are in a better position to decide.

37 The doctrine of *forum non conveniens* confers on the court a supplementary power to decline to exercise a jurisdiction that is otherwise granted to it by one of the conflict of laws rules provided for in the *C.C.Q.* The law attaches an exceptional character to this power, although the exercise of the power is not regarded as unusual (*Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78, at paras. 77 and 81; *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, 2005 SCC 46, at para. 33). Furthermore, the judge may exercise it only at the request of a party, and not on his or her own initiative. The application of this doctrine requires a review of various, and variable, criteria. On the basis of the Quebec Court of Appeal's decision in *Lexus Maritime inc. v. Oppenheim Forfait GmbH*, [1998] Q.J. No. 2059 (QL), at para. 18, Professor J. A. Talpis enumerated the most important factors as follows:

> The criteria most commonly used in the Quebec jurisprudence on *forum non conveniens* include: 1) the residence and domicile of the parties, 2) the location of the natural forum, 3) the location of the evidence, 4) the place of residence of the witnesses, 5) the location of the alleged conduct and transaction, including the place of formation and execution of the contract, 6) the existence of an action pending in another jurisdiction between the same parties (in an imperfect *lis pendens* situation) and the stage of such proceeding, 7) the law applicable to the dispute, 8) the ability to join all parties, 9) the need for enforcement in the alternative court, 10) the juridical advantages for the plaintiff, and 11) the interests of justice. As the Quebec Court of Appeal observes in *Oppenheim Forfait G.M.B.H.* v. *Lexus Maritime inc.*, these and other less frequently used criteria, have evolved from the jurisprudence in Quebec as well as in the common law jurisdictions. [Footnotes omitted.]

(J. A. Talpis, "*If I am from Grand-Mère, Why Am I Being Sued in Texas?*" *Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), at pp. 44-45; see also *Spar Aerospace*, at para. 71.)

compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige.

La doctrine du *forum non conveniens* confère au tribunal un pouvoir supplémentaire de refuser d'exercer une compétence que lui attribue par ailleurs l'une des règles de conflits de lois prévues par le *C.c.Q.* La loi attache un caractère d'exception à ce pouvoir, bien que son exercice ne soit pas considéré comme inhabituel (*Spar Aerospace Ltée c. American Mobile Satellite Corp.*, [2002] 4 R.C.S. 205, 2002 CSC 78, par. 77 et 81; *GreCon Dimter inc. c. J.R. Normand inc.*, [2005] 2 R.C.S. 401, 2005 CSC 46, par. 33). Le juge doit d'ailleurs l'exercer à la demande d'une partie, et non de son propre chef. L'application de cette doctrine exige l'examen de critères divers et variables. S'appuyant sur l'arrêt *Lexus Maritime inc. c. Oppenheim Forfait GmbH*, [1998] A.Q. n° 2059 (QL), par. 18, de la Cour d'appel du Québec, le professeur J. A. Talpis énumérait ainsi les facteurs les plus importants :

> [TRADUCTION] Les critères retenus le plus souvent par les tribunaux québécois pour l'application de la doctrine du *forum non conveniens* comprennent : 1) le lieu de résidence des parties et leur domicile, 2) l'emplacement du forum naturel, 3) l'emplacement des éléments de preuve, 4) le lieu de résidence des témoins, 5) le lieu où seraient survenus l'acte et l'opération allégués, y compris le lieu de formation et d'exécution du contrat, 6) l'existence d'une action à laquelle les mêmes personnes sont parties dans un autre ressort (dans un cas de litispendance imparfaite) et les étapes franchies dans cette instance, 7) le droit applicable au litige, 8) la possibilité de réunir toutes les actions, 9) la nécessité d'une procédure en exemplification dans l'autre ressort, 10) les avantages pour le demandeur sur le plan juridique et 11) l'intérêt de la justice. Comme la Cour d'appel du Québec le fait observer dans *Oppenheim Forfait G.M.B.H. c. Lexus Maritime inc.*, ces critères et d'autres moins usités sont issus de la jurisprudence québécoise et de celle des ressorts de common law. [Notes en bas de page omises.]

(J. A. Talpis, « *If I am from Grand-Mère, Why Am I Being Sued in Texas?* » *Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), p. 44-45; voir aussi *Spar Aerospace*, par. 71.)

2005 SCC 64 (CanLII)

38

In this appeal, the application of the most relevant factors would have led a Quebec court to recognize that an Ontario court would be in a better position to hear the action. Indeed, the principal object of the case is the judicial review of the decision of an Ontario administrative body that has been delegated the authority to administer the pension plan even with regard to plan members in Quebec. The natural forum for reviewing this body's decisions would appear to be an Ontario court, if only to reduce the risk of conflicting decisions and to adhere to the principle of administration set out in the memorandum of reciprocal agreement. This conclusion is all the more compelling in that the challenge by the Quebec plan members could affect the plan as a whole and the rights of the other members.

Dans le présent pourvoi, l'application des facteurs les plus pertinents aurait amené une cour québécoise à reconnaître qu'un tribunal de l'Ontario était mieux placé pour connaître de la demande en justice. En effet, l'objet principal du litige serait la révision judiciaire de la décision de l'organisme administratif ontarien auquel est délégué le pouvoir d'administrer le régime même à l'égard des participants québécois. Il appert que le forum naturel du contrôle des décisions de cet organisme soit d'abord le tribunal de l'Ontario, ne serait-ce que pour réduire le risque de décisions contradictoires et pour respecter le principe d'administration prévu par l'accord de réciprocité. Cette conclusion s'imposerait d'autant plus que la contestation des participants québécois pourrait affecter l'ensemble du régime et les droits des autres participants.

III. Conclusion

39

Since the action as brought is inadmissible, there is no need to consider the other issues raised by the parties. Consequently, for the reasons set out above, I concurred with my colleagues that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Rivest Schmidt, Montréal.

Solicitors for the respondent: McCarthy Tétrault, Montréal.

Solicitor for the intervener: Ministry of the Attorney General, Toronto.

III. Conclusion

En raison de l'irrecevabilité de la demande formulée, il est inutile d'examiner les autres questions soulevées par les parties. En conséquence, pour les motifs qui précèdent, j'ai été d'accord avec mes collègues pour rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Rivest Schmidt, Montréal.

Procureurs de l'intimée : McCarthy Tétrault, Montréal.

Procureur de l'intervenant : Ministère du Procureur général, Toronto.

2005 SCC 64 (CanLII)

Her Majesty The Queen in right of the Province of British Columbia *Appellant*

v.

Henfrey Samson Belair Ltd. *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Alberta and the Attorney General of Newfoundland *Interveners*

INDEXED AS: BRITISH COLUMBIA *v.* HENFREY SAMSON BELAIR LTD.

File No.: 20515.

1989: April 21; 1989: July 13.

Present: Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy — Priority — Statutorily created trust for tax collected — Tax collected commingled with bankrupt's assets — All assets applied to reduce bank's indebtedness — Whether or not province should be given priority over other creditors because of statutorily created trust — Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47(a), 107(1)(j) — Social Service Tax Act, R.S.B.C. 1979, c. 388, s. 18.

Tops Pontiac Buick Ltd. collected provincial sales tax in the course of its business operations, as required by the *Social Service Tax Act*, and mingled the tax collected with its other assets. A creditor placed Tops in receivership and Tops then made an assignment in bankruptcy. The receiver sold the assets and applied the full proceeds to reduce the bank's indebtedness.

The province contended that the *Social Service Tax Act* created a statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted, and that it had priority over the bank and all other creditors for this amount. The chambers judge

Sa Majesté La Reine du chef de la province de la Colombie-Britannique *Appelante*

c.

Henfrey Samson Belair Ltd. *Intimée*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général du Nouveau-Brunswick, le procureur général du Manitoba, le procureur général de l'Alberta et le procureur général de Terre-Neuve *Intervenants*

RÉPERTORIÉ: COLOMBIE-BRITANNIQUE *c.* HENFREY SAMSON BELAIR LTD.

N° du greffe: 20515.

1989: 21 avril; 1989: 13 juillet.

Présents: Les juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory et McLachlin.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite — Priorité — Fiducie créée par la Loi à l'égard des taxes perçues — Taxes perçues et confondues avec les biens de la faillie — Affectation de tous les biens de la faillie à la réduction de la créance de la Banque — La province doit-elle avoir priorité sur les autres créanciers en raison de la fiducie créée par la loi? — Loi sur la faillite, S.R.C. 1970, chap. B-3, art. 47a), 107(1)j) — Social Service Tax Act, R.S.B.C. 1979, chap. 388, art. 18.

La société Tops Pontiac Buick Ltd. a perçu la taxe provinciale de vente dans le cours de ses opérations commerciales, comme elle était tenue de le faire en vertu de la *Social Service Tax Act*, et elle a confondu les montants de taxe perçus avec ses autres biens. Un créancier de Tops l'a placée sous séquestre et Tops a alors déclaré faillite et fait cession de ses biens. Le séquestre a vendu les biens et consacré la totalité du produit de cette vente à la réduction de la créance de la Banque.

La province a soutenu que la *Social Service Tax Act* crée une fiducie sur les biens de Tops jusqu'à concurrence du montant de taxe de vente perçu mais non remis et qu'à l'égard de ce montant, elle a priorité sur la Banque et sur tous les autres créanciers. Le juge en

1989 CanLII 43 (SCC)

held that the *Social Service Tax Act* did not create a trust and that the province had no priority under the *Bankruptcy Act*. The Court of Appeal held that the legislation created a statutory trust but the *Bankruptcy Act* did not confer priority on such a trust. At issue here is whether the statutory trust created by s. 18 of the British Columbia *Social Service Tax Act* gives the province priority over other creditors under the *Bankruptcy Act*.

Held (Cory J. dissenting): The appeal should be dismissed.

Per Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The statutory trust created by the provincial legislation is not a trust within s. 47(*a*) of the *Bankruptcy Act* but merely a Crown claim under s. 107(1)(*j*). Section 47(*a*), which concerns "property held by the bankrupt in trust for any other person", permits removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the *Bankruptcy Act*. Section 107(1)(*j*), on the other hand, does not deal with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. If sections 47(*a*) and 107(1)(*j*) are read in this way, no conflict arises between them. This construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act* conforms with the principle that provinces cannot create priorities under the *Bankruptcy Act* by their own legislation.

Section 18 of *Social Service Tax Act* deems a statutory trust at the moment the tax is collected. The trust property is identifiable at that time and the requirements for a trust under the principles of trust law are met. The money when collected would therefore be exempt from distribution to creditors by reason of s. 47(*a*). The trust at common law ceases to exist, however, when the tax money collected is mingled with other money so that it cannot be traced and is no longer identifiable. The province has a claim secured only by a charge or lien created by s. 18(2) of the *Social Service Tax Act*, and s. 107(1)(*j*) of the *Bankruptcy Act* would accordingly apply. Here, no specific property impressed with a trust could be identified and s. 47(*a*) of the *Bankruptcy Act* did not extend to the province's claim.

Per Cory J. (dissenting): The moneys collected as sales tax by a vendor belong to the province and the vendor is in every sense of the word a trustee for them. The province did not need to rely on the vendor's

chambre a statué que la *Social Service Tax Act* ne crée pas de fiducie et que la province n'a pas la priorité en vertu de la *Loi sur la faillite*. La Cour d'appel a statué que les dispositions législatives créent une fiducie, mais que la *Loi sur la faillite* ne confère pas de priorité à l'égard de cette fiducie. La question en litige est de savoir si la fiducie légale créée par l'art. 18 de la *Social Service Tax Act* de la Colombie-Britannique confère à la province la priorité sur les autres créanciers en vertu de la *Loi sur la faillite*.

Arrêt (le juge Cory est dissident): Le pourvoi est rejeté.

Les juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier et McLachlin: La fiducie créée par la loi provinciale est non pas une fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite*, mais simplement une réclamation de la Couronne au sens de l'al. 107(1)*j*). L'alinéa 47*a*), qui vise «les biens détenus par le failli en fiducie pour toute autre personne», permet de soustraire, du régime de répartition établi par la *Loi sur la faillite*, les biens qui peuvent être spécifiquement identifiés comme n'appartenant pas au failli selon les principes généraux du droit des fiducies. D'autre part, l'al. 107(1)*j*) porte non pas sur les droits conférés par le droit général, mais sur les créances établies par la loi en faveur du fisc fédéral et provincial. Interprétés de cette façon, les al. 47*a*) et 107(1)*j*) ne se contredisent pas. Cette interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite* respecte le principe selon lequel les provinces ne peuvent, par leur propre loi, modifier l'ordre de priorité établi en vertu de la *Loi sur la faillite*.

Aux termes de l'art. 18 de la *Social Service Tax Act*, il y a fiducie légale réputée au moment de la perception de la taxe. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. Au moment de sa perception, la somme serait donc exclue, en raison de l'al. 47*a*), de la répartition des biens entre les créanciers. Cependant, il n'y a plus de fiducie, en *common law*, lorsque le montant de taxe perçu est confondu avec les autres sommes de sorte qu'il devient impossible de le retracer et de l'identifier. La province a une créance garantie seulement par un privilège créé par le par. 18(2) de la *Social Service Tax Act* et l'al. 107(1)*j*) de la *Loi sur la faillite* s'appliquerait donc. En l'espèce, il n'est possible d'identifier aucun bien précis sujet à une fiducie et l'al. 47*a*) de la *Loi sur la faillite* ne s'applique pas à la créance de la province.

Le juge Cory (dissident): Les sommes perçues par un marchand au titre de la taxe de vente appartiennent à la province et le marchand est, au sens strict du terme, un fiduciaire à l'égard dès sommes ainsi perçues. La pro-

1989 CanLII 43 (SCC)

keeping separate bank accounts to protect its trust property but rather could and did implement a registration system that allowed it to specify precisely the amount owing through a system of bookkeeping. If the tax were not paid to the province then a vendor must have stolen the funds, converted them to its own use or most charitably lost the funds for which it would be responsible and for which it would be accountable to the province.

The *Bankruptcy Act* prevents the provinces from creating priorities but it does not prevent them from creating a deemed trust or lien. It protects funds which, at the moment they were paid, were truly trust funds and the validity of the trust need not be determined exclusively on the basis of common law. Since section 18 of the *Social Service Tax Act* and ss. 47(*a*) and 107 of the *Bankruptcy Act* do not conflict, the doctrine of federal paramountcy cannot apply and s. 18 should prevail. The property at issue which was subject to s. 18 of the *Social Service Tax Act* never at any time became the property of the bankrupt and was therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the *Bankruptcy Act*.

The trust, created by s. 18, contained the three essential characteristics required of a trust by equity: certainty of intention, subject matter and of objects. The statute established certainty of intention and of object and through the use of a clear formula established the trust property. A statutorily constituted trust has an advantage over a privately constituted trust in that it is recognized without the beneficiary's having to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies determined by this Court.

Cases Cited

By McLachlin J.

Applied: *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; **referred to**: *Re Phoenix Paper Products Ltd.* (1983), 48 C.B.R. (N.S.) 113.

vince n'a pas eu besoin d'exiger que le marchand ouvre des comptes de banque distincts pour protéger ses fonds en fiducie. Elle a plutôt établi, ce qu'elle pouvait faire, un système d'enregistrement lui permettant de déterminer avec précision, par un régime de comptabilité, les sommes qui lui sont dues. Si la taxe n'est pas versée à la province, un marchand doit alors avoir ou volé ces sommes, ou les avoir détournées à son propre usage ou encore, si l'on est indulgent, avoir perdu les sommes dont il était responsable et comptable à la province.

La *Loi sur la faillite* empêche les provinces d'établir des priorités, mais elle ne les empêche pas d'établir une fiducie ou un privilège réputés. La Loi protège les sommes qui, dès leur versement, constituent véritablement des fonds en fiducie et il n'est pas nécessaire de déterminer la validité de la fiducie exclusivement en fonction de la *common law*. Puisqu'il n'y a pas de conflit entre l'art. 18 de la *Social Service Tax Act*, d'une part, et l'al. 47*a*) et l'art. 107 de la *Loi sur la faillite*, d'autre part, la théorie de la prépondérance de la loi fédérale ne peut s'appliquer et l'art. 18 devrait prévaloir. Le bien en cause, qui était visé par l'art. 18 de la *Social Service Tax Act*, n'est jamais devenu la propriété de la faillie et n'était donc pas sujet à répartition comme l'étaient les biens de la faillie en vertu de l'art. 107 de la *Loi sur la faillite*.

La fiducie créée par l'art. 18 comporte les trois caractéristiques essentielles requises d'une fiducie en *equity*: la certitude quant à l'intention, la certitude quant aux biens sujets à la fiducie et la certitude quant aux bénéficiaires. La Loi établit la certitude quant à l'intention et la certitude quant au bénéficiaire, de même qu'un moyen clair de déterminer le bien qui est en fiducie. Une fiducie établie par la loi offre un avantage sur une fiducie établie par un particulier en ce que son existence est reconnue sans que le bénéficiaire ait à engager l'action excessivement coûteuse en droit de suite sur les sommes confondues. Cet avantage ne devrait pas dépouiller les biens en fiducie légale de leur caractère fiduciaire ni les soustraire à l'application des principes énoncés par cette Cour.

Jurisprudence

Citée par le juge McLachlin

Arrêts appliqués: *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; **arrêt mentionné**: *Re Phoenix Paper Products Ltd.* (1983), 48 C.B.R. (N.S.) 113.

1989 CanLII 43 (SCC)

By Cory J. (dissenting)

Royal Trust Co. v. Tucker, [1982] 1 S.C.R. 250; *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487; *Re Deslauriers Construction Products Ltd.* (1970), 3 O.R. 599; *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Re Diplock's Estate*, [1948] Ch. 465, [1948] 2 All E.R. 318, aff'd *sub nom. Min. of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.); *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47(*a*), 107(1)(*j*).
Builders' Lien Act, R.S.A. 1980, c. B-12, s. 16.1.
Business Corporations Act, S.A. 1981, c. B-15, s. 191(1).
Canada Pension Plan, R.S.C., 1985, c. C-8, s. 23(4).
Construction Lien Act, 1983, S.O. 1983, c. 6, s. 7.
Employment Standards Act, R.S.A. 1980, c. E-10.1, s. 113.
Health Insurance Act, R.S.O. 1980, c. 197, s. 18.
Health Insurance Premiums Regulation, Alta. Reg. 217/81.
Insurance Act, R.S.A. 1980, c. I-5, s. 123(1).
Insurance Act, R.S.O. 1980, c. 218, s. 359.
Mechanics' Lien Act, R.S.O. 1950, c. 227.
Pension Benefits Act, S.O. 1987, c. 35, s. 58.
Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14.
Revenue Act, R.S.B.C. 1979, c. 367.
Social Service Tax Act, R.S.B.C. 1979, c. 388, ss. 5, 6, 8, 9, 10, 18(1), (2), 27.
Social Services Tax Act Regulations, B.C. Reg. 84/58, Division 5.

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APPEAL from a judgment of the British Columbia Court of Appeal (1987), 13 B.C.L.R.

Citée par le juge Cory (dissident)

Royal Trust Co. c. Tucker, [1982] 1 R.C.S. 250; *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] R.C.S. 487; *Re Deslauriers Construction Products Ltd.* (1970), 3 O.R. 599; *Dauphin Plains Credit Union Ltd. c. Xyloid Industries Ltd.*, [1980] 1 R.C.S. 1182; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; *Re Diplock's Estate*, [1948] Ch. 465, [1948] 2 All E.R. 318, conf. sous l'intitulé *Min. of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.); *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061.

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Builders' Lien Act, R.S.A. 1980, chap. B-12, art. 16.1.
Business Corporations Act, S.A. 1981, chap. B-15, art. 191(1).
Employment Standards Act, R.S.A. 1980, chap. E-10.1, art. 113.
Health Insurance Premiums Regulation, Alta. Reg. 217/81.
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Loi de 1987 sur les régimes de retraite, L.O. 1987, chap. 35, art. 58.
Loi sur l'assurance-maladie, L.R.O. 1980, chap. 197, art. 18.
Loi sur la faillite, S.R.C. 1970, chap. B-3, art. 47*a*), 107(1)*j*).
Loi sur les assurances, L.R.O. 1980, chap. 218, art. 359.
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1989 CanLII 43 (SCC)

(2d) 346; 40 D.L.R. (4th) 728; [1987] 4 W.W.R. 673; 65 C.B.R. (N.S.) 24; 5 A.C.W.S. (3d) 47, dismissing an appeal from a judgment of Meredith J. in chambers (1986), 5 B.C.L.R. (2d) 212, 61 C.B.R. (N.S.) 59. Appeal dismissed, Cory J. dissenting.

William A. Pearce and *J. G. Pottinger*, for the appellant.

Wendy G. Baker, Q.C., and *Gillian E. Parson*, for the respondent.

James M. Mabbutt, Q.C., for the intervener the Attorney General of Canada.

Janet E. Minor and *Timothy Macklem*, for the intervener the Attorney General for Ontario.

Yves de Montigny and *Madeleine Aubé*, for the intervener the Attorney General of Quebec.

Reinhold M. Endres, for the intervener the Attorney General of Nova Scotia.

Richard Burns, for the intervener the Attorney General for New Brunswick.

W. Glenn McFetridge and *Dirk D. Blevins*, for the intervener the Attorney General of Manitoba.

Robert C. Maybank, for the intervener the Attorney General for Alberta.

W. G. Burke-Robertson, Q.C., for the intervener the Attorney General of Newfoundland.

The judgment of Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

MCLACHLIN J.—The issue on this appeal is whether the statutory trust created by s. 18 of the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388, gives the province priority over other creditors under the *Bankruptcy Act*, R.S.C. 1970, c. B-3.

Tops Pontiac Buick Ltd. collected sales tax for the provincial government in the course of its business operations, as it was required to do by the *Social Service Tax Act*. Tops mingled the tax collected with its other assets. When the Canadian Imperial Bank of Commerce placed Tops in receivership pursuant to its debenture and Tops

(2d) 346, 40 D.L.R. (4th) 728, [1987] 4 W.W.R. 673, 65 C.B.R. (N.S.) 24, 5 A.C.W.S. (3d) 47, qui a rejeté l'appel d'une décision du juge en chambre Meredith (1986), 5 B.C.L.R. (2d) 212, 61 C.B.R. (N.S.) 59. Pourvoi rejeté, le juge Cory est dissident.

William A. Pearce et *J. G. Pottinger*, pour l'appelante.

Wendy G. Baker, c.r., et *Gillian E. Parson*, pour l'intimée.

James M. Mabbutt, c.r., pour l'intervenant le procureur général du Canada.

Janet E. Minor et *Timothy Macklem*, pour l'intervenant le procureur général de l'Ontario.

Yves de Montigny et *Madeleine Aubé*, pour l'intervenant le procureur général du Québec.

Reinhold M. Endres, pour l'intervenant le procureur général de la Nouvelle-Écosse.

Richard Burns, pour l'intervenant le procureur général du Nouveau-Brunswick.

W. Glenn McFetridge et *Dirk D. Blevins*, pour l'intervenant le procureur général du Manitoba.

Robert C. Maybank, pour l'intervenant le procureur général de l'Alberta.

W. G. Burke-Robertson, c.r., pour l'intervenant le procureur général de Terre-Neuve.

Version française du jugement des juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier et McLachlin rendu par

LE JUGE MCLACHLIN—Le présent pourvoi soulève la question de savoir si la fiducie légale établie par l'art. 18 de la *Social Service Tax Act*, R.S.B.C. 1979, chap. 388, confère à la province la priorité sur les autres créanciers en vertu de la *Loi sur la faillite*, S.R.C. 1970, chap. B-3.

La société Tops Pontiac Buick Ltd. a perçu la taxe de vente pour le compte du gouvernement provincial dans le cours de ses opérations commerciales, comme elle était tenue de le faire en vertu de la *Social Service Tax Act*. Tops a confondu les montants de taxe perçus avec ses autres biens. Lorsque la Banque canadienne impériale de com-

1989 CanLII 43 (SCC)

made an assignment in bankruptcy, the receiver sold the assets of Tops and applied the full proceeds in reduction of the indebtedness of the bank.

The province contends that the *Social Service Tax Act* creates a statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted ($58,763.23), and that it has priority over the bank and all other creditors for this amount.

The Chambers judge held that the *Social Service Tax Act* did not create a trust and that the province did not have priority. On appeal the receiver conceded that the legislation created a statutory trust, but contended that the chambers judge was correct in ruling that the Province did not have priority because the *Bankruptcy Act* did not confer priority on such a trust. The British Columbia Court of Appeal accepted this submission. The Province now appeals to this Court.

The section of the *Social Service Tax Act* which the Province contends gives it priority provides:

18. (1) Where a person collects an amount of tax under this Act

(a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and

(b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.

(2) The amount of taxes that, under this Act,

(a) is collected and held in trust in accordance with subsection (1); or

(b) is required to be collected and remitted by a vendor or lessor

forms a lien and charge on the entire assets of

(c) the estate of the trustee under paragraph (a);

merce a placé Tops sous séquestre en raison de la débenture qu'elle détenait, Tops a déclaré faillite et fait cession de ses biens; le séquestre a vendu les biens de Tops et consacré la totalité du produit de cette vente à la réduction de la créance de la Banque.

La province soutient que la *Social Service Tax Act* crée une fiducie sur les biens de Tops jusqu'à concurrence du montant de taxe de vente perçu mais non remis (58 763,23 $) et qu'à l'égard de ce montant, elle a priorité sur la Banque et tous les autres créanciers.

Le juge en chambre a statué que la *Social Service Tax Act* ne crée pas de fiducie et que la province n'a pas la priorité. En appel, le séquestre a reconnu que les dispositions législatives créent une fiducie, mais il a soutenu que le juge en chambre avait eu raison de statuer que la province n'avait pas la priorité parce que la *Loi sur la faillite* ne confère pas de priorité à l'égard de cette fiducie. La Cour d'appel de la Colombie-Britannique a fait droit à cet argument. La province se pourvoit maintenant devant cette Cour.

L'article de la *Social Service Tax Act* qui, selon la province, lui donne la priorité est ainsi conçu:

[TRADUCTION] **18.** (1) Lorsqu'une personne perçoit une taxe en application de la présente loi

a) elle est réputée détenir cette taxe en fiducie pour le compte de Sa Majesté du chef de la province en vue de son paiement à Sa Majesté de la manière et au moment prescrits par la présente loi ou par son règlement d'application, et

b) la taxe perçue est réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue en vertu de la présente loi, qu'elle ait été ou non effectivement détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de cette personne.

(2) La taxe qui, en vertu de la présente loi,

a) est perçue et détenue en fiducie conformément au paragraphe (1); ou

b) qui doit être perçue et remise par un marchand ou un locateur;

emporte un privilège sur la totalité des biens

c) du patrimoine du fiduciaire en vertu de l'alinéa a);

1989 CanLII 43 (SCC)

(d) the person required to collect or remit the tax under paragraph (b); or

(e) the estate of the person required to collect or remit the tax under paragraph (d).

The province argues that s. 18(1) creates a trust within s. 47(*a*) of the *Bankruptcy Act*, which provides:

47. The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

The respondent, on the other hand, submits that the deemed statutory trust created by s. 18 of the *Social Service Tax Act* is not a trust within s. 47 of the *Bankruptcy Act*, in that it does not possess the attributes of a true trust. It submits that the province's claim to the tax money is in fact a debt falling under s. 107(1)(*j*) of the *Bankruptcy Act*, the priority to which falls to be determined according to the priorities established by s. 107.

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

. . .

(*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

Discussion

The issue may be characterized as follows. Section 47(*a*) of the *Bankruptcy Act* exempts trust property in the hands of the bankrupt from distribution to creditors, giving trust claimants absolute priority. Section 107(1) establishes priorities between creditors on distribution; s. 107(1)(*j*) ranks Crown claims last. Section 18 of the *Social Service Tax Act* creates a statutory trust which lacks the essential characteristics of a trust, namely, that the property impressed with the trust be identifiable or traceable. The question is whether the statutory trust created by the provincial legislation is a trust within s. 47(*a*) of the *Bankruptcy Act* or a mere Crown claim under s. 107(1)(*j*).

d) de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa b); ou

e) du patrimoine de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa d).

a

La province soutient que le par. 18(1) crée une fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite*, dont voici le texte:

47. Les biens d'un failli, constituant le patrimoine b attribué à ses créanciers, ne comprennent pas les biens suivants:

a) les biens détenus par le failli en fiducie pour toute autre personne,

c

De son côté, l'intimée fait valoir que la fiducie réputée créée par l'art. 18 de la *Social Service Tax Act* n'est pas une fiducie au sens de l'art. 47 de la *Loi sur la faillite*, en ce qu'elle n'a pas les attributs d'une véritable fiducie. L'intimée soutient que la d réclamation du montant de la taxe par la province est en réalité une créance assujettie à l'al. 107(1)*j*) de la *Loi sur la faillite*, dont le rang est déterminé selon l'ordre de priorité établi à l'art. 107.

107. (1) Sous réserve des droits des créanciers garan- e tis, les montants réalisés provenant des biens d'un failli doivent être distribués d'après l'ordre de priorité de paiement suivant:

. . .

f *j*) les réclamations, non précédemment mentionnées au présent article, de la Couronne du chef du Canada ou d'une province du Canada, *pari passu*, nonobstant tout privilège statutaire à l'effet contraire.

Analyse

g

On peut formuler ainsi la question en litige: l'al. 47*a*) de la *Loi sur la faillite* soustrait, du patrimoine attribué aux créanciers, les biens détenus en fiducie par le failli et accorde la priorité absolue h aux bénéficiaires de la fiducie. Le paragraphe 107(1) détermine le rang des différents créanciers pour les fins de la répartition; l'al. 107(1)*j*) place les créances de la Couronne au dernier rang. L'article 18 de la *Social Service Tax Act* établit une i fiducie à laquelle il manque un des attributs essentiels de la fiducie, savoir un bien sujet à la fiducie qui puisse être identifié ou retracé. La question qui se pose est de savoir si la fiducie établie par la loi j provinciale est une fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite* ou une simple réclamation de la Couronne au sens de l'al. 107(1)*j*).

1989 CanLII 43 (SCC)

In my opinion, the answer to this question lies in the construction of the relevant provisions of the *Bankruptcy Act* and the *Social Service Tax Act*.

In approaching this task, I take as my guide the following passage from Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 105:

> The decisions ... indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:
>
> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
>
> 2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.

With these principles in mind, I turn to the construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act*. The question which arises under s. 47(*a*) of the Act concerns the meaning of the phrase "property held by the bankrupt in trust for any other person". Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the *Bankruptcy Act* because, in equity, it belongs to another person. The intention of Parliament in enacting s. 47(*a*), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the *Bankruptcy Act*.

Section 107(1)(*j*), on the other hand, has been held to deal not with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. The purpose of s. 107(1)(*j*) was discussed by this Court in *Deputy Minister of Revenue v. Rainville*, [1980] 1

Selon moi, la réponse à cette question dépend de l'interprétation des dispositions applicables de la *Loi sur la faillite* et de la *Social Service Tax Act*.

En m'attaquant à cette tâche, je m'inspire du passage suivant de l'ouvrage de Driedger intitulé *Construction of Statutes* (2e éd. 1983), à la p. 105:

> [TRADUCTION] La jurisprudence [...] indique qu'il faut interpréter ainsi les dispositions législatives pertinentes dans une affaire particulière:
>
> 1. Il faut interpréter l'ensemble de la Loi en fonction de tout son contexte pour déterminer l'intention du législateur (la Loi selon sa teneur expresse ou implicite), l'objet de la Loi (les fins qu'elle poursuit) et l'économie de la Loi (les liens entre les différentes dispositions de la Loi).
>
> 2. Il faut ensuite interpréter les termes des dispositions particulières applicables à l'affaire en cause selon leur sens grammatical et ordinaire, en fonction de l'intention du législateur manifestée dans l'ensemble de la Loi, de l'objet de la Loi et de l'économie de la Loi. S'ils sont clairs et précis, et conformes à l'intention, à l'objet, à l'économie et à l'ensemble de la Loi, l'analyse s'arrête là.

Gardant à l'esprit ces principes, j'aborde maintenant l'interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite*. L'alinéa 47*a*) de la Loi soulève la question du sens de l'expression «les biens détenus par le failli en fiducie pour toute autre personne». Selon leur sens ordinaire, ces mots renvoient à une situation où il existe des biens qui peuvent être identifiés comme étant détenus en fiducie. Ces biens doivent être retirés des autres biens que le failli détient avant leur répartition conformément à la *Loi sur la faillite* parce qu'en *equity* ils appartiennent à une autre personne. En adoptant l'al. 47*a*), le législateur a donc voulu permettre de soustraire, du régime de répartition établi par la *Loi sur la faillite*, les biens qui peuvent être spécifiquement identifiés comme n'appartenant pas au failli selon les principes généraux du droit des fiducies.

D'autre part, on a jugé que l'al. 107(1)*j*) porte non pas sur les droits conférés par le droit général, mais sur les créances établies par la loi en faveur du fisc fédéral et provincial. Cette Cour a déjà examiné l'objet de l'al. 107(1)*j*) dans l'arrêt *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S.

1989 CanLII 43 (SCC)

S.C.R. 35. Pigeon J., speaking for the majority, stated at p. 45:

There is no need to consider the scope of the expression "claims of the Crown". It is quite clear that this applies to claims of provincial governments for taxes and I think it is obvious that it does not include claims not secured by Her Majesty's personal preference, but by a privilege which may be obtained by anyone under general rules of law, such as a vendor's or a builder's privilege.

If sections 47(*a*) and 107(1)(*j*) are read in this way, no conflict arises between them. If a trust claim is established under general principles of law, then the property subject to the trust is removed from the general distribution by reason of s. 47(*a*). Following the reasoning of Pigeon J. in *Deputy Minister of Revenue v. Rainville*, such a claim would not fall under s. 107(1)(*j*) because it is valid under general principles of law and is not a claim secured by the Crown's personal preference.

This construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act* conforms with the principle that provinces cannot create priorities under the *Bankruptcy Act* by their own legislation, a principle affirmed by this Court in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785. As Wilson J. stated at p. 806:

... the issue in *Re Bourgault* [*Deputy Minister of Revenue v. Rainville*] and *Re Black Forest Restaurant Ltd.* was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the *Bankruptcy Act*. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the *Bankruptcy Act* and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced

35, où le juge Pigeon, s'exprimant au nom de la majorité, affirme à la p. 45:

Il ne serait pas à propos de rechercher la portée exacte de l'expression «réclamations de la Couronne». Il est bien sûr qu'elle s'applique aux créances du fisc et il me paraît évident qu'elle ne saurait embrasser des créances garanties non par un privilège propre à Sa Majesté mais par un privilège dont toute autre personne peut jouir en vertu des principes généraux du droit tel que le privilège de vendeur, celui de constructeur, etc.

Interprétés de cette façon, les al. 47*a*) et 107(1)*j*) ne se contredisent pas. Si une réclamation fondée sur une fiducie est prouvée selon les principes généraux du droit, le bien sujet à la fiducie est soustrait à la répartition générale en raison de l'al. 47*a*). Selon le raisonnement du juge Pigeon dans l'arrêt *Sous-ministre du Revenu c. Rainville*, l'al. 107(1)*j*) ne s'appliquerait pas à une telle réclamation parce qu'elle est valide en vertu des principes généraux du droit et qu'elle ne constitue pas une créance garantie par un privilège propre à Sa Majesté.

Cette interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite* respecte le principe selon lequel les provinces ne peuvent, par leur propre loi, modifier l'ordre de priorité établi en vertu de la *Loi sur la faillite*. L'arrêt de cette Cour *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785, a consacré ce principe. Comme l'affirme le juge Wilson, à la p. 806:

... dans les arrêts *Re Bourgault* [*Sous-ministre du Revenu c. Rainville*] et *Re Black Forest Restaurant Ltd.*, le litige n'était pas de savoir s'il y avait eu création d'un droit de propriété en vertu des lois provinciales applicables. Il s'agissait de savoir si, même si elle créait un droit de propriété, la loi provinciale pouvait aller à l'encontre du plan de distribution prévu au par. 107(1) de la *Loi sur la faillite*. Ces arrêts ont décidé qu'elle ne le pouvait pas et que, même si la loi provinciale pouvait validement créer une sûreté pour des dettes sur les biens du débiteur en dehors de la faillite, dès qu'il y avait faillite, le par. 107(1) déterminait le statut et la priorité des réclamations expressément mentionnées dans cet article. Il n'était pas loisible au créancier de la faillite de dire: en vertu de la loi provinciale applicable, je suis un créancier garanti au sens des premiers mots du par. 107(1) de la *Loi sur la faillite* et en conséquence la priorité que l'alinéa pertinent du par. 107(1) accorde à ma réclamation ne s'applique pas à moi. En réalité, c'est

1989 CanLII 43 (SCC)

before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have the effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

While *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board* was concerned with provincial legislation purporting to give the province the status of a secured creditor for purposes of the *Bankruptcy Act*, the same reasoning applies in the case at bar.

To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

Practical policy considerations also recommend this interpretation of the *Bankruptcy Act*. The difficulties of extending s. 47(*a*) to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament, in enacting the *Bankruptcy Act*, of setting up a clear and orderly

la position adoptée par la Cour d'appel et plaidée devant nous par l'intimée. Cette position n'est pas étayée par l'interprétation législative du par. 107(1) puisque, si on interprétait l'article dans ce sens, il aurait pour effet de permettre aux provinces de déterminer les priorités en cas de faillite, ce qui relève de la compétence fédérale exclusive.

Bien que l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board* ait porté sur une disposition législative provinciale qui avait pour objet de conférer à la province le statut de créancier garanti pour les fins de la *Loi sur la faillite*, le même raisonnement vaut pour l'espèce.

Interpréter l'al. 47*a*) comme s'appliquant non seulement aux fiducies établies en vertu du droit général, mais aussi aux fiducies légales établies par les provinces, qui ne possèdent pas les attributs des fiducies de *common law*, reviendrait à permettre aux provinces d'établir leur propre ordre de priorité applicable à la *Loi sur la faillite* et à ouvrir la porte à l'établissement de régimes de répartition en cas de faillite différents d'une province à l'autre.

Des considérations pratiques générales favorisent aussi cette interprétation de la *Loi sur la faillite*. Les difficultés que peut susciter l'application de l'al. 47*a*) aux cas où il n'est pas possible d'identifier un bien précis sujet à une fiducie sont considérables et contraires à l'équité et au bon sens. Par exemple, si les créances pour taxes sont égales ou supérieures aux sommes que détient le syndic de faillite, ce dernier sera dans l'impossibilité de se faire indemniser des frais engagés pour réaliser l'actif. Le syndic pourrait même contrevenir à la Loi en engageant des dépenses pour réaliser l'actif du failli. La présence de plus d'un créancier à l'égard du bien en fiducie soulèverait d'autres difficultés. Imaginons le cas de la personne qui aurait une réclamation fondée sur une fiducie, valide selon les principes généraux du droit, à l'égard d'un bien précis et qui se trouverait en concurrence avec Sa Majesté qui invoquerait l'existence d'une fiducie légale concernant ce même bien et tous les autres biens. La créance générale de Sa Majesté pourrait-elle avoir priorité sur le droit de propriété du créancier en vertu du droit des fiducies? Ou encore, le créancier en vertu

1989 CanLII 43 (SCC)

scheme for the distribution of the bankrupt's assets.

du droit des fiducies aurait-il priorité? Reconnaître l'existence d'une telle possibilité irait à l'encontre de l'intention clairement exprimée par le législateur, en adoptant la *Loi sur la faillite*, d'établir un régime clair et ordonné de répartition de l'actif d'un failli.

In summary, I am of the view that s. 47(*a*) should be confined to trusts arising under general principles of law, while s. 107(1)(*j*) should be confined to claims such as tax claims not established by general law but secured "by her Majesty's personal preference" through legislation. This conclusion, in my opinion, is supported by the wording of the sections in question, by the jurisprudence of this Court, and by the policy considerations to which I have alluded.

En résumé, j'estime que l'application de l'al. 47*a*) devrait se limiter aux fiducies établies en vertu des principes généraux du droit, alors que l'al. 107(1)*j*) devrait s'appliquer aux seules créances pour taxes qui ne découlent pas du droit général, mais qui sont garanties «par un privilège propre à Sa Majesté» par voie législative. À mon avis, le texte des dispositions en cause, la jurisprudence de cette Cour et les considérations de principe auxquelles j'ai fait allusion appuient cette conclusion.

I turn next to s. 18 of the *Social Service Tax Act* and the nature of the legal interests created by it. At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(*b*) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt.

J'examinerai maintenant l'art. 18 de la *Social Service Tax Act* et la nature des droits qu'il crée. Au moment de la perception de la taxe, il y a fiducie légale réputée. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. La difficulté que présente l'espèce, qui est la même que dans la plupart des autres cas, vient de ce que le bien en fiducie cesse bientôt d'être identifiable. Le montant de la taxe est confondu avec d'autres sommes que détient le marchand et immédiatement affecté à l'acquisition d'autres biens de sorte qu'il est impossible de le retracer. Dès lors, il n'existe plus de fiducie de *common law*. Pour obvier à ce problème, l'al. 18(1)*b*) prévoit que la taxe perçue sera réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue. Mais, comme l'existence de la disposition déterminative le reconnaît tacitement, en réalité, après l'affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. Il n'y a pas de bien qu'on puisse considérer comme sujet à la fiducie. Aussi, pour cette raison, le par. 18(2) ajoute que la taxe impayée emporte un privilège sur la totalité des biens de celui qui l'a perçue, c'est-à-dire un droit tenant d'une créance garantie.

Applying these observations on s. 18 of the *Social Service Tax Act* to the construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act* which

Si j'applique ces observations relatives à l'art. 18 de la *Social Service Tax Act* à l'interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite* que j'ai

1989 CanLII 43 (SCC)

I have earlier adopted, the answer to the question of whether the province's interest under s. 18 is a "trust" under s. 47(*a*) or a "claim of the Crown" under s. 107(1)(*j*) depends on the facts of the particular case. If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of s. 47(*a*). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held . . . in trust" under s. 47(*a*). The province has a claim secured only by a charge or lien, and s. 107(1)(*j*) applies.

In the case at bar, no specific property impressed with a trust can be identified. It follows that s. 47(*a*) of the *Bankruptcy Act* should not be construed as extending to the province's claim in this case.

The province, however, argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of "trust" which is operative for purposes of exemption under the *Bankruptcy Act* must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the *Bankruptcy Act*: *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board.*

Nor does the argument that the tax money remains the property of the Crown throughout withstand scrutiny. If that were the case, there would be no need for the lien and charge in the Crown's favour created by s. 18(2) of the *Social Service Tax Act*. The province has a trust interest and hence property in the tax funds so long as they can be identified or traced. But once they lose that character, any common law or equitable property interest disappears. The province is left with a statutory deemed trust which does not give it the same property interest a common law trust would,

précédemment retenue, la réponse à la question de savoir si le droit que l'art. 18 confère à la province est une «fiducie» au sens de l'al. 47*a*) ou une «réclamation de la Couronne» au sens de l'al. 107(1)*j*) dépend des faits de l'espèce. Si la somme perçue pour fins de taxe peut-être identifiée ou retracée, la situation correspond au sens ordinaire du mot «fiducie» et la somme est exclue, en raison de l'al. 47*a*), de la répartition des biens entre les créanciers. Par contre, si la somme a servi à acquérir d'autres biens et ne peut être retracée, il n'y a pas de «biens détenus [. . .] en fiducie» au sens de l'al. 47*a*). La province a une créance garantie seulement par un privilège et l'al. 107(1)*j*) s'applique.

En l'espèce, il n'est possible d'identifier aucun bien précis sujet à une fiducie. Il s'ensuit qu'on ne saurait considérer que l'al. 47*a*) de la *Loi sur la faillite* s'applique à la créance de la province en l'espèce.

La province soutient cependant qu'il lui est loisible de définir le mot «fiducie» comme elle l'entend puisque la propriété et les droits civils relèvent de sa compétence. À cette affirmation, il suffit de répondre que la définition applicable du mot «fiducie» pour les fins des exceptions prévues à la *Loi sur la faillite* est celle du législateur fédéral et non celle des législateurs provinciaux. Les provinces peuvent définir à leur gré le mot «fiducie» pour les matières relevant de leur compétence, mais elles ne peuvent imposer au Parlement la définition que la fiducie doit recevoir pour les fins de *Loi sur la faillite*: voir l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board.*

L'argument voulant que le montant de taxe perçu demeure la propriété de Sa Majesté en tout temps ne résiste pas non plus à l'analyse. S'il en était ainsi, le privilège que crée le par. 18(2) de la *Social Service Tax Act* en faveur de Sa Majesté serait parfaitement inutile. La province a un droit de fiducie et donc de propriété sur les montants de taxe perçus dans la mesure où ils peuvent être identifiés ou retracés. Dès que ces sommes perdent ce caractère, tout droit de propriété découlant de la *common law* ou de l'*equity* disparaît. Il reste à la province une fiducie légale réputée qui ne lui

1989 CanLII 43 (SCC)

supplemented by a lien and charge over all the bankrupt's property under s. 18(2).

The province relies on *Re Phoenix Paper Products Ltd.* (1983), 48 C.B.R. (N.S.) 113 (Ont. C.A.), where the Ontario Court of Appeal held that accrued vacation pay mixed with other assets of a bankrupt constituted a trust under s. 47(*a*) of the *Bankruptcy Act*. As the Court of Appeal in this case pointed out, the Ontario Court of Appeal in *Re Phoenix Paper Products Ltd.*, in considering the two divergent lines of authority presented to it, did not have the advantage of considering what was said in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, and the affirmation in that case of the line of authority which the Ontario Court of Appeal rejected.

The appellant raised a second question in the alternative, namely:

> If the Province is divested of its trust property by reason of S. 18(1) being in conflict with S. 107(1)(j) of the *Bankruptcy Act*, does [that] property devolve to the secured creditor [the Bank] or is it distributed to unsecured creditors pursuant to S. 107 of the *Bankruptcy Act*?

This question was not raised in the courts below, nor on the application for leave to appeal. It concerns parties who were not present on the appeal. For these reasons, I would decline to consider it.

Conclusion

For the reasons stated, I conclude that s. 47(*a*) of the *Bankruptcy Act* does not apply in this case and the priority of the province's claim is governed by s. 107(1)(*j*) of the Act. I would decline to answer the alternative question posed by the appellant.

I would dismiss the appeal, with costs.

The following are the reasons delivered by

CORY J. (dissenting)—I have read with great interest the compelling reasons of my colleague Justice McLachlin. Unfortunately I cannot agree

confère pas le même droit de propriété qu'une fiducie de *common law*, auquel s'ajoute un privilège sur la totalité des biens du failli en application du par. 18(2).

La province invoque l'arrêt *Re Phoenix Paper Products Ltd.* (1983), 48 C.B.R. (N.S.) 113 (C.A. Ont.), dans lequel la Cour d'appel de l'Ontario a statué que le salaire dû pour des vacances confondu avec les autres biens d'un failli constituait un bien en fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite*. Comme la Cour d'appel l'a souligné en l'espèce, quand, dans l'arrêt *Re Phoenix Paper Products Ltd.*, la Cour d'appel de l'Ontario a examiné les deux courants de jurisprudence divergents qui lui ont été soumis, elle n'avait pas eu l'occasion de prendre connaissance de l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board* et de constater que ce dernier arrêt confirmait le courant de jurisprudence que la Cour d'appel de l'Ontario a alors rejeté.

L'appelante soulève une deuxième question à titre subsidiaire, savoir:

> [TRADUCTION] Si la province est privée du bien en fiducie parce que le par. 18(1) et l'al. 107(1)j) de la *Loi sur la faillite* se contredisent, [ce] bien échoit-il au créancier garanti [la Banque] ou est-il attribué aux créanciers non garantis conformément à l'art. 107 de la *Loi sur la faillite*?

Cette question n'a été soulevée ni devant les tribunaux d'instance inférieure, ni lors de la demande d'autorisation de pourvoi. Elle vise des parties qui n'ont pas été mises en cause dans le présent pourvoi. Pour ces motifs, je refuse de l'examiner.

Conclusion

Pour ces motifs, je suis d'avis que l'al. 47*a*) de la *Loi sur la faillite* ne s'applique pas à l'espèce, mais que le rang de la créance de la province est régi par l'al. 107(1)*j*) de la Loi. Je refuse de répondre à la question subsidiaire soulevée par l'appelante.

Je suis d'avis de rejeter le pourvoi avec dépens.

Version française des motifs rendus par

LE JUGE CORY (dissident)—J'ai lu avec beaucoup d'intérêt les motifs convaincants de ma collègue le juge McLachlin. Malheureusement, je ne

1989 CanLII 43 (SCC)

that s. 47(*a*) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, does not apply in this case. If section 18 of the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388, creates a valid trust, then s. 47(*a*) of the *Bankruptcy Act* must apply. In order to determine the effect of s. 18 it may be helpful to consider the *Social Service Tax Act* as a whole.

Scheme of the B.C. *Social Service Tax Act*

Registration under this Act is a condition precedent to carrying on a retail sales business in the Province of British Columbia. Subject to certain irrelevant and minor exceptions, the Act provides that no one may sell "tangible personal property" in the province at a retail sale without being registered with the "commissioner", the provincial official appointed to administer the Act. It is sufficient to note that the term "tangible personal property" is given a very broad definition. With the approval of the Minister, the Commissioner may cancel or suspend the certificate of anyone found guilty of an offence under the Act thus terminating the retail business. This is the ultimate form of control that the province exercises over those who collect the taxes assessed under the Act. In addition, the regulations passed pursuant to the Act provide for close scrutiny of the use of the registration certificates issued to vendors.

Pursuant to s. 5 of the Act, retail vendors are deemed to be agents of the Minister for the purposes of levying and collecting sales tax. Section 6 provides that these agents are deemed to be tax collectors for the purposes of the *Revenue Act*, R.S.B.C. 1979, c. 367, and are made subject to the provisions of ss. 22 to 28 of that Act. Sections 22 to 28 prescribe the penalties for tax collectors who fail to ender their accounts as required by the statute. Pursuant to s. 27, where a collector has received money belonging to the Crown in right of the Province and has failed to pay it to the province, the defaulting collector's property may be seized. As a *quid pro quo*, s. 8 of the *Social Service Tax Act* provides that vendors are to

puis accepter que l'al. 47*a*) de la *Loi sur la faillite*, S.R.C. 1970, chap. B-3, ne s'applique pas à l'espèce. Si l'article 18 de la *Social Service Tax Act* de la Colombie-Britannique, R.S.B.C. 1979, chap. 388, crée une fiducie valide, alors l'al. 47*a*) de la *Loi sur la faillite* doit s'appliquer. Afin de déterminer l'effet de l'art. 18, il peut être utile d'examiner l'ensemble de la *Social Service Tax Act*.

Économie de la *Social Service Tax Act* de la Colombie-Britannique

L'enregistrement prévu à cette loi constitue une condition préalable à l'exploitation d'un commerce de détail dans la province de la Colombie-Britannique. Sous réserve de certaines exceptions mineures non pertinentes en l'espèce, la Loi prescrit que personne ne peut vendre au détail un [TRADUCTION] «bien matériel personnel» dans la province sans être enregistré auprès du «commissaire», le fonctionnaire provincial chargé d'appliquer la Loi. Il suffit de souligner que l'expression «bien matériel personnel» est définie de manière très générale. Avec l'autorisation du Ministre, le commissaire peut annuler ou suspendre le certificat de quiconque est déclaré coupable d'infraction à la Loi, mettant ainsi fin au commerce de détail. C'est là la forme ultime de contrôle que la province exerce sur ceux qui perçoivent les taxes fixées en vertu de la Loi. De plus, le règlement d'application de la Loi prescrit l'examen minutieux de l'usage des certificats d'enregistrement délivrés aux marchands.

Conformément à l'art. 5 de la Loi, les marchands au détail sont réputés être des mandataires du Ministre aux fins de l'imposition et de la perception de la taxe de vente. L'article 6 prévoit que ces mandataires sont réputés être des percepteurs d'impôt pour les fins de la *Revenue Act*, R.S.B.C. 1979, chap. 367, et qu'ils sont assujettis aux dispositions des art. 22 à 28 de cette loi. Les articles 22 à 28 prescrivent des peines pour les percepteurs d'impôt qui omettent de rendre compte comme l'exige la Loi. Conformément à l'art. 27, si un percepteur a reçu des sommes appartenant à Sa Majesté du chef de la province et qu'il ne les a pas versées à la province, il est passible de saisie de ses biens. En contrepartie, l'art. 8 de la *Social Service*

1989 CanLII 43 (SCC)

receive remuneration for the service they provide to the government by collecting the tax.

Under ss. 9 and 10 of the Act every vendor is required to make returns and keep tax records in the form prescribed by the regulations and must keep a record of all purchases and sales. Division 5 of the *Social Services Tax Act Regulations*, B.C. Reg. 84/58, makes detailed provision for these returns and records. The regulations make clear that there is to be continuous supervision of sales tax collection. Separate monthly returns must be made for each place of business and the returns must be made no later than fifteen days after the last day of each monthly period. The regulations provide in detail for the means of calculating upon each return the commission for each vendor on the collection of sales tax.

The requirements concerning the keeping of records and accounts emphasize the trust nature of the arrangement. They provide that books of account must contain distinct records of all (1) sales, (2) purchases, (3) non-taxable sales, (4) taxable sales, (5) amounts of tax collected and (6) disposal of tax including commission taken. The records further stress that "all entries concerning the tax and such books of account, records and documents shall be kept separate and distinguishable from other entries made therein." (Emphasis added.) As well the tax must be shown as a separate item on all receipts given to purchasers. Section 27 of the Act provides wide powers for the inspection of these records.

It is against this background that s. 18 of the *Social Service Tax Act* must be considered. That section provides:

18. (1) Where a person collects an amount of tax under this Act

(a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and

Tax Act prévoit que les marchands doivent être rémunérés pour les services qu'ils rendent au gouvernement en percevant la taxe.

a Selon les art. 9 et 10 de la Loi, tout marchand est tenu de produire des déclarations et de tenir une comptabilité fiscale de la manière prescrite par le règlement et de consigner tous les achats et toutes les ventes effectués. La section 5 des *Social* b *Services Tax Act Regulations*, B.C. Reg. 84/58, comporte des dispositions détaillées sur ces déclarations et cette comptabilité. Le règlement indique clairement qu'il doit y avoir une surveillance continue de la perception de la taxe de vente. Il faut c préparer une déclaration mensuelle distincte pour chaque commerce et la produire dans les quinze jours qui suivent la fin du mois auquel elle se rapporte. Le règlement prescrit en détail la façon d de calculer, dans chaque déclaration, la commission attribuée à chaque marchand pour la perception de la taxe de vente.

Les exigences relatives à la tenue de livres et de e relevés de compte soulignent la nature fiduciaire de cet arrangement. On exige notamment que les livres comptables comportent des comptes distincts pour (1) les ventes, (2) les achats, (3) les ventes non taxables, (4) les ventes taxables, (5) les monf tants de taxe perçus et (6) l'emploi de la taxe y compris la commission retenue. Le règlement insiste également pour que [TRADUCTION] «toutes les écritures relatives à la taxe dans ces livres g comptables, déclarations et pièces ... [soient] séparées et distinctes des autres inscriptions qui y sont faites.» (Je souligne.) De même le montant de la taxe doit figurer séparément sur tous les récépissés remis aux acheteurs. L'article 27 de la Loi h confère des pouvoirs étendus de vérification de ces livres.

C'est dans ce contexte qu'il faut interpréter l'art. 18 de la *Social Service Tax Act*, dont voici le i texte:

[TRADUCTION] **18.** (1) Lorsqu'une personne perçoit une taxe en application de la présente loi

a) elle est réputée détenir cette taxe en fiducie pour j le compte de Sa Majesté du chef de la province en vue de son paiement à Sa Majesté de la manière et au moment prescrits par la présente loi ou par son règlement d'application, et

1989 CanLII 43 (SCC)

(b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.

(2) The amount of taxes that, under this Act,

(a) is collected and held in trust in accordance with subsection (1); or

(b) is required to be collected and remitted by a vendor or lessor

forms a lien and charge on the entire assets of

(c) the estate of the trustee under paragraph (a);

(d) the person required to collect or remit the tax under paragraph (b); or

(e) the estate of the person required to collect or remit the tax under paragraph (d).

b) la taxe perçue est réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue en vertu de la présente loi, qu'elle ait été ou non effectivement détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de cette personne.

(2) La taxe qui, en vertu de la présente loi,

a) est perçue et détenue en fiducie conformément au paragraphe (1); ou

b) qui doit être perçue et remise par un marchand ou un locateur;

emporte un privilège sur la totalité des biens

c) du patrimoine du fiduciaire en vertu de l'alinéa a);

d) de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa b); ou

e) du patrimoine de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa d).

It can be seen that the moneys collected by a vendor such as Tops as the tax collector of the sales tax never belongs to the vendor. The sales tax is payable by the purchaser who owes that sum to the province. The vendor never has any interest in those funds and is in every sense of the word a trustee of the funds collected for the sales tax. The vendor is simply the conduit for payment of the sales tax to the province. The province has not relied upon a requirement that separate bank accounts be kept by a vendor to protect its trust property. Rather, it has put into place a system of registration of all retail sales businesses and provided for a regulated means of record keeping and inspection. This system permits the government to specify precisely what money is due to it and to ascertain what is happening to its money on a monthly basis.

If the tax is not paid to the province then a vendor such as Tops must have stolen the funds, converted them to its own use or most charitably lost the funds for which it was responsible and for which it was accountable to the province.

From the point of view of fairness, there would seem to be no objection to the provincial government's creating a lien or charge on the assets of

On peut constater que les sommes perçues par un marchand comme Tops, à titre de percepteur de la taxe de vente, ne deviennent jamais la propriété du marchand. La taxe de vente est payable par l'acheteur et elle est due à la province. Le marchand n'a jamais droit à cette somme, il est, au sens strict du terme, un fiduciaire à l'égard des sommes perçues au titre de la taxe de vente. Le marchand ne sert que d'intermédiaire pour le paiement de la taxe de vente à la province. La province n'a pas été jusqu'à exiger que le marchand ouvre des comptes de banque distincts pour protéger ses fonds en fiducie. Elle a plutôt instauré un système d'enregistrement de tous les commerces de détail et établi un régime réglementé de comptabilité et d'inspection. Ce système permet au gouvernement de déterminer avec précision les sommes qui lui sont dues et de vérifier ce qui advient de ces sommes d'un mois à l'autre.

Si la taxe n'est pas versée à la province, un marchand comme Tops doit alors avoir ou volé ces sommes, ou les avoir détournées à son propre usage ou encore, si l'on est indulgent, avoir perdu les sommes dont il était responsable et comptable à la province.

Sur le plan de l'équité, il ne semblerait pas y avoir d'empêchement à la création, par la province, d'un privilège ou d'une sûreté grevant les

1989 CanLII 43 (SCC)

the vendor for the amount of the sales tax (the trust funds) which the vendor was responsible for collecting and remitting to the province.

Does Section 18 Create a Valid Trust?

The question may be phrased more precisely by asking: If, as the chambers judge found, sales tax money "was misappropriated by Tops and mingled with its assets", does that put an end to the trust? It is said that the trust, although validly existing at the moment the funds were paid by the purchaser, ceases to exist or have any validity once the funds were mingled so that they could not be traced readily. To begin with, and somewhat simplistically, there is no prohibition in the *Bankruptcy Act* against the province creating a deemed trust or lien against the retail vendor's property for the extent of the sales tax nor is there a conflict between s. 18 of the *Social Service Tax Act* and s. 47(*a*) and s. 107 of the *Bankruptcy Act*. This is not a statutory ruse to evade the provisions of the *Bankruptcy Act*. It is simply an attempt to protect trust funds which are earmarked to be used for the public benefit and public use. Rather than insist that on each sale there be a separate payment to the province, the Act created a system which was in the best interest of retail purchasers, retail vendors, the business community and the province as a whole. The Act does no more than protect funds which at the moment they were paid were truly trust funds. Nor am I sure that the validity of a trust must be determined exclusively on the basis of common law. It has been held by this Court that the civil law of trust is not the same as that of common law. See *Royal Trust Co. v. Tucker*, [1982] 1 S.C.R. 250, at p. 261.

There are a number of provincial statutory provisions which create trusts. This type of legislation is common to a wide range of statutes that may benefit employees, purchasers of insurance, payers of health and insurance and many others who lack the organization or bargaining power to establish a trust for themselves. See for example,

biens du marchand pour le montant de la taxe de vente (les fonds en fiducie) qu'il est chargé de percevoir et de remettre à la province.

L'article 18 crée-t-il une fiducie valide?

On peut formuler la question de façon plus précise en se demandant si, après que le juge de première instance eut constaté que le montant de la taxe de vente [TRADUCTION] «avait été détourné par Tops qui l'avait confondu avec ses biens», c'en était fait de la fiducie. On a dit que même si la fiducie existait régulièrement au moment où les sommes ont été payées par les acheteurs, elle a cessé d'exister ou d'être valide dès que les sommes eurent été confondues de telle manière qu'il était difficile de les retracer. Commençons par affirmer de façon un peu simpliste qu'il n'y a rien dans la *Loi sur la faillite* qui empêche une province d'établir une fiducie ou un privilège réputés sur les biens du détaillant jusqu'à concurrence du montant de taxe de vente perçu et il n'y a pas d'incompatibilité entre, d'une part, l'art. 18 de la *Social Service Tax Act* et, d'autre part, l'al. 47*a*) et l'art. 107 de la *Loi sur la faillite*. Il n'y a pas là de subterfuge légal pour se soustraire aux dispositions de la *Loi sur la faillite*. Ce n'est qu'une tentative de protéger les fonds en fiducie qui sont destinés à l'usage et à l'avantage du public. Plutôt que d'insister pour qu'à chaque vente il y ait un versement distinct à la province, la Loi a établi un régime avantageux pour l'acheteur au détail, le détaillant, le monde des affaires et l'ensemble de la province. La Loi ne fait rien de plus que de protéger les sommes qui, dès leur versement, constituent véritablement des fonds en fiducie. Je ne suis pas certain non plus que la validité d'une fiducie puisse se déterminer exclusivement en fonction de la *common law*. Cette Cour a déjà affirmé que le droit civil des fiducies diffère de celui de la *common law*. Voir *Royal Trust Co. c. Tucker*, [1982] 1 R.C.S. 250, à la p. 261.

Il existe de nombreuses dispositions législatives provinciales qui créent des fiducies. Ce genre de disposition est courant dans une vaste catégorie de lois susceptibles de bénéficier aux salariés, aux acheteurs d'assurance, aux cotisants à des régimes d'assurance-santé et à plusieurs autres catégories de gens qui ne disposent pas de l'organisation ou

1989 CanLII 43 (SCC)

Pension Benefits Act, S.O. 1987, c. 35, s. 58; *Insurance Act*, R.S.O. 1980, c. 218, s. 359; *Health Insurance Act*, R.S.O. 1980, c. 197, s. 18; *Builders' Lien Act*, R.S.A. 1980, c. B-12, s. 16.1; *Construction Lien Act, 1983*, S.O. 1983, c. 6, s. 7; *Business Corporations Act*, S.A. 1981, c. B-15, s. 191(1); *Employment Standards Act*, R.S.A. 1980, c. E-10.1, s. 113; *Insurance Act*, R.S.A. 1980, c. I-5, s. 123(1); *Real Estate Agents' Licensing Act*, R.S.A. 1980, c. R-5, s. 14, and *Health Insurance Premiums Regulation*, Alta. Reg. 217/81.

This Court has held that a province may, to further and protect a principle of social policy, create a statutory trust. In *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487, at p. 494, the trust provisions of *The Mechanics' Lien Act*, R.S.O. 1950, c. 227, (now the *Construction Lien Act*) were found to be validly enacted. The statutory trusts referred to above provide needed protection for their beneficiaries and forward salutary social objectives which the provinces have jurisdiction to pursue.

Subsection 23(4) of the *Canada Pension Plan*, R.S.C., 1985, c. C-8, creates a statutory trust using language almost identical to s. 18 of the *Social Service Tax Act*. In *Re Deslauriers Construction Products Ltd.* (1970), 3 O.R. 599 (C.A.), Gale C.J.O., for a unanimous Court, noted that the Act deemed Pension Plan moneys to be kept separate and apart from the estate of the employer "whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate", and commented at p. 601:

[These words] were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the

du pouvoir de négociation nécessaire pour établir une fiducie en leur propre faveur. Voir, par exemple, les lois suivantes: *Loi de 1987 sur les régimes de retraite*, L.O. 1987, chap. 35, art. 58; *Loi sur les assurances*, L.R.O. 1980, chap. 218, art. 359; *Loi sur l'assurance-maladie*, L.R.O. 1980, chap. 197, art. 18; *Builders' Lien Act*, R.S.A. 1980, chap. B-12, art. 16.1; *Loi de 1983 sur le privilège dans l'industrie de la construction*, L.O. 1983, chap. 6, art. 7; *Business Corporations Act*, S.A. 1981, chap. B-15, par. 191(1); *Employment Standards Act*, R.S.A. 1980, chap. E-10.1, art. 113; *Insurance Act*, R.S.A. 1980, chap. I-5, par. 123(1); *Real Estate Agents' Licensing Act*, R.S.A. 1980, chap. R-5, art. 14, et *Health Insurance Premiums Regulation*, Alta. Reg. 217/81.

Cette Cour a déjà statué qu'une province peut, pour favoriser ou protéger un principe de politique sociale, créer une fiducie légale. Dans l'arrêt *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] R.C.S. 487, à la p. 494, les dispositions en matière de fiducie de *The Mechanics' Lien Act*, R.S.O. 1950, chap. 227 (maintenant appelée *Loi sur le privilège dans l'industrie de la construction*) ont été confirmées. Les fiducies légales mentionnées plus haut fournissent la protection voulue à leurs bénéficiaires et favorisent la réalisation d'objectifs sociaux salutaires que les provinces ont le pouvoir de poursuivre.

Le paragraphe 23(4) du *Régime de pensions du Canada*, L.R.C. (1985), chap. C-8, crée une fiducie en des termes presque identiques à ceux de l'art. 18 de la *Social Service Tax Act*. Dans *Re Deslauriers Construction Products Ltd.* (1970), 3 O.R. 599 (C.A.), le juge en chef Gale de l'Ontario a, au nom de la cour à l'unanimité, souligné que, selon la Loi, les sommes relatives au Régime de pensions sont réputées être détenues de manière séparée et distincte du patrimoine de l'employeur qu'elles [TRADUCTION] «ai[ent] ou non effectivement été conservé[es] dans un compte séparé et distinct des propres fonds de l'employeur ou de la masse des biens» et il ajoute, à la p. 601:

[TRADUCTION] [Ces mots ont] été inséré[s] dans la Loi expressément dans le but de soustraire de la masse des biens du failli, par la création d'une fiducie, un

1989 CanLII 43 (SCC)

creation of a trust and making those moneys the property of the Minister.

From this he drew the following conclusion at pp. 602-3:

In the *Canada Pension Plan* the fund is deemed to be property which does not comprise part of the bankruptcy at all, so that the Crown under that act is not a creditor, but is deemed to hold property which is not the property of the bankrupt.

Gale C.J.O's judgment was cited with approval by Pigeon J. writing for the majority in this Court in *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182, at p. 1198, who stated: "I find the reasoning in *Deslauriers* wholly persuasive . . . ."

The provisions of s. 18 then should prevail unless they are in conflict with the provisions of the *Bankruptcy Act*. Sections 47 and 107 of the Act provide:

47. The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person;

. . .

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

. . .

(*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

The doctrine of federal paramountcy of legislation can only apply if there is actual conflict in the operation of the provincial and federal statutes. The principle was set forth in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191, by Dickson J., as he then was, in these words:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens

montant équivalent aux déductions et d'en faire la propriété du Ministre.

Puis il en conclut ceci, aux pp. 602 et 603:

a

[TRADUCTION] Dans le *Régime de pensions du Canada*, les fonds sont présumés être des biens exclus de façon absolue de la faillite de sorte qu'en vertu de la Loi, Sa Majesté n'est pas un créancier, mais est réputée détenir un bien qui n'appartient pas au failli.

b

Le juge Pigeon a, au nom de cette Cour à la majorité, cité et approuvé l'avis du juge en chef Gale dans l'arrêt *Dauphin Plains Credit Union Ltd. c. Xyloid Industries Ltd.*, [1980] 1 R.C.S. 1182, à la p. 1198, en affirmant: «Je trouve le raisonnement suivi dans l'arrêt *Deslauriers* tout à fait convaincant . . .»

c

d

Les dispositions de l'art. 18 devraient donc prévaloir à moins d'incompatibilité avec celles de la *Loi sur la faillite*. Les articles 47 et 107 de la Loi sont ainsi conçus:

e

47. Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants:

a) les biens détenus par le failli en fiducie pour toute autre personne,

f

. . .

107. (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli doivent être distribués d'après l'ordre de priorité de paiement suivant:

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. . .

j) les réclamations, non précédemment mentionnées au présent article, de la Couronne du chef du Canada ou d'une province du Canada, *pari passu*, nonobstant tout privilège statutaire à l'effet contraire.

h

La théorie de la prépondérance de la loi fédérale ne peut s'appliquer que s'il y un conflit véritable dans l'application des lois fédérale et provinciale. Ce principe a été énoncé dans l'arrêt *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, dans lequel le juge Dickson, maintenant Juge en chef, affirme à la p. 191:

i

En principe, il ne semble y avoir aucune raison valable de parler de prépondérance et d'exclusion sauf lorsqu'il y a un conflit véritable, comme lorsqu'une loi dit «oui» et que l'autre dit «non»; «on demande aux mêmes citoyens

j

1989 CanLII 43 (SCC)

are being told to do inconsistent things"; compliance with one is defiance of the other.

In this case there is no conflict as the property which was subject to s. 18 of the *Social Service Tax Act* never at any time became the property of the bankrupt and is therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the *Bankruptcy Act*. On a plain reading of s. 47 of the *Bankruptcy Act* there is no conflict created by the two statutes.

It is true that this Court has in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785, recognized and emphasized that provinces cannot, by means of their own legislation, create priorities under the *Bankruptcy Act*. However, s. 18 has not created a priority. It did no more than give statutory recognition to a valid trust. It then eliminated the necessity of setting up a separate bank account for sales tax moneys and substituted a system of registration and record-keeping to control these funds which never at any time belonged to the vendor trustee. That latter step did not alter the existence of the valid trust of the funds collected from the purchasers for payment to the province. I do not think that the decision in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, *supra*, can be taken to have altered the meaning of the words "property of the bankrupt" contained in s. 47 of the *Bankruptcy Act*.

This appears to be the opinion expressed by Anne E. Hardy, the author of *Crown Priority in Insolvency* (1986). She concedes that in the interest of consistency with *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, *supra*, the lien portion of the deemed trust section should probably be held to be ineffective on the bankruptcy of the trustee. Nonetheless at p. 107 she sets out her position in this way:

> Thus, as a matter of interpretation, it is questionable to limit the scope of section 47(*a*) of the Bankruptcy Act to trusts which either exist in fact or do not benefit the Crown or a creditor whose claim is referred to in subsection 107(1) of the Act. Until the Act is amended to permit the courts to construe section 47 in this manner, they are probably not justified in taking this

d'accomplir des actes incompatibles»; l'observance de l'une entraîne l'inobservance de l'autre.

a

En l'espèce, il n'y a pas de conflit puisque le bien visé par l'art. 18 de la *Social Service Tax Act* n'est jamais devenu la propriété de la faillie et n'est donc pas sujet à répartition comme le sont les biens de la faillie en vertu de l'art. 107 de la *Loi sur la faillite*. Selon le sens clair de l'art. 47 de la *Loi sur la faillite*, il n'y a pas de conflit entre les deux lois.

b

c

Il est vrai que, dans l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785, cette Cour a reconnu et souligné que les provinces ne peuvent, par leurs propres lois, établir un ordre de priorité en vertu de la *Loi sur la faillite*. Cependant, l'art. 18 n'établit pas de priorité. Il ne fait rien de plus que reconnaître la validité d'une fiducie. Il élimine ainsi la nécessité d'établir un compte de banque distinct pour les montants de taxe de vente perçus en y substituant un système d'enregistrement et de comptabilité qui permet de contrôler ces fonds qui n'appartiennent jamais au marchand fiduciaire. Cette dernière mesure n'affecte pas la validité de la fiducie relative aux sommes perçues des acheteurs pour fins de versement à la province. Je ne crois pas qu'on puisse considérer que l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, précité, a changé le sens de l'expression «les biens d'un failli» figurant à l'art. 47 de la *Loi sur la faillite*.

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Cela semble être l'avis qu'exprime Anne E. Hardy, dans son ouvrage intitulé *Crown Priority in Insolvency* (1986). Elle reconnaît que si l'on se conforme à l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, précité, il faut tenir pour inopérante la disposition relative au privilège dans l'article qui traite de la fiducie réputée, en cas de faillite du fiduciaire. Néanmoins, elle exprime l'avis suivant, à la p. 107:

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> [TRADUCTION] Donc, il est douteux d'adopter une interprétation qui restreint la portée de l'alinéa 47*a*) de la Loi sur la faillite aux fiducies qui existent dans les faits ou à celles qui ne profitent pas à la Couronne ou à un créancier dont la réclamation est mentionnée au paragraphe 107(1) de la Loi. Tant que la Loi n'aura pas été modifiée pour permettre aux tribunaux d'interpréter

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1989 CanLII 43 (SCC)

approach. The *Coopers & Lybrand* case therefore appears to be incorrectly decided. The judgments in most cases which have upheld statutory deemed trusts in bankruptcy and refused to rank the claims covered by them under subsection 107(1) of the Act are preferable.

As argued above, trusts should generally be upheld on the bankruptcy of the trustee regardless of the manner in which they arise. It is possible, however, that certain types be deemed trust provisions should be held to be ineffective and that a valid trust would therefore not come into existence. Most of the trust cases decided since *Re Bourgault* have distinguished that case because it did not discuss trust provisions or the relationship between the trusts covered by section 47(*a*) and subsection 107(1) of the Bankruptcy Act. Some of these decisions dealt with trust provisions under which an amount deemed to be held in trust had been made a lien and charge on the assets of the trustee.

That view should I think prevail.

Furthermore, it seems that the trust although imposed by statute contains all the essential characteristics required of a trust. In order for a trust to be recognized in equity, there had to be three fundamental aspects complied with, that is to say there had to be certainty of intention, certainty of subject matter and certainty of objects. It is conceded that the statute establishes certainty of intention and of object. The respondent argues that there cannot be certainty of subject matter because the trust property cannot be identified and that thus trust in the traditional sense has not come into existence. However, here the subject matter was clearly identified at the moment of the sales by the vendor (Tops). The only issue that remained was whether or not the trust property could be identified so that such a trust could succeed in a tracing action. This subject matter was addressed by Professor Waters in the *Law of Trusts in Canada* (2nd ed. 1984), at pp. 119-22:

When the courts say that there must be certainty of subject-matter, they mean that the property must either

ainsi l'article 47, il ne leur sera probablement pas possible de le faire. L'arrêt *Coopers & Lybrand* semble donc critiquable. Les décisions plus nombreuses qui ont confirmé la validité des fiducies légales réputées, en cas de faillite, et refusé d'établir la priorité des réclamations qui y sont assujetties selon le paragraphe 107(1) de la Loi sont préférables.

Comme je l'ai déjà dit, il faut généralement confirmer les fiducies en cas de faillite du fiduciaire quelle que soit leur origine. Il est toutefois possible que certains types de dispositions relatives aux fiducies réputées doivent être tenus pour inopérants et qu'une fiducie valide ne voie pas le jour. Dans la plupart des décisions qui ont porté sur des fiducies depuis la décision *Re Bourgault*, on a établi des distinctions d'avec cette dernière puisque celle-ci ne traitait pas des dispositions portant fiducie ou du lien entre les fiducies visées par l'alinéa 47*a*) et le paragraphe 107(1) de la Loi sur la faillite. Certaines de ces décisions portaient sur des dispositions en matière de fiducie en vertu desquelles une somme réputée détenue en fiducie constituait un privilège et une sûreté grevant les biens du fiduciaire.

C'est l'avis qu'il faut, selon moi, adopter.

De plus, il semble que même si elle est imposée par la loi, la fiducie comporte toutes les caractéristiques essentielles requises d'une fiducie. Pour être valide en *equity*, la fiducie devait remplir trois conditions fondamentales: il devrait y avoir certitude quant à l'intention, certitude quant aux biens sujets à la fiducie et certitude quant aux bénéficiaires. On reconnaît que la Loi établit la certitude quant à l'intention et la certitude quant au bénéficiaire. L'intimée soutient qu'il ne peut y avoir de certitude quant aux biens sujets à la fiducie puisqu'il est impossible d'identifier les biens en fiducie et qu'en conséquence aucune fiducie, au sens traditionnel du terme, n'a vu le jour. Cependant, en l'espèce, les biens sujets à la fiducie ont été clairement identifiés au moment des ventes effectuées par le marchand (Tops). La seule question qu'il restait à résoudre était de savoir si les biens en fiducie pouvaient être identifiés de manière à ce que cette fiducie puisse avoir gain de cause dans une action en droit de suite. Le professeur Waters a abordé cette question dans l'ouvrage intitulé *Law of Trusts in Canada* (2e éd. 1984), aux pp. 119 à 122:

[TRADUCTION] Quand les tribunaux affirment qu'il doit y avoir certitude quant aux biens sujets à la fiducie,

1989 CanLII 43 (SCC)

be described in the trust instrument, or there must be "a formula or method given for identifying it."

. . .

In determining certainty, what the courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject-matter.

He distinguishes this question from the tracing issue:

Initial ascertainability does not exist, so far as case law is concerned, unless specific property is earmarked as *the* trust property. Once this has occurred, and the trust has come into effect, the trust beneficiary can trace that property, whether it is converted into other forms, or, if money, it is mixed with other funds. [Emphasis in original.]

There can be no doubt that the statute provides a clear formula for establishing the trust property, that is to say the sales tax, and therefore certainty of subject matter does indeed exist. The three certainties of intention, object and subject matter are thus established by statute. It could not be said that funds which were collected by Tops for sales tax became the property of Tops on the ground that the certainties required of a trust by equity do not exist as the statute has validly created them.

Neither could it be said that the statutory trust funds (the sales tax collected) became the property of the bankrupt Tops by reason of the fact that Tops improperly mingled those funds with its own property. In equity, funds mingled in this way remained impressed with their trust obligations. This left the beneficiary with two possible recourses against the trustee for its wrongful conduct. The beneficiary might either seek to recover the trust property by itself through the remedy of tracing or might choose instead to seek compensation for the loss by means of an action against the trustee.

Although there is some dispute as to whether at common law funds can be "followed" once they have been mixed with the defendant's own funds, in equity those monies can be traced "either as a

ils veulent dire que ces biens doivent être décrits dans l'acte de fiducie ou qu'il doit «exister une formule ou méthode permettant de les identifier.»

. . .

a Pour déterminer la certitude, les tribunaux s'intéressent à la certitude de notion plutôt qu'à la question de savoir s'il est trop difficile de vérifier quels sont les biens sujets à la fiducie.

b Il distingue cette question de celle du droit de suite:

[TRADUCTION] Selon la jurisprudence, il n'y a aucune possibilité de vérification au départ s'il n'y a pas de biens précis définis comme étant *les* biens en fiducie. Du *c* moment que cela a été fait et que la fiducie a vu le jour, son bénéficiaire peut exercer un droit de suite sur ces biens, peu importe que ceux-ci aient été transformés ou, s'il s'agit d'une somme d'argent, qu'elle ait été confondue avec d'autres fonds. [En italique dans l'original.]

d Il n'y a pas de doute que la Loi établit un moyen clair de déterminer le bien qui est en fiducie, c'est-à-dire la taxe de vente, de sorte qu'il y a certitude quant au bien sujet à la fiducie. Les trois *e* certitudes, savoir la certitude quant à l'intention, la certitude quant aux biens sujets à la fiducie et la certitude quant au bénéficiaire sont établies par la Loi. On ne saurait dire que les montants de taxe de vente perçus par Tops sont devenus sa propriété *f* parce que les certitudes requises pour qu'il y ait fiducie en *equity* n'existent pas puisque la Loi les a validement établies.

On ne saurait dire non plus que les fonds en *g* fiducie légale (la taxe de vente perçue) sont devenues la propriété de la faillie Tops du fait que celle-ci les a confondus, à tort, avec ses propres biens. En *equity*, les fonds ainsi confondus demeurent assujettis aux obligations découlant de la fidu- *h* cie. Dans ce cas, le bénéficiaire disposait de deux recours possibles contre le fiduciaire en raison de la conduite injustifiée de ce dernier. Le bénéficiaire pourrait soit chercher à récupérer les biens *i* en fiducie eux-mêmes par action en droit de suite ou il pourrait choisir de se faire indemniser de la perte par action intentée contre le fiduciaire.

Bien qu'il y ait une certaine controverse quant à *j* savoir si, en *common law*, ces fonds sont susceptibles de droit de suite après avoir été confondus avec les propres fonds du défendeur, en *equity* ces

1989 CanLII 43 (SCC)

separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund": *Re Diplock's Estate*, [1948] Ch. 465, at p. 521, [1948] 2 All E.R. 318, at p. 347 (C.A.), *per* Lord Green M.R.; aff'd *sub nom. Min. of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.) The limits to a tracing action are largely fixed by the difficulties and ultimately the prohibitive excuse of providing the necessary accounts. See D. W. M. Waters, *supra*, at pp. 1037 ff. There is no reason why a statutorily constituted trust cannot provide an advantage over a privately constituted trust by recognizing the existence of the trust in property held by the trustee without requiring the beneficiary to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies articulated in *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, *supra*, and *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061. It would thus seem that the statutory trust complies with the requirements of a valid trust that would be recognized in equity.

If, as stated in *Deputy Minister of Revenue v. Rainville*, mechanics' liens or construction liens may be recognized, although it would be impossible to trace the funds of the sub-contractors in the commingled accounts of the general contractor, so too should the statutory trust pertaining to sales tax be recognized.

Nor will such a conclusion create practical problems. If the proposed trustee in bankruptcy is faced with the question as to whether or not the assets are subject to a trust, an application may be made to the court to determine that issue at the outset of the proceedings. Further, if there is a dispute between those claiming a trust interest it can be determined on the basis of priority predicated upon the date on which the trust arose.

sommes peuvent faire l'objet d'un droit de suite [TRADUCTION] «soit à titre de sommes distinctes, soit à titre de sommes confondues ou à titre de bien caché dans les biens acquis avec ces sommes»: *Re Diplock's Estate*, [1948] Ch. 465, à la p. 521, [1948] 2 All E.R. 318, à la p. 347 (C.A.), le maître des rôles lord Greene, décision confirmée sous l'intitulé *Min. of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.) Les difficultés et, en fin de compte, le coût prohibitif de la comptabilité nécessaire fixent dans une large mesure les limites de l'action en droit de suite. Voir D. W. M. Waters, précité, aux pp. 1037 et suiv. Rien n'interdit qu'une fiducie établie par la loi offre un avantage sur une fiducie établie par un particulier en reconnaissant l'existence d'une fiducie à l'égard des biens détenus par le fiduciaire sans que le bénéficiaire ait à engager l'action excessivement coûteuse en droit de suite sur les sommes confondues. Cet avantage ne devrait pas dépouiller les biens en fiducie légale de leur caractère fiduciaire ni les soustraire à l'application des principes énoncés dans les arrêts *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35, *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, précité, et *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061. Il semblerait donc que les fiducies établies par la loi remplissent les conditions de validité des fiducies reconnues en *equity*.

Si comme on le dit dans l'arrêt *Sous-ministre du Revenu c. Rainville*, il est possible de reconnaître un privilège de constructeur malgré l'impossibilité de retracer les sommes des sous-traitants dans les comptes confondus de l'entrepreneur général, il faut aussi reconnaître l'existence de la fiducie légale relative à la taxe de vente.

Cette conclusion ne crée pas non plus de problème pratique. Si le syndic de faillite proposé doit déterminer si les biens font l'objet d'une fiducie, il pourra s'adresser aux tribunaux pour faire trancher cette question dès le début des procédures. De plus, s'il surgit un différend entre ceux qui invoquent une fiducie, il pourra être résolu en fonction de l'ordre de priorité qui découle de la date à laquelle la fiducie a vu le jour.

1989 CanLII 43 (SCC)

Disposition

I conclude therefore that the trust described in s. 18 of the British Columbia *Social Service Tax Act* is not in any sense a claim against the property of the bankrupt so as to conflict with the policy underlying s. 107(1) of the *Bankruptcy Act* as that policy has been expounded in *Deputy Minister of Revenue v. Rainville*; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board* and *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)* for the following reasons:

(a) the sums constituting the trust were never the property of the bankrupt, but were transferred from purchasers of vehicles to the provincial Crown, for whom Tops acted as trustee, in satisfaction of an obligation incurred by those purchasers;

(b) the trust was validly constituted in that it complied with the three certainties required of trusts by the law of equity: s. 18 of the *Social Service Tax Act* does not dispense with those certainties, but conforms to them, in the same way that a contractual trust instrument must;

(c) the only relevant distinction between this statutory trust and a contractual express trust lies in the deemed tracing remedy provided by the statute. The existence of this remedy

  (i) does not negate the trusts;

  (ii) is largely facilitative and thus does not take the trust out of the policy enunciated in *Deputy Minister of Revenue v. Rainville*; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board* and *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)*;

(d) the trust therefore properly falls within s. 47(*a*) of the *Bankruptcy Act* and outside the property of the bankrupt, as that term is to be understood in light of the policy underlying s. 107(1) of the Act.

I would therefore answer the constitutional question as follows:

Dispositif

Je conclus donc que la fiducie décrite à l'art. 18 de la *Social Service Tax Act* ne constitue nullement une réclamation contre les biens de la faillie de manière à entrer en conflit avec le principe sous-jacent du par. 107(1) de la *Loi sur la faillite*, énoncé dans les arrêts *Sous-ministre du Revenu c. Rainville, Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board* et *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, pour les motifs suivants:

a) les sommes en fiducie ne sont jamais devenues la propriété de la faillie, mais elles sont passées des acquéreurs de véhicules à Sa Majesté du chef de la province, pour le compte de laquelle Tops agissait en qualité de fiduciaire, conformément à une obligation contractée par ces acquéreurs;

b) la fiducie a été constituée régulièrement parce qu'elle comportait les trois certitudes requises pour qu'il y ait fiducie en *equity*; l'art. 18 de la *Social Service Tax Act* ne dispense pas de satisfaire à ces trois certitudes, mais les respecte de la même manière qu'un acte de fiducie conventionnel doit le faire;

c) la seule différence pertinente entre cette fiducie légale et une fiducie conventionnelle expresse réside dans le recours réputé en droit de suite qu'accorde la Loi. L'existence de ce recours

  i) ne rend pas la fiducie nulle;

  ii) est surtout auxiliaire et ne soustrait donc pas la fiducie à l'application du principe énoncé dans les arrêts *Sous-ministre du Revenu c. Rainville*, *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, et *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*;

d) la fiducie relève donc de l'al. 47*a*) de la *Loi sur la faillite* et ne fait pas partie des biens du failli au sens que doit avoir cette expression selon le principe qui sous-tend le par. 107(1) de la Loi.

Je suis donc d'avis de répondre ainsi à la question constitutionnelle:

1989 CanLII 43 (SCC)

Are the provisions of s. 18(1) of the *Social Service Tax Act*, R.S.B.C. 1979, c. 388, as amended, inoperative by reason of being in conflict with s. 107(1)(*j*) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3?

Answer: No.

I would allow the appeal, set aside the decision of the Court of Appeal and that of the chambers judge and direct that the special case be answered "the defendant was not correct in granting the Canadian Imperial Bank of Commerce priority over the statutory trust of the plaintiff."

Appeal dismissed, CORY J. *dissenting.*

Solicitor for the appellant: The Ministry of the Attorney General of British Columbia, Victoria.

Solicitors for the respondent: Davis & Company, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: The Department of the Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Gordon E. Pilkey, Winnipeg.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland: The Attorney General of Newfoundland. St. John's.

Les dispositions du par. 18(1) de la *Social Service Tax Act*, R.S.B.C. 1979, chap. 388 et ses modifications, sont-elles inopérantes pour le motif qu'elles sont incompatibles avec les dispositions de l'al. 107(1)*j*) de la *Loi sur la faillite*, S.R.C. 1970, chap. B-3?

Réponse: Non

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel et la décision rendue par le juge en chambre et d'ordonner de répondre ceci à l'exposé de cause: «la défenderesse a eu tort d'accorder à la Banque canadienne impériale de commerce la priorité sur la fiducie légale de la demanderesse».

Pourvoi rejeté, le juge CORY *est dissident.*

Procureur de l'appelante: Le ministère du Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intimée: Davis & Company, Vancouver.

Procureur de l'intervenant le procureur général du Canada: Le sous-procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Procureur de l'intervenant le procureur général du Québec: Le procureur général du Québec, Ste-Foy.

Procureur de l'intervenant le procureur général de la Nouvelle-Écosse: Le ministère du Procureur général de la Nouvelle-Écosse, Halifax.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick: Le procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général du Manitoba: Gordon E. Pilkey, Winnipeg.

Procureur de l'intervenant le procureur général de l'Alberta: Le procureur général de l'Alberta, Edmonton.

Procureur de l'intervenant le procureur général de Terre-Neuve: Le procureur général de Terre-Neuve, St. John's.

1989 CanLII 43 (SCC)

Rogers Communications Incorporated *Appellant*

v.

Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C. T. Mui, William Neal, Katherine Sheila Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen

Rogers Communications Incorporated *Appelante*

c.

Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C. T. Mui, William Neal, Katherine Sheila Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen

2006 SCC 28 (CanLII)

Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young and National Trust Company *Respondents*

and

National Trust Company *Appellant*

v.

Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C. T. Mui, William Neal, Katherine Sheila

Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young et Compagnie Trust National *Intimés*

et

Compagnie Trust National *Appelante*

c.

Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C. T. Mui, William Neal, Katherine Sheila

2006 SCC 28 (CanLII)

Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young and Rogers Communications Incorporated *Respondents*

Indexed as: Buschau *v.* Rogers Communications Inc.

Neutral citation: 2006 SCC 28.

File No.: 30462.

2005: November 15; 2006: June 22.

Present: McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Pensions — Pension plan — Trust — Termination — Pension plan indicating that trust surplus to be distributed amongst remaining pension plan members in event of termination — Pension plan and trust agreement not providing for termination of trust by pension plan members — Whether members can rely on rule in Saunders v. Vautier to terminate trust — Whether recourse available to members under federal pension benefits standards legislation — Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.), s. 29(2), (11).

The individual respondents are members of a pension plan ("Plan"). The Plan and the trust were

Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young et Rogers Communications Incorporated *Intimés*

Répertorié : Buschau *c.* Rogers Communications Inc.

Référence neutre : 2006 CSC 28.

N° du greffe : 30462.

2005 : 15 novembre; 2006 : 22 juin.

Présents : La juge en chef McLachlin et les juges Bastarache, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Pensions — Régime de retraite — Fiducie — Cessation — Régime de retraite indiquant que, en cas de cessation, le surplus de la fiducie sera réparti entre les participants au régime de retraite restants — Régime de retraite et convention de fiducie ne prévoyant pas que les participants au régime de retraite peuvent mettre fin à la fiducie — Les participants peuvent-ils invoquer la règle de Saunders c. Vautier pour mettre fin à la fiducie? — Ont-ils un recours en vertu de la loi fédérale sur les normes de prestation de pension? — Loi de 1985 sur les normes de prestation de pension, L.R.C. 1985, ch. 32 (2e suppl.), art. 29(2), (11).

Les personnes intimées sont des participants à un régime de retraite (« régime »). Le régime et la fiducie

2006 SCC 28 (CanLII)

established in 1974 as a defined benefit plan funded solely by the employer for the benefit of employees of a company that RCI acquired in 1980. It provided that, in the event of termination, the surplus remaining in the trust was to be distributed amongst the remaining members, but neither the trust agreement nor the Plan provided, at any time, for termination of the trust by employees. The Plan developed a large actuarial surplus. In 1981, RCI amended the Plan so that any surplus funds remaining on termination would revert to RCI and, in 1984, it closed the Plan to new employees. RCI began taking contribution holidays the following year and was refunded $968,285 from the surplus. In 1992, it merged the Plan retroactively with other RCI pension plans. The Plan members initiated a first action against RCI and the Court of Appeal concluded (1) that the merger was valid but did not affect the existence of the Plan trust as a separate trust; and (2) that the members were at liberty to institute proceedings to terminate the trust based on the rule in *Saunders v. Vautier*, to the extent that it was applicable. According to that rule, the terms of a trust can be varied or the trust can be terminated if all beneficiaries of the trust, being of full legal capacity, consent. The court also concluded that the members retained the right to distribution of the surplus upon termination. Relying on the common law rule, the members initiated a second action and succeeded in obtaining order terminating the Plan. The Court of Appeal set aside a part of the chambers judge's decision, finding that a court did not have the power under the *Trust and Settlement Variation Act* to consent on behalf of contingent *sui juris* beneficiaries. The court found that, provided that all the required consents were obtained, the members will be at liberty to invoke the common law rule. It also found that RCI could not amend the Plan to permit the addition of new members. Since questions could arise concerning the "mechanics" of the termination, the trustee would have to satisfy itself that all the conditions and all statutory requirements had been met.

Held: The appeal should be allowed.

Per LeBel, Deschamps, Fish and Abella JJ.: The members of the Plan cannot invoke the rule in *Saunders v. Vautier* to terminate the trust. That rule is not easily incorporated into the context of employment pension plans. Such plans are heavily regulated. The *Pension Benefits Standards Act, 1985* ("*PBSA*") deals

des employés d'une compagnie dont RCI a fait l'acquisition en 1980 ont été établis en 1974 sous la forme d'un régime à prestations déterminées capitalisé uniquement par l'employeur. Ce régime prévoyait que, en cas de cessation, le surplus de la caisse en fiducie serait réparti entre les participants restants, mais la convention de fiducie et le régime n'ont jamais prévu que les employés pourraient mettre fin à la fiducie. Le régime en est venu à afficher un important surplus actuariel. En 1981, RCI a modifié le régime de manière à ce que tout surplus qui resterait au moment de la cessation lui revienne et, en 1984, elle a fermé le régime aux nouveaux employés. RCI a commencé à s'accorder des périodes d'exonération de cotisations l'année suivante et a obtenu le remboursement de la somme de 968 285 $ provenant du surplus. En 1992, elle a fusionné le régime rétroactivement avec d'autres régimes de retraite de RCI. Les participants au régime ont intenté une première action contre RCI et la Cour d'appel a conclu (1) que la fusion était valide mais n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte, et (2) qu'il était loisible aux participants d'entamer des procédures destinées à mettre fin à la fiducie en se fondant sur la règle de *Saunders c. Vautier*, dans la mesure où elle pouvait s'appliquer. Selon cette règle, il est possible de modifier les modalités d'une fiducie ou de mettre fin à la fiducie si les bénéficiaires de la fiducie ayant la pleine capacité juridique y consentent tous. La cour a aussi décidé que les participants conservaient le droit à la répartition du surplus en cas de cessation. Invoquant la règle de common law, les participants ont intenté une deuxième action et ont réussi a obtenir une ordonnance mettant fin au régime. La Cour d'appel a annulé une partie de la décision de la juge en chambre, statuant que la *Trust and Settlement Variation Act* n'habilitait pas une cour à consentir au nom d'éventuels bénéficiaires juridiquement autonomes. La cour a décidé que les participants seraient libres d'invoquer la règle de common law pourvu que le consentement de tous les participants et bénéficiaires ait été obtenu. Elle a ajouté que RCI ne pouvait pas modifier le régime pour permettre l'adhésion de nouveaux participants. Étant donné que des questions pouvaient se poser au sujet du « processus » de cessation, la fiduciaire devrait s'assurer que toutes les conditions et toutes les exigences légales ont été respectées.

Arrêt : Le pourvoi est accueilli.

Les juges LeBel, Deschamps, Fish et Abella : Les participants au régime ne peuvent invoquer la règle de *Saunders c. Vautier* pour mettre fin à la fiducie. Cette règle ne s'intègre pas facilement au contexte des régimes de retraite d'employeurs. Ces régimes sont fortement réglementés. La *Loi de 1985 sur les normes de*

2006 SCC 28 (CanLII)

extensively with the termination of plans and the distribution of assets, and it is clear from this explicit legislation that Parliament intended its provisions to displace the common law rule. To the extent that the *PBSA* provides a means to reach the distribution stage, it should prevail over the common law. Moreover, a pension trust is not a stand-alone instrument. In this case, the trust is explicitly made part of the Plan. It cannot be terminated without taking into account the Plan for which it was created and the specific legislation governing the Plan. The conclusion that the common law rule does not generally apply to traditional pension funds is reinforced by the fact that the *PBSA* provides mechanisms that protect members from inappropriate conduct by plan administrators. [2] [27-33]

prestation de pension (« *LNPP* ») traite abondamment de la cessation des régimes et de la répartition de l'actif, et il ressort clairement de ce texte législatif explicite que le législateur a voulu que ses dispositions supplantent la règle de common law. Dans la mesure où elle prévoit un moyen de parvenir à l'étape de la répartition, la *LNPP* doit primer la common law. De plus, une fiducie de retraite n'est pas un instrument distinct. En l'espèce, la fiducie fait explicitement partie du régime. On ne peut y mettre fin sans tenir compte du régime pour lequel elle a été créée et de la loi particulière qui s'applique à ce régime. La conclusion que la règle de common law ne s'applique pas généralement aux caisses de retraite traditionnelles est renforcée par le fait que la *LNPP* établit des mécanismes de protection des participants contre la conduite répréhensible des administrateurs du régime. [2] [27-33]

The *PBSA* is not a complete code, but when it provides recourse to pension plan members, they should use it. Here, the members of the Plan want the trust fund to be collapsed and distributed directly to them, but the available recourse is subject to the provisions of the *PBSA*. The Superintendent of Financial Institutions, who is responsible for the application of the *PBSA*, is in a position to deal with issues relating to termination or winding up. He can rule on questions of both fact and law, and all parties can make appropriate recommendations to him. He is also in the best position to monitor the orderly termination of the Plan in accordance with the *PBSA*, which is a condition precedent to distribution. Because all contributions ceased in 1984, the Superintendent could consider the Plan terminated under s. 29(2), which is not limited to solvency issues, and could decide whether the facts warrant winding up the part of the RCI pension plan that relates to the Plan pursuant to s. 29(11) of the *PBSA*, which would have the effect of terminating the trust. Contribution holidays, although legitimate for funding purposes, can nevertheless be considered illegitimate if they hide an improper refusal to terminate a plan. Determining the validity of a reason given for not terminating a pension plan lies with the Superintendent and properly falls within his s. 29(2)(*a*) power. Whether RCI can amend the Plan to open it to new members is a question best left to the Superintendent. [2] [29] [35-36] [44-57]

La *LNPP* n'est pas un code exhaustif, mais lorsqu'elle offre un recours aux participants à un régime de retraite, ceux-ci devraient l'exercer. En l'espèce, les participants au régime veulent mettre fin à la caisse en fiducie et souhaitent que l'actif de la caisse soit réparti entre eux directement, mais le recours dont ils disposent est assujetti aux dispositions de la *LNPP*. Le surintendant des institutions financières, qui est responsable de l'application de la *LNPP*, est en mesure de traiter les questions de cessation ou de liquidation. Il peut trancher à la fois des questions de fait et des questions de droit, et les parties peuvent lui faire des recommandations appropriées. Il est aussi le mieux placé pour assurer la cessation ordonnée du régime conformément à la *LNPP*, qui est une condition préalable de la répartition. Étant donné qu'on a arrêté complètement de payer des cotisations en 1984, le surintendant pourrait considérer qu'il a été mis fin au régime en vertu du par. 29(2), qui ne porte pas uniquement sur des questions de solvabilité, et pourrait décider si les faits justifient la liquidation de la partie du régime de retraite de RCI qui concerne le régime conformément au par. 29(11) *LNPP*, ce qui aurait pour effet de mettre fin à la fiducie. Bien qu'elles soient légitimes aux fins de capitalisation, les périodes d'exonération de cotisations peuvent néanmoins être jugées illégitimes si elles cachent un refus injustifié de mettre fin à un régime. Il appartient au surintendant, conformément au pouvoir que lui confère l'al. 29(2)*a*), de déterminer la validité d'une raison donnée pour ne pas mettre fin à un régime de retraite. Il est de son ressort de décider si RCI peut modifier le régime de manière à l'ouvrir à de nouveaux participants. [2] [29] [35-36] [44-57]

Per McLachlin C.J. and Bastarache and Charron JJ.: The rule in *Saunders v. Vautier* does not apply in the circumstances of this case, and any application

La juge en chef McLachlin et les juges Bastarache et Charron : La règle de *Saunders c. Vautier* ne s'applique pas en l'espèce et toute demande relative à la cessation

2006 SCC 28 (CanLII)

regarding the termination of the Plan and the trust must be dealt with in accordance with the terms of the Plan and the provisions of the *PBSA*. [100]

The *PBSA* is a comprehensive statutory scheme which contains detailed provisions for the termination of pension plans and the distribution of plan assets. It recognizes that employers are generally, as in the case at bar, entitled to terminate a pension plan, but it also empowers the Superintendent of Financial Institutions to terminate such plans in specified situations, including those referred to in s. 29. The Superintendent's supervisory focus is primarily on matters affecting the solvency or the financial condition of a pension plan. There is no provision in the *PBSA* for plan beneficiaries to terminate a pension plan or for any party to terminate a trust under which pension fund contributions are held as security for the payment of plan benefits prior to, and independent of, the termination of the plan. Beneficiaries may request that the Superintendent exercise his discretionary power under s. 29(2), but he does not have a general discretion to terminate pension plans and may comply with such a request only where the stipulated pre-conditions are met. In the instant case, none of the statutory grounds for termination of the Plan are present. The words "suspension or cessation of employer contributions" in respect of the Superintendent's power to terminate a pension plan under s. 29(2)(*a*) must be construed as referring to an employer's failure to make required contributions; they do not extend to contribution holidays where the employer is relieved from making contributions by reason of a surplus in the plan. [79-88]

Because the Plan members have only a contingent interest in the trust surplus, the rule in *Saunders v. Vautier* cannot be invoked to terminate the trust. It requires that beneficiaries seeking early termination possess the sum total of vested, not contingent, interests in the trust corpus. The members do not have absolute entitlement to the surplus until the Plan and trust are terminated. Furthermore, the common law rule also requires the consent of all parties who have an interest in the trust property. Since both the *PBSA* and the Plan include survivor rights, those rights cannot be overridden by the consent of present Plan members and other beneficiaries, or by the courts. Nor can s. l(b) of the *Trust and Settlement Variation Act* assist in this respect. The court does not have the power to consent on behalf of current spouses and common law partners who are of

du régime et de la fiducie doit être examinée conformément aux modalités du régime et aux dispositions de la *LNPP*. [100]

La *LNPP* est un régime législatif complet qui comporte des dispositions détaillées régissant la cessation des régimes de retraite et la répartition de leur actif. Il reconnaît que les employeurs ont généralement le droit de mettre fin à un régime de retraite, comme c'est le cas en l'espèce, mais il habilite également le surintendant des institutions financières à mettre fin à ces régimes dans des situations précises, y compris celles mentionnées à l'art. 29. La supervision assurée par le surintendant porte principalement sur les questions touchant la solvabilité ou la situation financière d'un régime de retraite. Aucune disposition de la *LNPP* ne permet aux bénéficiaires d'un régime de mettre fin à un régime de retraite ou à quiconque de mettre fin à une fiducie en vertu de laquelle des cotisations à une caisse de retraite sont détenues à titre de garantie du versement des prestations du régime, avant la cessation du régime et indépendamment de celle-ci. Les bénéficiaires peuvent demander au surintendant d'exercer le pouvoir discrétionnaire que lui confère le par. 29(2), mais celui-ci n'a aucun pouvoir discrétionnaire général de mettre fin à des régimes de retraite et ne peut répondre favorablement à une telle demande que si les conditions préalables énoncées sont remplies. Aucune des raisons, prévues par la Loi, de mettre fin au régime n'existe en l'espèce. L'expression « la suspension ou l'arrêt de paiement des cotisations patronales », en ce qui concerne le pouvoir de mettre fin à un régime de retraite que l'al. 29(2)*a*) confère au surintendant, doit être interprétée comme désignant le défaut de l'employeur d'effectuer les cotisations requises; elle ne vise pas les périodes d'exonération de cotisations pendant lesquelles l'employeur est dispensé d'effectuer des cotisations en raison de l'existence d'un surplus dans le régime. [79-88]

Du fait que les participants au régime ont seulement un intérêt éventuel dans le surplus de la fiducie, la règle de *Saunders c. Vautier* ne peut pas être invoquée pour mettre fin à la fiducie. Cette règle exige que les bénéficiaires qui sollicitent la cessation anticipée possèdent tous les intérêts dévolus et non éventuels dans le capital de la fiducie. Les participants n'ont un droit absolu au surplus qu'une fois qu'il a été mis fin au régime et à la fiducie. De plus, la règle de common law exige aussi le consentement de toutes les parties ayant un intérêt dans les biens en fiducie. Étant donné que la *LNPP* et le régime incluent tous les deux les droits de survivant, ces droits conférés par la loi ne peuvent être écartés ni par le consentement des participants au régime et autres bénéficiaires actuels, ni par les tribunaux. L'alinéa lb) de la *Trust and Settlement Variation Act* n'est pas plus

2006 SCC 28 (CanLII)

full legal capacity, nor can consent be given on behalf of unascertainable future spouses and common law partners, since the termination of the Plan would presumably not be in their best interests. [90] [98-99]

utile à cet égard. La cour n'a pas le pouvoir de consentir au nom des époux et conjoints de fait actuels qui ont la pleine capacité juridique, ni en celui de futurs époux et conjoints de fait non identifiables, étant donné que la cessation du régime ne serait probablement pas dans leur intérêt. [90] [98-99]

Trust law cannot in the present case prevail over the contract and the governing legislation. Applying the rule in *Saunders v. Vautier* would contradict the reasonable contractual expectations of the parties, since the terms of the Plan do not give rise to a reasonable expectation that the trust could be terminated by the members over RCI's objections so that the members might obtain the surplus. Such a result would permit members of a pension plan to vary its terms without the employer's consent. Applying the common law rule would disregard the employer's unique role in respect of the Plan and the trust, circumvent the terms of the contract at the root of the trust, and make the legislative framework irrelevant. In particular, applying it would disregard s. 29(9) and permit the termination of the Plan and the trust without the involvement of the employer as plan administrator, and without the Superintendent's approval. Finally, introducing the rule in *Saunders v. Vautier* into the private pension system would disrupt the fair and delicate balance between the interests of the employer and employees, and would be contrary to the legislative objective of encouraging the establishment and maintenance of private pension plans. [92-94] [97]

En l'espèce, le droit des fiducies ne peut pas l'emporter sur le contrat et la loi applicable. L'application de la règle de *Saunders c. Vautier* irait à l'encontre des attentes contractuelles raisonnables des parties étant donné que les modalités du régime ne permettent pas aux participants de s'attendre raisonnablement à ce qu'en dépit des objections de RCI ils puissent mettre fin à la fiducie de manière à pouvoir toucher le surplus. Un tel résultat permettrait aux participants à un régime de retraite d'en modifier les modalités sans le consentement de l'employeur. L'application de la règle de common law ne tiendrait pas compte du rôle unique que l'employeur joue à l'égard du régime et de la fiducie, contournerait les clauses du contrat à l'origine de la fiducie et ferait perdre toute pertinence au cadre législatif. En particulier, son application ne tiendrait pas compte du par. 29(9) et permettrait de mettre fin au régime et à la fiducie sans la participation de l'employeur en tant qu'administrateur du régime et sans l'approbation du surintendant. Enfin, l'introduction de la règle de *Saunders c. Vautier* dans le système des régimes de retraite privés romprait le juste et délicat équilibre entre les intérêts de l'employeur et ceux de l'employé, et contreviendrait à l'objectif législatif consistant à encourager l'établissement et le maintien de régimes de retraite privés. [92-94] [97]

A court has no authority to assign the responsibilities of the administrator and the Superintendent to the trustee contrary to the legislative scheme, under which a process for terminating a pension plan has been established. [95]

Un tribunal n'a pas le pouvoir d'assigner à la fiduciaire les responsabilités de l'administrateur et du surintendant contrairement au régime législatif qui a établi un processus de cessation de régime de retraite. [95]

RCI's powers of amendment were not forfeited or estopped because of the closure of the Plan. Any termination of the Plan and any amendments to it must be examined in light of to the applicable provisions of the Plan and the *PBSA*. In the special context of pension plans, employers who administer such plans on behalf of their employees must always act in accordance with the spirit, purpose and terms of the plans, and in such a way as to ensure the protection of employees' pension benefits, not to reduce, threaten or eliminate them. [102-103]

RCI n'a pas été déchue de ses pouvoirs de modification ni empêchée de les exercer en raison de la fermeture du régime. La cessation et la modification du régime doivent être examinées en fonction des dispositions applicables du régime et de la *LNPP*. En raison du contexte particulier des régimes de retraite, l'employeur qui gère un tel régime pour le compte de ses employés doit toujours en respecter l'esprit, l'objet et les modalités et se comporter de manière à préserver les prestations de retraite des employés et non de manière à les réduire, à les compromettre ou à les éliminer. [102-103]

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2006 SCC 28 (CanLII)

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Not followed: *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; **referred to:** *Halifax School for the Blind v. Chipman*, [1937] S.C.R. 196; *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54; *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.*, [1991] 2 All E.R. 597.

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Irwin G. Nathanson, *Q.C.*, and *Stephen R. Schachter*, *Q.C.*, for the appellant/respondent Rogers Communications Inc.

Jennifer J. Lynch and *Joanne Lysyk*, for the appellant/respondent National Trust Co.

John N. Laxton, *Q.C.*, and *Robert D. Gibbens*, for the respondents Sandra Buschau et al.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Low et Thackray) (2004), 24 B.C.L.R. (4th) 85, 236 D.L.R. (4th) 18, [2004] 5 W.W.R. 10, 6 E.T.R. (3d) 236, 193 B.C.A.C. 258, 316 W.A.C. 258, 39 C.C.P.B. 247, [2004] B.C.J. No. 297 (QL), 2004 BCCA 80, et (2004), 27 B.C.L.R. (4th) 17, 239 D.L.R. (4th) 610, [2004] 7 W.W.R. 218, 9 E.T.R. (3d) 221, 197 B.C.A.C. 279, 323 W.A.C. 279, [2004] B.C.J. No. 991 (QL), 2004 BCCA 282, avec motifs supplémentaires (2004), 35 B.C.L.R. (4th) 248, 241 D.L.R. (4th) 766, [2005] 2 W.W.R. 67, 197 B.C.A.C. 279, p. 287, 323 W.A.C. 279, p. 287, [2004] B.C.J. No. 1321 (QL), 2004 BCCA 369, qui a infirmé des décisions de la juge Loo (2002), 100 B.C.L.R. (3d) 327, 44 E.T.R. (2d) 177, 30 C.C.P.B. 167, [2002] B.C.J. No. 865 (QL), 2002 BCSC 624, et (2003), 13 B.C.L.R. (4th) 385, [2003] 7 W.W.R. 341, 35 C.C.P.B. 199, [2003] B.C.J. No. 1025 (QL), 2003 BCSC 683, qui a accueilli une demande de cessation d'un régime de retraite. Pourvoi accueilli.

Irwin G. Nathanson, *c.r.*, et *Stephen R. Schachter*, *c.r.*, pour l'appelante/intimée Rogers Communications Inc.

Jennifer J. Lynch et *Joanne Lysyk*, pour l'appelante/intimée la Compagnie Trust National.

John N. Laxton, *c.r.*, et *Robert D. Gibbens*, pour les intimés Sandra Buschau et autres.

2006 SCC 28 (CanLII)

The judgment of LeBel, Deschamps, Fish and Abella was delivered by

1 DESCHAMPS J. — The 112 respondents are pension plan members who have been litigating for over 10 years to gain access to their pension trust fund. This case is about whether and how the fund can be distributed to them.

2 By 2002, the plan for which the trust was created, the Premier pension plan ("Plan"), had a surplus evaluated at $11 million. The Supreme Court and the Court of Appeal for British Columbia accepted the members' arguments and found that the trust used to fund the Plan ("Trust" or "Premier Trust") could be collapsed under the common law rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.). According to that rule, the terms of a trust can be varied or the trust can be terminated if all beneficiaries of the trust, being of full legal capacity, consent. For the reasons that follow, I am of the view that the common law rule does not apply to the Trust in the case at bar. The context and the purpose of pension plans do not generally lend themselves well to the common law rule. Moreover, a pension trust is not a stand-alone instrument. The Trust is explicitly made part of the Plan. It cannot be terminated without taking into account the Plan for which it was created and the specific legislation governing the Plan. Any recourse available to the members here is subject to the provisions of a federal statute, the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("*PBSA*"). In my view, the Superintendent of Financial Institutions ("Superintendent"), who is responsible for the application of the *PBSA*, is in a position to resolve the impasse that the members would face if the interpretation suggested by my colleague Bastarache J. were adopted.

3 In order to explain the particular context in which the termination of the Trust is sought, a few

Version française du jugement des juges LeBel, Deschamps, Fish et Abella rendu par

LA JUGE DESCHAMPS — Les 112 intimés sont des participants à un régime de retraite (« participants ») qui, depuis 10 ans, tentent par voie judiciaire d'avoir accès à leur caisse de retraite détenue en fiducie. Il s'agit, en l'espèce, de décider si l'actif de la caisse peut être réparti entre eux, et de quelle façon il peut l'être.

Dès 2002, le régime pour lequel la fiducie a été créée, à savoir le régime de retraite de Premier (« Régime »), affichait un surplus évalué à 11 millions de dollars. La Cour suprême et la Cour d'appel de la Colombie-Britannique ont retenu les arguments des participants et ont conclu qu'il pouvait être mis fin à la fiducie utilisée pour la capitalisation du Régime (« fiducie » ou « fiducie de Premier »), en application de la règle de common law établie dans *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.). Selon cette règle, il est possible de modifier les modalités d'une fiducie ou de mettre fin à la fiducie si les bénéficiaires de la fiducie ayant la pleine capacité juridique y consentent tous. Pour les motifs qui suivent, j'estime que la règle de common law ne s'applique pas à la fiducie en cause dans la présente affaire. En général, le contexte et l'objet des régimes de retraite ne se prêtent pas bien à l'application de la règle de common law. De plus, une fiducie de retraite n'est pas un instrument distinct. La fiducie fait explicitement partie du Régime. On ne peut y mettre fin sans tenir compte du régime pour lequel elle a été créée et de la loi particulière qui s'applique à ce régime. En l'espèce, tout recours ouvert aux participants est assujetti aux dispositions d'une loi fédérale, à savoir la *Loi de 1985 sur les normes de prestation de pension*, L.R.C. 1985, ch. 32 (2e suppl.) (« *LNPP* »). Selon moi, le surintendant des institutions financières (« surintendant »), qui est responsable de l'application de la *LNPP*, est en mesure de dénouer l'impasse dans laquelle les participants se trouveraient si l'interprétation préconisée par mon collègue le juge Bastarache était retenue.

Pour expliquer le contexte particulier dans lequel la cessation de la fiducie est demandée, il

2006 SCC 28 (CanLII)

facts will have to be elicited to situate the dispute between the members and their former employer. Then, to explain why the common law rule does not apply, it will be useful to briefly review pension plans in general and the Plan itself. Finally, I will comment on the relevant provisions of the *PBSA* that would allow the members to make a proper request to the Superintendent.

sera nécessaire de relater quelques faits permettant de situer le litige opposant les participants à leur ancien employeur. Ensuite, afin d'expliquer pourquoi la règle de common law ne s'applique pas, il sera utile d'examiner brièvement la question des régimes de retraite en général et le Régime lui-même. Enfin, je formulerai des observations sur les dispositions de la *LNPP* qui permettraient aux participants de présenter une demande légitime au surintendant.

I. Facts

I. Les faits

4 The Plan was established in 1974 for the employees of Premier Communication Ltd. It provides for defined benefits and is funded by the employer only. It states that the company expects to continue the Plan indefinitely, but that in the event of termination, the surplus remaining in the trust fund is to be distributed amongst the remaining members:

GENERAL RULE SEVEN – AMENDMENT OR TERMINATION OF PLAN

. . .

2. While the Company expects to continue the Plan indefinitely, it must and does reserve the right to terminate the Plan, if, at any time in the future, conditions should arise that indicate the necessity of such action.

   In the event of the termination of the Plan, the benefits being paid to Retired Members will be continued as provided for under the terms and provisions of the Plan. The balance of assets remaining in the Trust Fund, after all liabilities to Retired Members have been satisfied, will be distributed by the Committee among the remaining Members on the basis required under the provisions of Section 12 of the Pension Benefits Standards Act.

Le régime des employés de Premier Communication Ltd. a été établi en 1974. Il s'agit d'un régime à prestations déterminées capitalisé uniquement par l'employeur. Il prévoit que la compagnie s'attend à ce qu'il subsiste indéfiniment, mais que, en cas de cessation, le surplus de la caisse en fiducie sera réparti entre les participants restants :

[TRADUCTION]

SEPTIÈME RÈGLE GÉNÉRALE – MODIFICATION OU CESSATION DU RÉGIME

. . .

2. Bien que la compagnie s'attende à ce que le régime subsiste indéfiniment, elle doit se réserver, et par les présentes se réserve, le droit de mettre fin au régime si jamais des conditions commandent d'y mettre fin.

   En cas de cessation du régime, les prestations versées aux participants retraités seront maintenues conformément aux modalités et aux dispositions du régime. Après que toutes les dettes envers les participants retraités auront été acquittées, le comité répartira entre les autres participants l'actif restant de la caisse en fiducie, conformément aux dispositions de l'article 12 de la Loi sur les normes de prestation de pension.

5 In 1980, Rogers Cablesystems Inc. (which later became Rogers Communications Inc. ("Rogers")) acquired Premier Communication Ltd. In September 1983, the Plan's actuary was of the view that a surplus evaluated at approximately $800,000 could be used to improve benefits for members. On April 12, 1984, the actuary actually

En 1980, Rogers Cablesystems Inc. (devenue par la suite Rogers Communications Inc. (« Rogers »)) fait l'acquisition de Premier Communication Ltd. En septembre 1983, l'actuaire du Régime estime qu'un surplus évalué à environ 800 000 $ peut servir à bonifier les prestations des participants. Le 12 avril 1984, l'actuaire recommande effectivement

2006 SCC 28 (CanLII)

recommended improvements to the benefits. The actuary was replaced on May 22, 1984. On July 1, 1984, the Plan was closed to future employees. On July 11, 1984, Rogers asked the then trustee, Canada Trust, for a refund of part of its contributions. Canada Trust required a legal opinion before doing so. On October 31, 1984, Canada Trust was replaced by National Trust. On July 15, 1985, Rogers requested that the new trustee, National Trust, refund $968,285 to it, which National Trust did. By December 31, 1986, Rogers had also taken contribution holidays evaluated at $842,000. In December 1992, Rogers amended the Plan to merge it retroactively with four other pension plans in the Rogers Communications Inc. Pension Plan ("RCI Plan"). The views of the employees with respect to such a merger were known to Rogers, as can be seen from an internal memorandum dated July 16, 1990:

> It is clear that [the Premier employee representative] is not in favour of folding the Premier Plan into the RCI plan unless we can show clear benefit (unlikely scenario).

6 The long-term goal pursued by Rogers with respect to the Plan is stated in another internal memorandum dated April 22, 1993:

> You asked for an update on the status of the Premier Pension Plan. As you are aware, our objectives related to this plan were (i) to get at the surplus the plan had and (ii) minimize our administration (i.e. eliminate an audited statement and an annual regulatory filing, etc.).
>
> We were able to accomplish the objectives above by the amalgamation of all of the defined benefit plans into one plan. Therefore, the need to do anything further was redundant.

7 The members initiated the litigation against Rogers in 1995. They requested the return of the trust funds paid to Rogers in 1985 and a declaration that the funds belonged to them. The trial judge dismissed the claim on most of the issues ((1998), 54 B.C.L.R. (3d) 125). The members appealed. The Court of Appeal found that trust law imports its

de bonifier les prestations. Cet actuaire est remplacé le 22 mai 1984. Le 1er juillet 1984, le Régime est fermé aux futurs employés. Le 11 juillet 1984, Rogers demande à la fiduciaire d'alors, Canada Trust, de lui rembourser une partie de ses cotisations. Canada Trust estime devoir bénéficier d'un avis juridique avant de le faire. Le 31 octobre 1984, Canada Trust est remplacée par la Compagnie Trust National (« Trust National »). Le 15 juillet 1985, Rogers demande à la nouvelle fiduciaire, Trust National, de lui rembourser 968 285 $, ce que fait Trust National. Dès le 31 décembre 1986, Rogers s'accorde également des périodes d'exonération de cotisations évaluées à 842 000 $. En décembre 1992, Rogers modifie le Régime pour le fusionner rétroactivement avec quatre autres régimes de retraite dans le régime de retraite de Rogers Communications Inc. (« régime de RCI »). Comme l'indique une note de service interne datée du 16 juillet 1990, Rogers connaît le point de vue des employés au sujet de cette fusion :

> [TRADUCTION] Il est clair que [le représentant des employés de Premier] n'est pas en faveur de la fusion du régime de Premier avec le régime de RCI, à moins que nous puissions démontrer l'existence d'un avantage évident (ce qui est peu vraisemblable).

L'objectif à long terme que Rogers poursuit quant au Régime est exposé dans une autre note de service interne datée du 22 avril 1993 :

> [TRADUCTION] Vous avez demandé de faire le point sur le régime de retraite de Premier. Comme vous le savez, nos objectifs concernant ce régime étaient (i) d'avoir accès au surplus du régime et (ii) de réduire au minimum notre gestion (c'est-à-dire éliminer un état financier vérifié et un dépôt annuel réglementaire, etc.).
>
> Nous avons pu atteindre les objectifs susmentionnés en combinant tous les régimes à prestations déterminées en un seul régime. En conséquence, toute autre mesure devenait superflue.

Les participants entament les procédures judiciaires contre Rogers en 1995. Ils demandent la restitution des fonds en fiducie qui ont été versés à Rogers en 1985 et un jugement déclarant que ces fonds leur appartiennent. Le juge de première instance rejette leur demande à presque tous égards ((1998), 54 B.C.L.R. (3d) 125). Les participants

2006 SCC 28 (CanLII)

own rules that apply in addition to, and in precedence over, the law of contract and the rules of construction of contracts. To this extent and in view of Rogers' concession that the merger was not complete as regards the Plan, members of the Plan retained rights that were distinct from those of members of the other plans that had been merged with it in the RCI Plan. The Court of Appeal concluded that the merger of the Plan with the RCI Plan was valid but did not affect the existence of the Trust as a separate trust. The members were also at liberty to institute proceedings to terminate the Trust based on the rule in *Saunders v. Vautier* or on the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463, to the extent that either may be applicable. The Court of Appeal held that the employer's withdrawal of substantial funds from the surplus in 1985, which was admitted to have been in breach of trust, had been properly repaid to the trustee. Thus, the Plan's members retained the right to distribution of the surplus upon termination ((2001), 83 B.C.L.R. (3d) 261, 2001 BCCA 16 ("*Buschau No. 1*"), at paras. 63-68). This Court denied leave to appeal that decision, [2001] 2 S.C.R. vii.

interjettent appel. La Cour d'appel conclut que le droit des fiducies fait intervenir ses propres règles qui s'appliquent en sus du droit des contrats et des règles d'interprétation des contrats et qui les priment. Dans cette mesure et compte tenu du fait que Rogers a concédé que la fusion n'était pas complète quant au Régime, les participants au Régime conservent des droits distincts de ceux des participants aux autres régimes qui ont été fusionnés avec le leur dans le régime de RCI. La Cour d'appel statue que la fusion du Régime avec le régime de RCI est valide, mais qu'elle n'a aucun effet sur la fiducie qui continue d'exister comme une entité distincte. Il est également loisible aux participants d'entamer des procédures destinées à mettre fin à la fiducie en se fondant soit sur la règle de *Saunders c. Vautier* soit sur la *Trust and Settlement Variation Act*, R.S.B.C. 1996, ch. 463, dans la mesure où l'une ou l'autre peut s'appliquer. La Cour d'appel décide que les sommes importantes que l'employeur a retirées du surplus en 1985, retrait que celui-ci a admis avoir fait en violation d'une obligation fiduciaire, ont été dûment remboursées à la fiduciaire. Ainsi, les participants au Régime conservent le droit à la répartition du surplus en cas de cessation ((2001), 83 B.C.L.R. (3d) 261, 2001 BCCA 16 (« *Buschau nº 1* »), par. 63-68). Notre Cour refuse l'autorisation d'appeler de cette décision, [2001] 2 R.C.S. vii.

8

In 2001, the members applied to the Supreme Court of British Columbia for an order terminating the Plan. Loo J. ordered termination on the basis that the rule in *Saunders v. Vautier* was applicable and that s. 1(b) of the *Trust and Settlement Variation Act* provided the court with the jurisdiction to consent on behalf of those missing beneficiaries who were *sui juris* ((2002), 100 B.C.L.R. (3d) 327, 2002 BCSC 624). Rogers appealed.

En 2001, les participants demandent à la Cour suprême de la Colombie-Britannique de rendre une ordonnance mettant fin au Régime. La juge Loo ordonne la cessation pour le motif que la règle de *Saunders c. Vautier* s'applique et que l'al. 1b) de la *Trust and Settlement Variation Act* donne à la cour compétence pour consentir au nom des bénéficiaires juridiquement autonomes manquants ((2002), 100 B.C.L.R. (3d) 327, 2002 BCSC 624). Rogers interjette appel.

9

The Court of Appeal found that the members were at liberty to invoke the rule in *Saunders v. Vautier* provided that the consents of all members and beneficiaries had been obtained. It set aside a part of the chambers judge's decision based on the *Trust and Settlement Variation Act*, finding that a court did not have the power to consent on behalf of contingent *sui juris* beneficiaries. However, it

La Cour d'appel conclut que les participants sont libres d'invoquer la règle de *Saunders c. Vautier* pourvu que le consentement de tous les participants et bénéficiaires ait été obtenu. Elle annule une partie de la décision que la juge en chambre a rendue en se fondant sur la *Trust and Settlement Variation Act*, statuant qu'une cour n'a pas le pouvoir de consentir au nom d'éventuels bénéficiaires

2006 SCC 28 (CanLII)

provided the members with an opportunity to show that all the required consents had been obtained ((2004), 24 B.C.L.R. (4th) 85, 2004 BCCA 80 ("*Buschau No. 2*")). After receiving additional evidence and representation, the Court of Appeal found that the rule in *Saunders v. Vautier* could operate to terminate the trust. It recognized that questions could arise concerning the "mechanics" of the termination, but it was of the opinion that the trustee would have to satisfy itself that "[all] the conditions have been met and that all statutory requirements — including the payment of applicable taxes — have been complied with" before distributing the trust assets ((2004), 27 B.C.L.R. (4th) 17, 2004 BCCA 282 ("*Buschau No. 3*"), at para. 17). Rogers and the trustee appealed to this Court.

juridiquement autonomes. Toutefois, elle donne aux participants la possibilité de démontrer que tous les consentements requis ont été obtenus ((2004), 24 B.C.L.R. (4th) 85, 2004 BCCA 80 (« *Buschau n° 2* »)). Après avoir obtenu des éléments de preuve et des observations supplémentaires, la Cour d'appel décide que la règle de *Saunders c. Vautier* peut être appliquée pour mettre fin à la fiducie. Elle reconnaît que des questions peuvent se poser au sujet du [TRADUCTION] « processus » de cessation, mais elle estime que la fiduciaire doit s'assurer que [TRADUCTION] « [toutes] les conditions ont été remplies et toutes les exigences légales — dont le paiement des taxes applicables — ont été respectées » avant de répartir l'actif de la fiducie ((2004), 27 B.C.L.R. (4th) 17, 2004 BCCA 282 (« *Buschau n° 3* »), par. 17). Rogers et la fiduciaire interjettent appel devant notre Cour.

10 Rogers submits that the rule in *Saunders v. Vautier* does not apply. National Trust does not take issue with the Court of Appeal's order inasmuch as it determines the rights of Rogers or of the members. However, the trustee claims that the order places it in an untenable position by devolving upon it the authority and legal responsibility to give effect to and administer the termination of the Premier Trust, although this authority is not provided for by the terms of the Trust or by statute. The members maintain that the rule in *Saunders v. Vautier* applies but argue, in the alternative, that Rogers should terminate the Plan pursuant to its fiduciary duty under the *PBSA*. At the end of the hearing before this Court, the parties were asked to provide their views on the application of the *PBSA* to the termination of a plan by the Superintendent. Rogers takes the position that the Superintendent does not have the right to terminate the Plan because his role is limited to solvency issues. The members submit that the Superintendent has a discretionary power and that, as a result, they do not have a clear recourse. In their view, the rule in *Saunders v. Vautier* is not ousted by the *PBSA*.

Rogers soutient que la règle de *Saunders c. Vautier* ne s'applique pas. Trust National ne conteste pas l'ordonnance de la Cour d'appel dans la mesure où elle détermine les droits de Rogers ou des participants. La fiduciaire fait cependant valoir que cette ordonnance la place dans une situation intenable en lui transférant le pouvoir et la responsabilité juridique de mettre en œuvre et de gérer la cessation de la fiducie de Premier, bien que ce pouvoir ne soit prévu ni par les modalités de la fiducie ni par la loi. Les participants maintiennent que la règle de *Saunders c. Vautier* s'applique, mais ils allèguent subsidiairement que Rogers devrait mettre fin au Régime conformément à l'obligation fiduciaire qui lui incombe en vertu de la *LNPP*. À la fin de l'audience devant notre Cour, les parties ont été invitées à présenter leur point de vue concernant l'application de la *LNPP* à la cessation d'un régime déclarée par le surintendant. Rogers est d'avis que le surintendant n'a pas le droit de mettre fin au Régime parce que son rôle se limite aux questions de solvabilité. Les participants affirment que le surintendant a un pouvoir discrétionnaire de sorte qu'ils ne disposent d'aucun recours clair. Selon eux, la *LNPP* n'écarte pas la règle de *Saunders c. Vautier.*

11 It is clear from the history of the litigation that some of the issues are now *res judicata*. One of

L'historique du litige montre clairement que certaines questions ont acquis le statut de chose jugée.

2006 SCC 28 (CanLII)

them is that the merger of the Plan with the RCI Plan did not affect the Trust. As the Court of Appeal noted at the time, this peculiar situation may present some conceptual difficulties (*Buschau No. 1*, at para. 66). Nonetheless, these facts must be interpreted with the help of the general principles of pension law. For this reason, it will be useful to review some background information concerning pension plans in general and the Plan in particular.

II. Pension Plans in General

12 Pension plans have a complex history and constitute a response to a multitude of needs. As R. L. Deaton puts it:

> . . . [employee] benefits [initially] served multiple purposes, including attracting a labour supply and reducing turnover, serving as an investment in human capital by improving morale, increasing productivity and efficiency by rationalizing the human element in the work process, promoting loyalty to the firm, preventing or forestalling unionization, preventing government intervention with respect to compulsory social insurance, maximizing the tax position of certain benefits by increasing non-taxable compensation to employees, minimizing the cost per unit of benefit through group arrangements, thereby compensating for imperfect individual knowledge of insurance markets, and creating a favourable corporate public relations image.

(*The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* (1989), at pp. 119-20)

He adds that in recent years many sophisticated employers have adopted a compensation approach based on the "total value of labour remuneration, wages and fringes having become interchangeable costs" (p. 122). Thus, what some may still view as a gratuitous reward for employees remains a powerful long-term human resources management tool as well as an undeniable benefit for aging employees. Employees rightly see their pension benefits as part of their overall compensation. How important pension benefits are to employees, and how sensitive employees are about such benefits, is even clearer

L'une d'elles veut que la fusion du Régime avec le régime de RCI n'ait eu aucun effet sur la fiducie. Comme la Cour d'appel l'a fait remarquer à l'époque, cette situation particulière peut présenter des difficultés conceptuelles (*Buschau n° 1*, par. 66). Néanmoins, ces faits doivent être interprétés à l'aide des principes généraux du droit régissant les régimes de retraite. C'est pourquoi il sera utile d'examiner certains renseignements de base concernant les régimes de retraite en général et le Régime en particulier.

II. Les régimes de retraite en général

L'histoire des régimes de retraite est complexe : ces régimes répondent à une multitude de besoins. Comme le dit R. L. Deaton :

> [TRADUCTION] . . . les avantages sociaux [des employés] visaient [au départ] des objectifs multiples, dont attirer la main d'œuvre et réduire le roulement du personnel, constituer un investissement dans le capital humain en améliorant le moral, augmenter la productivité et le rendement par la rationalisation de l'élément humain dans les méthodes de travail, promouvoir la loyauté envers l'entreprise, empêcher ou prévenir la syndicalisation, empêcher l'intervention gouvernementale concernant l'assurance sociale obligatoire, maximiser l'exemption fiscale de certains avantages en accroissant la partie non taxable de la rémunération des employés, réduire le coût unitaire des avantages grâce à des mesures collectives et suppléer ainsi aux lacunes de la connaissance individuelle des marchés de l'assurance, et enfin créer une image favorable de l'entreprise auprès du public.

(*The Political Economy of Pensions : Power, Politics and Social Change in Canada, Britain and the United States* (1989), p. 119-120)

L'auteur ajoute que, au cours des dernières années, de nombreux employeurs avertis ont adopté un mode de rétribution fondé sur [TRADUCTION] « la valeur totale de la rémunération du travail, les salaires et les avantages sociaux étant devenus des coûts interchangeables » (p. 122). Par conséquent, ce que d'aucuns peuvent encore percevoir comme une gratification destinée aux employés demeure un puissant outil de gestion à long terme des ressources humaines ainsi qu'un avantage indéniable pour les employés qui vieillissent. Les employés ont raison de considérer leurs prestations de retraite comme

2006 SCC 28 (CanLII)

in the present context of corporate mergers and acquisitions.

une composante de leur rémunération globale. L'importance que les prestations de retraite revêtent pour les employés et la mesure dans laquelle celles-ci leur tiennent à cœur sont encore plus évidentes dans le présent contexte où il est question de fusions et d'acquisitions de sociétés commerciales.

13 Pension benefits also serve broader social goals, which were recognized by the Court of Appeal (*Buschau No. 2*, at para. 47), citing approvingly E. E. Gillese (now a justice of the Ontario Court of Appeal), "Pension Plans and the Law of Trusts" (1996), 75 *Can. Bar Rev.* 221, at pp. 232-34. Together with government programs and individual savings, pension plans provide an aging population with invaluable financial support. In recognition of the social value of such an investment, pension contributions receive special tax treatment. The social component of private pension plans plays a crucial role in an era in which public pension programs have not yet been reformed to ensure adequate funding (see Deaton, at pp. 136-37, for an outline of the increase in contributions that would be required to conform to international standards). Courts do not make social policy, but the social role of pension plans might prove relevant when it comes time to decide whether the rule in *Saunders v. Vautier* can be employed to terminate a pension trust.

Les prestations de retraite visent aussi des objectifs sociaux généraux que la Cour d'appel (*Buschau n° 2*, par. 47) a reconnus en citant avec approbation E. E. Gillese (maintenant juge à la Cour d'appel de l'Ontario), « Pension Plans and the Law of Trusts » (1996), 75 *R. du B. can.* 221, p. 232-234. Conjugués aux programmes gouvernementaux et à l'épargne individuelle, les régimes de retraite procurent un soutien financier inestimable à une population vieillissante. En reconnaissance de la valeur sociale de cet investissement, les cotisations de retraite bénéficient d'un traitement fiscal particulier. Le volet social des régimes de retraite privés joue un rôle crucial à une époque où les programmes de retraite publics n'ont pas encore été réformés pour en assurer une capitalisation suffisante (voir Deaton, p. 136-137, pour un aperçu de l'augmentation des cotisations qui serait nécessaire pour respecter les normes internationales). Les tribunaux n'établissent pas des politiques sociales, mais le rôle social des régimes de retraite pourrait se révéler pertinent lorsqu'il s'agit de décider si la règle de *Saunders c. Vautier* peut être utilisée pour mettre fin à une fiducie de retraite.

14 In Canada, defined benefit plans are usually funded in one of two ways: the funds are either held by an insurance company or held in trust (D. Rienzo, "Trust Law and Access to Pension Surplus" (2005), 25 *E.T.P.J.* 14; G. Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in Meredith Memorial Lectures 1988, *New Developments in Employment Law* (1989), 59, at p. 64). In an insured plan, the insurance company receives an agreed payment and, bearing the risk of a shortfall, undertakes to pay the pension benefits to the members. When a plan is funded through a trust, the employer contracts with a trust company. The trust company holds and invests the pension contributions, subject to instructions under the trust agreement. The contributions are generally adjusted following an

Au Canada, la capitalisation des régimes à prestations déterminées se fait généralement de deux façons : les fonds sont soit détenus par une compagnie d'assurances, soit détenus en fiducie (D. Rienzo, « Trust Law and Access to Pension Surplus » (2005), 25 *E.T.P.J.* 14; G. Nachshen, « Access to Pension Fund Surpluses : The Great Debate », dans Conférences Commémoratives Meredith 1988, *Le Contrat de travail : problèmes et perspectives* (1989), 59, p. 64). Dans le cas d'un régime assuré, la compagnie d'assurances reçoit un paiement convenu et, au risque de subir un déficit, elle s'engage à verser les prestations de retraite aux participants. Dans le cas d'un régime capitalisé au moyen d'une fiducie, l'employeur conclut un contrat avec une société de fiducie. Cette société de fiducie

2006 SCC 28 (CanLII)

evaluation by an actuary who determines the level of funding needed to meet the solvency requirement under the applicable legislation. Here, the Plan is and always has been funded through a trust, so the discussion can be limited to trust-related issues.

détient et investit les cotisations de retraite conformément aux directives fondées sur la convention de fiducie. Les cotisations sont généralement ajustées à la suite d'une évaluation effectuée par un actuaire qui détermine le niveau de capitalisation nécessaire pour respecter la norme de solvabilité prescrite par la loi applicable. En l'espèce, le Régime est, et a toujours été, capitalisé au moyen d'une fiducie, de sorte que l'analyse peut être limitée aux questions de fiducie.

2006 SCC 28 (CanLII)

15

A defined benefit plan can fall into deficit or accumulate a surplus. Pension underfunding is a cause for concern. Almost 70 percent of major corporate pension plans were in deficit positions in the late 1970s. In the early 1980s, however, the situation reversed. Surpluses were generated by high levels of investment earnings coupled with lower wage increases and widespread layoffs, while employer contributions were left in the funds as employees forfeited their future pension rights: Deaton, at pp. 133-34, and Nachshen, at pp. 66-67. The situation reverted to one of deficits in the late 1990s. The magnitude of the underfunding problem has only recently started to emerge in legal commentaries ("Pension Underfunding Still Widespread, Yet . . .", *Business & Legal Reports*, October 1, 2003 (online)). However, a surplus or deficit position reflects only a snapshot of a fund at a specific point in time. Since a pension plan is usually viewed as an ongoing instrument, time and sound actuarial advice are supposed to allow for secure funding while preventing the unnecessary accumulation of surpluses. Although the existence of deficits or surpluses is not an anomaly since actuaries cannot perfectly predict the future, in an ideal world, each plan would always be funded to the exact amount required to discharge its obligations.

Un régime à prestations déterminées peut afficher un déficit ou un surplus. La sous-capitalisation des régimes est une source de préoccupation. Près de 70 pour 100 des régimes de retraite des grandes sociétés affichaient un déficit vers la fin des années 1970. Cependant, au début des années 1980, il y a eu un revirement de situation. Des revenus de placement importants conjugués à de faibles augmentations des salaires et de nombreuses mises à pied, alors que les cotisations des employeurs étaient laissées dans les caisses et que les employés perdaient leurs droits futurs à une pension, ont engendré des surplus : Deaton, p. 133-134, et Nachshen, p. 66-67. À la fin des années 1990, les déficits sont réapparus. Ce n'est que récemment que des articles de doctrine ont commencé à faire état de l'ampleur du problème de la sous-capitalisation (« Pension Underfunding Still Widespread, Yet . . . », *Business & Legal Reports*, 1er octobre 2003 (en ligne)). Toutefois, l'existence d'un surplus ou d'un déficit représente seulement l'état dans lequel se trouve une caisse à un moment donné. Étant donné qu'un régime de retraite est habituellement perçu comme un instrument permanent, le temps et les conseils actuariels judicieux sont censés permettre une capitalisation suffisante tout en empêchant l'accumulation inutile de surplus. Bien que l'existence d'un déficit ou d'un surplus ne soit pas une anomalie du fait que les actuaires ne sont pas en mesure de prédire l'avenir avec une exactitude parfaite, dans un monde idéal, chaque régime disposerait toujours de la capitalisation dont il a exactement besoin pour s'acquitter de ses obligations.

16

Surpluses have not always been dealt with explicitly in pension plans or pension trusts. In *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, the

Les régimes de retraite ou les fiducies de retraite n'abordent pas toujours explicitement la question des surplus. Dans l'arrêt *Schmidt c. Air Products*

Court, dealing with issues relating to the distribution of a surplus, held that "when a trust is created, the funds which form the corpus are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust" (p. 639). The Court also stated that "[w]hen a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles" (p. 643 (emphasis added)). It is thus necessary to determine which trust law principles *are applicable* before considering how they apply.

Canada Ltd., [1994] 2 R.C.S. 611, la Cour a statué, au sujet de questions liées à la répartition d'un surplus, que « lorsqu'une fiducie est créée, le fonds qui forme le capital est assujetti aux exigences du droit des fiducies. Les modalités du régime de retraite ne sont alors pertinentes quant aux questions de répartition, que dans la mesure où elles sont insérées par renvoi dans l'acte qui crée la fiducie » (p. 639). La Cour a ajouté que « [l]a caisse de retraite assujettie à une fiducie est soumise à tous les principes applicables du droit des fiducies » (p. 643 (je souligne)). Il est donc nécessaire de déterminer quels principes du droit des fiducies *sont applicables* avant d'examiner la façon dont ils s'appliquent.

17 Before termination of a plan, a surplus is only an actuarial concept. While the plan is in operation, individuals entitled to the surplus assets do not have a specific interest in them. A pension surplus can be used to justify a contribution holiday if this is permitted by the plan, but the surplus can also disappear if investment earnings are lower than anticipated. Since pension plans are usually established for indefinite terms, issues relating to surpluses are not usually relevant to plan members while the plan is in operation. As the Court said in *Schmidt*, "[t]he right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan" (p. 654). Entitlement is determined by consulting the Plan, the Trust agreement (*Schmidt*, at p. 639) and the relevant legislation (*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 39).

Avant la cessation d'un régime, un surplus n'est qu'un concept actuariel. Pendant que le régime est en vigueur, les personnes ayant éventuellement droit au surplus ne peuvent se réclamer d'un droit précis sur celui-ci. Le surplus d'une caisse de retraite peut servir à justifier une période d'exonération de cotisations si le régime le permet, mais il peut aussi disparaître si les revenus de placement se révèlent moins élevés que prévu. Étant donné que les régimes de retraite sont normalement établis pour une période indéterminée, les questions de surplus sont habituellement dénuées d'intérêt pour les participants pendant que le régime est en vigueur. Comme la Cour l'a affirmé dans l'arrêt *Schmidt*, « [l]e droit à tout surplus n'est cristallisé que lorsque celui-ci devient vérifiable à la cessation du régime » (p. 654). Pour déterminer la teneur de ce droit, il faut consulter le régime, la convention de fiducie (*Schmidt*, p. 639) et la loi applicable (*Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, [2004] 3 R.C.S. 152, 2004 CSC 54, par. 39).

18 Pension plans are heavily regulated. At this juncture, it is worth looking at the legislative scheme applicable to the issue.

Les régimes de retraite sont fortement réglementés. À ce stade, il convient d'examiner le régime législatif applicable à la question en litige.

III. The *Pension Benefits Standards Act, 1985*

III. La *Loi de 1985 sur les normes de prestation de pension*

19 The complex statutory and regulatory framework to which pension plans are subject cannot be overlooked. Recognizing the economic and social

On ne saurait passer sous silence le cadre législatif et réglementaire complexe qui régit les régimes de retraite. Reconnaissant l'importance

2006 SCC 28 (CanLII)

importance of pension plans, Parliament and the vast majority of provincial and territorial legislatures have adopted legislation regulating them. The first federal pension benefits standards legislation came into force on March 23, 1967 (S.C. 1966-67, c. 92). The current statute, the *PBSA*, was initially enacted in 1986 (S.C. 1986, c. 40). Under it, an important role of control and supervision is assigned to the Superintendent (see A. N. Kaplan, *Pension Law* (2006), for analysis on the analogous role of the Superintendent under the Ontario legislation). The Superintendent administers the *PBSA*, collects information and conducts studies concerning pension plans and their operation (s. 5). Strict investment and solvency standards are imposed on plan administrators (s. 9(1) and *Pension Benefits Standards Regulations, 1985*, SOR/87-19, rr. 6 to 10), who must also file documents and information required by the *PBSA* (ss. 7.4 and 12). A plan administrator also acts as a trustee for the employer, the members of the plan, and any persons entitled to pension benefits. The Superintendent can issue a direction of compliance if he is of the view that an administrator or an employer is pursuing a course of conduct that is contrary to sound financial practices, or that a pension plan is not being administered in accordance with the *PBSA* (s. 11(1) and (2)). If the Superintendent's direction is not complied with, the pension plan's registration may be revoked (s. 11.1). The Superintendent also plays a key role at the termination and distribution stage (ss. 9.2 and 29, and rr. 16 and 24). For example, his consent must be obtained before a surplus can be distributed (r. 16(2)(*d*)). Guidelines and instruction guides are published by the Superintendent to assist in the administration and termination of plans and trusts. Specific attention is paid to the rights of beneficiaries upon a request for distribution of a surplus. The *Guidelines to Administrators for Plan Terminations* make it clear that a delay in winding up will not be accepted simply because the administrator prefers to manage the funds.

économique et sociale des régimes de retraite, le Parlement et la vaste majorité des législatures provinciales et territoriales les ont réglementés par voie législative. La première loi fédérale sur les normes de prestations de pension est entrée en vigueur le 23 mars 1967 (S.C. 1966-67, ch. 92). La loi actuelle, la *LNPP*, a été adoptée pour la première fois en 1986 (S.C. 1986, ch. 40). Elle attribue au surintendant une importante fonction de contrôle et de surveillance (voir A. N. Kaplan, *Pension Law* (2006), pour une analyse de la fonction analogue du surintendant nommé en vertu de la loi ontarienne). Le surintendant assure l'application de la *LNPP*, recueille des renseignements et procède à des études relatives aux régimes de pension et à leur fonctionnement (art. 5). L'administrateur d'un régime est tenu de respecter des normes rigoureuses en matière de placement et de solvabilité (par. 9(1) *LNPP*, et art. 6 à 10 du *Règlement de 1985 sur les normes de prestation de pension*, DORS/87-19 (« Règlement »)). Il doit également déposer les documents et renseignements requis par la *LNPP* (art. 7.4 et 12). L'administrateur d'un régime joue également le rôle de fiduciaire de l'employeur, des participants au régime et de toute personne ayant droit à des prestations de retraite. Le surintendant peut donner une directive s'il estime qu'un administrateur ou un employeur adopte une attitude contraire aux bonnes pratiques du commerce, ou que la gestion d'un régime de retraite n'est pas conforme à la *LNPP* (par. 11(1) et (2) *LNPP*). L'agrément du régime de retraite peut être révoqué en cas de non-conformité à la directive du surintendant (art. 11.1 *LNPP*). Le surintendant joue aussi un rôle essentiel à l'étape de la cessation et de la répartition (art. 9.2 et 29 *LNPP*, et art. 16 et 24 du Règlement). Il faut notamment obtenir son consentement avant de répartir un surplus (al. 16(2)*d*) du Règlement). Le surintendant publie des lignes directrices et des guides d'instruction utiles pour gérer les régimes et les fiducies et y mettre fin. Une attention particulière est accordée aux droits des bénéficiaires en cas de demande de répartition d'un surplus. Les *Lignes directrices à l'intention des administrateurs sur la cessation des régimes de pension* prévoient clairement que l'administrateur ne peut pas retarder la liquidation uniquement parce qu'il préfère gérer la caisse de retraite.

2006 SCC 28 (CanLII)

20 In essence, the Superintendent plays a crucial role in the protection of beneficiaries. Although most of his interventions relate to supervision of the solvency requirements, he also acts as a gatekeeper for the distribution of a pension fund. The Superintendent has unique duties and responsibilities *vis-à-vis* beneficiaries that may make it possible to avoid resorting to a common law rule that was designed for an environment totally different from that of pension law.

Essentiellement, le surintendant joue un rôle crucial dans la protection des bénéficiaires. Bien que la plupart de ses interventions visent à assurer le respect des normes de solvabilité, il joue également un rôle de gardien en ce qui a trait à la répartition de l'actif d'une caisse de retraite. Il a envers les bénéficiaires des obligations et des responsabilités exceptionnelles qui peuvent permettre d'éviter le recours à une règle de common law qui a été conçue pour s'appliquer dans un contexte totalement différent de celui du droit régissant les régimes de retraite.

IV. The Rule in *Saunders v. Vautier*

IV. La règle de *Saunders c. Vautier*

21 The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in *Underhill and Hayton Law Relating to Trusts and Trustees* (14th ed. 1987), at p. 628:

> If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees.

According to D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 1175, the rule was developed in the 19th century and originated as an implicit understanding of Chancery judges that the significance of property lay in the right of enjoyment. The idea was that, since the beneficiaries of a trust would eventually receive the property, they should decide how they intended to enjoy it.

On peut dire succinctement que la règle de common law de *Saunders c. Vautier* permet aux bénéficiaires d'une fiducie de déroger aux intentions initiales du disposant pourvu qu'ils aient la pleine capacité juridique et qu'ils possèdent ensemble tous les droits de propriété bénéficiaire sur les biens en fiducie. Plus formellement, la règle est définie ainsi dans *Underhill and Hayton Law Relating to Trusts and Trustees* (14e éd. 1987), p. 628 :

> [TRADUCTION] S'il n'y a qu'un seul bénéficiaire, ou s'il y en a plusieurs (peu importe qu'ils puissent exercer leurs droits concurremment ou successivement) qui sont unanimes, et qu'aucun n'est frappé d'incapacité juridique, l'exécution des obligations de la fiducie peut être interrompue et il peut y avoir modification ou extinction de la fiducie par le(s) bénéficiaire(s) sans égard à la volonté du disposant ou des fiduciaires.

Selon D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 1175, la règle a été établie au XIXe siècle et découle d'une conception implicite des juges de la Cour de la Chancellerie selon laquelle la propriété trouve son sens dans le droit de jouissance. On considérait que, puisque la propriété serait attribuée en fin de compte aux bénéficiaires de la fiducie, il appartenait à ces derniers de décider de quelle façon ils voulaient en jouir.

22 The members argue that this rule allows them to terminate the Trust fund even though the employer, upon agreeing to the Trust, stated that only he could terminate it. The terms of the Plan and its

Les participants allèguent que cette règle leur permet de mettre fin à la caisse en fiducie même si, en concluant la convention de fiducie, l'employeur a dit être le seul à pouvoir y mettre fin. Les

2006 SCC 28 (CanLII)

Trust fund are the key to the analysis. I will now turn to them.

V. The Plan and Its Trust Fund

23 The Plan, as stated in 1974, provided for the assets to be held in accordance with the terms of a Trust agreement. A committee known as the Retirement Committee was appointed by the company to administer the Plan. All employees hired after January 1, 1974 were required to become members of the Plan, while the other employees were eligible to join it under certain conditions (General Rule Two). The benefits were not to exceed the maximum permitted under the prevailing legislation and were payable upon retirement (the normal retirement age was 65 years). Although entitled to make additional contributions, employees were not required to contribute to the regular funding of the Plan (Special Rule Four (1)). The employer's contribution was calculated by the actuary appointed under the Plan (General Rule Four (2)). Benefits were to be paid to the member for the remainder of his or her life and then to the member's beneficiary for any remaining portion of a "guaranteed period". A lump sum could be paid, but only to a member, if the benefit was less than $10 per month, and even so this was at the Retirement Committee's discretion. The committee could decide all matters in respect to the operation, administration and interpretation of the provisions of the Plan (General Rule Six (12)). The company had the right to amend the Plan provided that the amendment did not affect rights acquired or benefits earned as at the date of the amendment. Upon termination, benefits were to be paid as provided for in the Plan, and the balance of assets remaining in the trust fund, after all liabilities had been satisfied, were to be distributed by the Committee among the remaining members on the basis of s. 12 of the former *Pension Benefits Standards Act* (General Rule Seven).

24 The Trust agreement was entered into for the specific purpose of creating a Trust fund for the Plan. The fund was to be held and administered for

modalités du Régime et de sa caisse en fiducie jouent un rôle essentiel dans l'analyse. Je vais maintenant les examiner.

V. Le Régime et sa caisse en fiducie

Le Régime défini en 1974 prévoyait que l'actif serait détenu conformément à une convention de fiducie. La compagnie a créé un comité, appelé le comité de retraite, qui était chargé de gérer le Régime. Tous les employés embauchés après le 1er janvier 1974 devaient adhérer au Régime, alors que les autres employés pouvaient le faire à certaines conditions (Deuxième règle générale). Les prestations ne devaient pas excéder le maximum autorisé par la loi en vigueur et étaient payables lors de la retraite (l'âge normal de la retraite étant fixé à 65 ans). Même s'ils avaient le droit de verser des cotisations supplémentaires, les employés n'étaient pas tenus de contribuer à la capitalisation régulière du Régime (Quatrième règle spéciale, section 1). Les cotisations de l'employeur étaient calculées par l'actuaire nommé conformément au Régime (Quatrième règle générale, section 2). Les prestations devaient être payées au participant jusqu'à la fin de ses jours, puis au bénéficiaire du participant pendant le reste d'une [TRADUCTION] « période garantie ». Une somme forfaitaire pouvait être versée, mais seulement à un participant, si la prestation était inférieure à 10 $ par mois, et même là, au gré du comité de retraite. Le comité pouvait trancher toute question relative à l'application et à l'interprétation des dispositions du Régime (Sixième règle générale, section 12). La compagnie avait le droit de modifier le Régime dans la mesure où cela ne portait pas atteinte aux droits acquis ou aux prestations accumulées à la date de la modification. À la cessation, les prestations devaient être payées conformément aux dispositions du Régime, et, après que toutes les dettes aient été acquittées, le comité devait répartir entre les autres participants l'actif restant de la caisse en fiducie, conformément à l'art. 12 de l'ancienne *Loi sur les normes des prestations de pension* (Septième règle générale).

La convention de fiducie a été conclue dans le but précis de doter le Régime d'une caisse de retraite en fiducie. La caisse devait être détenue et gérée

2006 SCC 28 (CanLII)

the benefit of employees and of beneficiaries under the Plan. The trustee was to follow directions given by the company. The company also had the right to terminate the Trust agreement (art. V(2)).

pour le compte des employés et des bénéficiaires assujettis au Régime. Le fiduciaire devait suivre les directives de la compagnie. Cette dernière avait aussi le droit de mettre fin à la convention de fiducie (art. V(2)).

25 Rogers purported to amend the Plan to give itself the right to the surplus in 1992, but the Court of Appeal found (*Buschau No. 1*, at para. 59) that the amendments had not affected the members' rights; its judgment in that case is now binding on the parties.

En 1992, Rogers a voulu modifier le Régime pour s'accorder le droit au surplus, mais la Cour d'appel a décidé (*Buschau n*[o] *1*, par. 59) que les modifications ne portaient pas atteinte aux droits des participants; cette décision lie maintenant les parties.

26 Thus, neither the Trust agreement nor the Plan provides for termination of the Trust by employees. The members consequently rely on the rule in *Saunders v. Vautier*. Does it apply? Like my colleague Bastarache J., I conclude that it does not. My reasons are slightly different, however.

Ainsi, ni la convention de fiducie ni le Régime ne prévoient que les employés peuvent mettre fin à la fiducie. En conséquence, les participants invoquent la règle de *Saunders c. Vautier*. S'applique-t-elle? À l'instar de mon collègue le juge Bastarache, je conclus que non, mais pour des raisons légèrement différentes.

VI. Non-Application of the Rule in *Saunders v. Vautier*

VI. L'inapplication de la règle de *Saunders c. Vautier*

27 There are many reasons why the rule is not easily incorporated into the context of employment pension plans.

La règle ne s'intègre pas facilement au contexte des régimes de retraite d'employeurs pour de nombreuses raisons.

28 First, pension plans are heavily regulated. The *PBSA* regulates the termination of a plan and the distribution of the fund and the trust assets. I accept the following comment of the Court of Appeal (*Buschau No. 2*, at para. 47):

> It must be acknowledged that the application of the rule in *Saunders v. Vautier* to pension trusts does involve different and more complicated factors, financial and legal, than an ordinary legacy or gift in trust. As already noted, pension trusts are part of the complex of rights and obligations (not only equitable, but also contractual and statutory) between employers and employees, and obviously serve broad societal and economic purposes.

However, the Court of Appeal's order (*Buschau No. 3*) defies the application of the *PBSA* because it allows for the operation of the rule in *Saunders v.*

Premièrement, les régimes de retraite sont fortement réglementés. La *LNPP* régit la cessation d'un régime et la répartition de l'actif de la caisse et de la fiducie. Je souscris à l'observation suivante de la Cour d'appel (*Buschau n*[o] *2*, par. 47) :

> [TRADUCTION] Il faut reconnaître que l'application de la règle de *Saunders c. Vautier* aux fiducies de retraite met effectivement en cause des facteurs différents et plus complexes, tant financiers que juridiques, que lorsqu'il s'agit d'un legs ou d'une donation ordinaire en fiducie. Comme nous l'avons vu, les fiducies de retraite font partie de l'ensemble complexe des droits et obligations (non seulement reconnus en *equity*, mais également prévus par le droit des contrats et la loi écrite) entre employeurs et employés et répondent, de toute évidence, à des besoins sociaux et économiques généraux.

L'ordonnance de la Cour d'appel (*Buschau n*[o] *3*) va cependant à l'encontre de la *LNPP* parce qu'elle permet l'application de la règle de *Saunders c.*

2006 SCC 28 (CanLII)

Vautier without regard to the obligations to report to the Superintendent and to provide for the payment of pension benefits before distribution of the trust fund. The *PBSA* deals extensively with the termination of plans and the distribution of assets. It is clear from this explicit legislation that Parliament intended its provisions to displace the common law rule. To the extent that it provides a means to reach the distribution stage, the *PBSA* prevails over the traditional rule in *Saunders v. Vautier.*

Vautier sans égard aux obligations de rendre compte au surintendant et de prévoir le versement de prestations de retraite avant la répartition de l'actif de la caisse en fiducie. La *LNPP* traite abondamment de la cessation des régimes et de la répartition de l'actif. Il ressort clairement de ce texte législatif explicite que le législateur a voulu que ses dispositions supplantent la règle de common law. Dans la mesure où elle prévoit un moyen de parvenir à l'étape de la répartition, la *LNPP* prime la règle traditionnelle de *Saunders c. Vautier.*

2006 SCC 28 (CanLII)

29

Second, a family or testamentary trust is generally a stand-alone instrument. It does not usually depend on any other instrument for its operation. No indirect effect results from the application of the rule in *Saunders v. Vautier* in such cases. In contrast, a pension trust serves only as a vehicle for holding and managing the funds required by the pension plan. In the instant case, the Trust agreement is expressly "made a part of the Plan" (art. I(1)) and the Plan is attached to that agreement (preamble to the Trust agreement). The Trust agreement is therefore dependent on the Plan for which it was created. The Premier Trust cannot be collapsed without regard to the Plan itself. The two instruments are therefore indissociable. This particular situation was not dealt with in *Schmidt*, which focussed on the distribution of trust assets, not the termination of a trust agreement that had been expressly made part of a plan. In the case at bar, despite the link between the Plan and the Trust agreement, the judgment of the Court of Appeal purports to authorize the members to resort to the rule in *Saunders v. Vautier*, but does not provide for termination of the Plan. And yet, termination of the Plan in accordance with the prevailing *PBSA* is a condition precedent to distribution. This awkward juridical status illustrates why the common law rule is not an easy fit in the pension law context.

Deuxièmement, une fiducie familiale ou testamentaire est généralement un instrument distinct. Son fonctionnement ne dépend généralement d'aucun autre instrument. L'application de la règle de *Saunders c. Vautier* n'a aucun effet indirect dans ces cas. Par contre, une fiducie de retraite ne sert que de moyen de détenir et de gérer les fonds requis par le régime de retraite. En l'espèce, il est prévu expressément que la convention de fiducie [TRADUCTION] « fait partie du régime » (art. I(1)) et le Régime est joint à cette convention (préambule de la convention de fiducie). La convention de fiducie est donc subordonnée au régime pour lequel elle a été conclue. On ne peut pas mettre fin à la fiducie de Premier sans tenir compte du Régime lui-même. Par conséquent, les deux instruments sont indissociables. Cette situation particulière n'a pas été examinée dans l'arrêt *Schmidt*, qui portait sur la répartition d'un actif en fiducie et non sur la cessation d'une convention de fiducie faisant expressément partie d'un régime de retraite. En l'espèce, malgré le lien qui existe entre le Régime et la convention de fiducie, l'arrêt de la Cour d'appel est censé autoriser les participants à recourir à la règle de *Saunders c. Vautier*, mais il ne prévoit pas la cessation du Régime. Pourtant, la cessation du Régime conformément à la *LNPP* en vigueur est une condition préalable de la répartition. Cette situation juridique incongrue montre pourquoi la règle de common law ne s'inscrit pas facilement dans le contexte du droit régissant les régimes de retraite.

30

Third, employers establish plans because it is in their interest to do so. Under normal circumstances, they have the right not to have their management decisions disturbed. In contrast, the common

Troisièmement, les employeurs établissent des régimes parce qu'ils ont intérêt à le faire. Dans des circonstances normales, ils ont droit à ce que leurs décisions administratives soient respectées. Par

law trust allows no room for the settlor's interest. Although the particular circumstances of this case may lead to the conclusion that the employer no longer has a legitimate interest in the continuation of the Plan, a blanket statement that the employer has no interest conflicts with the usual expectations of parties to a pension plan.

contre, la fiducie de common law ne fait aucune place à l'intérêt du disposant. Bien que les circonstances particulières de la présente affaire puissent mener à la conclusion que l'employeur n'a plus d'intérêt légitime dans le maintien du Régime, une déclaration générale selon laquelle l'employeur n'a aucun intérêt va à l'encontre des attentes normales des parties à un régime de retraite.

31 Fourth, gift or legacy trusts are gratuitous, and accelerating the date of the beneficiaries' entitlement has no broad social consequences. Pension trusts funds, however, are no longer generally viewed as being gratuitous: either employees contribute directly or their entitlement is regarded as remuneration deferred until the date of their retirement. The capital of the pension trust fund cannot be distributed without defeating the social purpose of preserving the financial security of employees in their retirement by allowing them to receive periodic payments until they die.

Quatrièmement, les donations ou legs en fiducie sont des libéralités, et le fait de rapprocher la date à laquelle les bénéficiaires peuvent exercer leur droit n'a aucune conséquence sociale générale. Toutefois, les droits dans les fiducies de retraite ne sont plus généralement considérés comme des libéralités : les employés peuvent cotiser directement ou encore leur droit est considéré comme une rémunération différée jusqu'à la date de leur départ à la retraite. Le capital de la caisse de retraite en fiducie ne peut pas être réparti sans contrecarrer l'objectif social consistant à assurer la sécurité financière des employés retraités en leur permettant de recevoir des versements périodiques jusqu'à la fin de leurs jours.

32 Thus, this case amply demonstrates the difficulties associated with applying the rule in *Saunders v. Vautier* to a pension trust. The Court of Appeal issued an order stating that the members were at liberty to invoke the rule in *Saunders v. Vautier*. All the reporting and approval mechanisms that must precede termination by virtue of the *PBSA* were disregarded. They were treated as issues relating merely to "mechanics" (*Buschau No. 3*, at para. 17). According to the Court of Appeal, the Premier Trust may be collapsed without regard to its purpose of providing a means to defer income. No order was made to provide for annuities as required by the *PBSA*. Moreover, while the Court of Appeal held that the Premier Trust may be terminated pursuant to the rule in *Saunders v. Vautier*, no corresponding provision was made for terminating the trustee's obligations to the members under the merged RCI Plan.

La présente affaire démontre donc amplement les difficultés que présente l'application de la règle de *Saunders c. Vautier* à une fiducie de retraite. La Cour d'appel a rendu une ordonnance déclarant que les participants étaient libres d'invoquer la règle de *Saunders c. Vautier*. Tous les mécanismes d'établissement de rapports et d'obtention d'approbations qui doivent précéder la cessation en vertu de la *LNPP* ont été passés sous silence. Ils ont été considérés comme de simples questions de « processus » (*Buschau n° 3*, par. 17). Selon la Cour d'appel, il peut être mis fin à la fiducie de Premier sans égard à son objectif consistant à donner un moyen de différer un revenu. Contrairement à ce qu'exige la *LNPP*, aucune ordonnance prévoyant le versement d'une rente n'a été rendue. De plus, bien que la Cour d'appel ait conclu qu'il peut être mis fin à la fiducie de Premier en application de la règle de *Saunders c. Vautier*, elle n'a pas prévu comment prendraient fin les obligations de la fiduciaire envers les participants aux termes du régime fusionné de RCI.

33 I therefore conclude that the impediments to applying the rule in *Saunders v. Vautier* are

Je conclus donc que les obstacles à l'application de la règle de *Saunders c. Vautier* sont nombreux.

2006 SCC 28 (CanLII)

numerous. The rule is not easily applicable to pension trusts and not even the length of time elapsed since the beginning of the proceedings can allow the members to bend the rule to fit it to their case. I do not exclude the possibility that the common law rule might apply to very small pension plans, the kind offered to a few officers of a corporation, but in general the fit is wrong. The conclusion that the common law rule does not generally apply to traditional pension funds is reinforced by the fact that the *PBSA* provides mechanisms that protect members from inappropriate conduct by plan administrators. Since my colleague Bastarache J. does not share my opinion on this point, I feel that I should elaborate on it.

Il n'est pas facile d'appliquer cette règle aux fiducies de retraite et même le temps écoulé depuis le début des procédures ne saurait permettre aux participants de la dénaturer pour qu'elle s'applique à leur cas. Je n'écarte pas la possibilité que la règle de common law s'applique à de petits régimes de retraite, comme ceux offerts à quelques dirigeants d'une société mais, en général, elle ne s'y prête pas. La conclusion que la règle de common law ne s'applique pas généralement aux caisses de retraite traditionnelles est renforcée par le fait que la *LNPP* établit des mécanismes de protection des participants contre la conduite répréhensible des administrateurs du régime. Étant donné que mon collègue le juge Bastarache ne partage pas mon opinion sur ce point, je me dois de préciser ma pensée.

2006 SCC 28 (CanLII)

VII. Members' Recourse

34

I have already noted that neither the Plan nor the Trust agreement grants members a direct right to terminate the Plan. There is a reason for this. Historically, employers created plans for their own purposes, without much input from employees. Of course, plans benefited employees, but they were essentially human resources management tools. Where possible, employers stated terms that allowed them to control the operation of the plans, thereby protecting their interests. Employer control is tempered, in a unionized context, by undertakings resulting from collective agreements and, outside of the collective bargaining context, by individual contracts of employment. However, wording reserving the employers' right to terminate is still common. A plan is also seen as being, if not a permanent instrument, at least a long-term one. However, the participation of any individual member is ephemeral: members come and go, while plans are expected to survive the flow of employees and corporate reorganizations. In an ongoing plan, a single group of employees should not be able to deprive future employees of the benefit of a pension plan. Thus, members often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust fund. However, they are not left without recourse should the employer infringe the *PBSA* or their plan. They

VII. Le recours des participants

J'ai déjà fait remarquer que ni le Régime ni la convention de fiducie ne confère aux participants un droit direct de mettre fin au Régime. Cela s'explique. Historiquement, les employeurs établissaient des régimes pour répondre à leurs propres besoins, sans que les employés aient beaucoup à dire. Certes, ces régimes étaient avantageux pour les employés, mais ils constituaient essentiellement des outils de gestion des ressources humaines. Lorsque cela était possible, les employeurs énonçaient des modalités qui leur permettaient de contrôler le fonctionnement des régimes et de protéger ainsi leurs intérêts. Dans un milieu de travail syndiqué, le contrôle exercé par l'employeur est tempéré par des engagements résultant de conventions collectives, et en dehors du contexte de la négociation collective, par des contrats de travail individuels. Toutefois, la formulation qui réserve à l'employeur le droit de cessation est encore courante. Un régime est aussi considéré comme un instrument, sinon permanent, tout au moins à long terme. Par ailleurs, la participation individuelle d'un employé est éphémère : des participants arrivent et d'autres partent; on s'attend néanmoins à ce que les régimes survivent aux roulements de personnel et aux réorganisations d'entreprise. Dans un régime en vigueur, un seul groupe d'employés ne devrait pas pouvoir priver d'un régime de retraite

can alert the Superintendent and trigger action if and when required.

les futurs employés. Par conséquent, les participants n'ont souvent qu'un droit passif et limité relativement aux décisions que l'employeur prend au sujet de l'avenir de leur régime et de leur caisse en fiducie. Cependant, ils ne sont pas dépourvus de recours si jamais l'employeur enfreint la *LNPP* ou leur régime. Au besoin, ils peuvent demander au surintendant d'intervenir.

2006 SCC 28 (CanLII)

35 The *PBSA* is not a complete code. However, when recourse is available to plan members, they should use it. Termination is dealt with explicitly in the *PBSA*. When asked to submit representations on the remedies afforded by the *PBSA*, the members took the position that the remedy afforded by the statute could not cover all their claims. They also stated that the Superintendent could have intervened on his own.

La *LNPP* n'est pas un code exhaustif. Toutefois, lorsque les participants au régime disposent d'un recours, ils devraient l'exercer. La *LNPP* traite expressément de la cessation. Lorsqu'on leur a demandé de présenter des observations sur les recours offerts par la *LNPP*, les participants ont prétendu que le recours prévu par la Loi ne pouvait pas s'appliquer à toutes leurs demandes. Ils ont ajouté que le surintendant aurait pu intervenir de son propre chef.

36 This answer is not satisfactory. The members wanted the Trust fund to be collapsed and distributed directly to them. A trust can in fact be automatically terminated and distributed in this way pursuant to the rule in *Saunders v. Vautier*. As mentioned above, however, such a distribution does not accord with the terms of the Plan and with the spirit of the social scheme, the purpose of which is to provide periodic payments during members' lifetimes, not to distribute the capital in a lump sum. Moreover, the members' position is not compatible with the *PBSA* and it puts them at risk of attracting undesirable tax consequences (*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 56(1), 146(8), 147.1(11) and (13); *Income Tax Regulations*, C.R.C. 1978, c. 945, ss. 8501(1) and 8502). Also, the Superintendent can hardly be expected to be familiar with details of the management of a particular pension plan. The members could have asked him to step in.

Cette réponse n'est pas satisfaisante. Les participants voulaient mettre fin à la caisse en fiducie et souhaitaient que l'actif de la caisse soit réparti entre eux directement. En fait, il est possible de mettre fin automatiquement à une fiducie et d'en répartir l'actif de cette manière conformément à la règle de *Saunders c. Vautier*. Toutefois, comme je l'ai déjà mentionné, une telle répartition n'est pas conforme aux modalités du Régime et à l'esprit du projet social qui vise à assurer des versements périodiques aux participants au cours de leur vie, et non à répartir le capital sous la forme d'une somme forfaitaire. De plus, le point de vue des participants n'est pas compatible avec la *LNPP* et il les expose à des conséquences fiscales non souhaitables (*Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.), par. 56(1), 146(8), 147.1(11) et (13); *Règlement de l'impôt sur le revenu*, C.R.C. 1978, ch. 945, par. 8501(1) et art. 8502). En outre, on ne peut guère s'attendre à ce que le surintendant ait une connaissance détaillée de la gestion d'un régime de retraite particulier. Les participants auraient pu lui demander d'intervenir.

37 A clear illustration of the Superintendent's potential role can be found in the facts that gave rise to the members' original action. In 1985, the trustee, at Rogers' request, transferred close to $1 million

Les faits à l'origine de la première action des participants illustrent bien le rôle que le surintendant peut jouer. En 1985, la fiduciaire a transféré à Rogers, à la demande de cette dernière, près de un

to Rogers out of the Plan's Trust fund. Rogers eventually acknowledged that the transfer was improper and reimbursed the amount in the course of that initial proceeding. However, the members could have asked the Superintendent to exercise his powers under the *PBSA*.

million de dollars provenant de la caisse en fiducie du Régime. Rogers a fini par reconnaître l'illégitimité de ce transfert et a remboursé la somme au cours de cette première action. Cependant, les participants auraient pu demander au surintendant d'exercer les pouvoirs que lui confère la *LNPP*.

38 Under s. 8(3) of the *PBSA*, plan members can object to an administrator's conduct if it is in breach of its fiduciary duty to them. Also, under s. 8(10), an employer who is an administrator is forbidden to put itself in a material conflict of interest. The Superintendent could have directed Rogers to return the money to the Trust (s. 29(11) and s. 11(1) of the *PBSA*).

Aux termes du par. 8(3) *LNPP*, les participants au régime peuvent s'opposer à la conduite d'un administrateur si elle constitue un manquement à l'obligation fiduciaire qu'il a envers eux. De même, le par. 8(10) interdit à l'employeur qui est l'administrateur de se trouver dans un conflit d'intérêts sérieux. Le surintendant aurait pu enjoindre à Rogers de remettre l'argent dans la fiducie (par. 29(11) et 11(1) *LNPP*).

39 Here, the members claim to be entitled to distribution of the surplus. For them to be entitled to distribution, the Plan must first be terminated. Since the Plan does not provide for them to terminate it, the Superintendent could order a distribution if he were faced with circumstances falling within the parameters of the *PBSA*.

En l'espèce, les participants soutiennent qu'ils ont droit à la répartition du surplus. Pour qu'ils aient droit à la répartition, il doit d'abord y avoir cessation du Régime. Étant donné que le Régime ne prévoit pas qu'ils peuvent y mettre fin, le surintendant pourrait ordonner une répartition s'il était en présence d'une situation qui s'inscrit à l'intérieur des paramètres de la *LNPP*.

40 Is that the case? I mentioned earlier that clauses allowing employers to control terminations are common. However, the traditional pension plan analysis does not apply in the instant case. Rogers conceded that the 1992 amendments entitling it to any surplus on termination were "invalid as against the [members]" (*Buschau No. 1*, at para. 38). The Court of Appeal found (*Buschau No. 1*, at paras. 63 and 66) that the merger was incomplete as regards the Plan and that the members retained rights that were distinct from those of members of the other plans that were merged in the RCI Plan. *Buschau No. 1* is now binding on Rogers. Although the members do not have a specific interest in the surplus before termination, the findings in *Buschau No. 1* limit Rogers' rights to use it.

Est-ce le cas? J'ai déjà mentionné que les clauses qui permettent aux employeurs de contrôler les cessations sont courantes. Cependant, l'analyse traditionnelle des régimes de retraite ne s'applique pas en l'espèce. Rogers a concédé que les modifications de 1992 lui donnant droit à tout surplus en cas de cessation étaient [TRADUCTION] « inopposables aux [participants] » (*Buschau nº 1*, par. 38). La Cour d'appel a conclu (*Buschau nº 1*, par. 63 et 66) que la fusion était incomplète quant au Régime et que les participants conservaient des droits distincts de ceux des participants aux autres régimes qui avaient été fusionnés dans le régime de RCI. L'arrêt *Buschau nº 1* lie désormais Rogers. Bien que les participants ne possèdent pas de droit précis sur le surplus avant la cessation, les conclusions de l'arrêt *Buschau nº 1* limitent le droit de Rogers de l'utiliser.

41 One circumstance that could justify delaying the termination of the Plan (as incompletely merged with the RCI Plan) and the incidental distribution of the Premier Trust fund would be if Rogers had a

La cessation du Régime (fusionné de manière incomplète avec le régime de RCI) et la répartition consécutive de l'actif de la caisse en fiducie de Premier pourraient être retardées si Rogers avait le

2006 SCC 28 (CanLII)

right to amend the Plan to open it to new members. However, the possibility of reopening the Plan is problematic and has been commented on by the courts below.

42 In the second action, the chambers judge interpreted the Court of Appeal's conclusion in *Buschau No. 1* concerning the distinct right of the Plan members to the surplus as preventing Rogers from using its power to amend the Plan to reopen it to new members. Dealing with Rogers' argument that the rule in *Saunders v. Vautier* could not apply because it had the right to amend, the chambers judge found, in her 2002 reasons, that Rogers could not use its amending power to do what it could not do through a merger (at para. 29):

> The Court of Appeal could only have granted liberty to the Members to terminate the trust on the basis that the trust was closed and that no further beneficiaries would be added. In my view, based on the evidence before me, the first time RCI gave any thought to re-opening the Plan to allow new members was in response to efforts by the Members to terminate the Plan and have the surplus paid to them. For these reasons, RCI's argument that the rule cannot apply because it may amend the Plan to allow new members, must fail.

43 The Court of Appeal left this finding undisturbed (*Buschau No. 2*, at para. 61):

> The particular circumstances of this case make it impossible in my view that RCI could now exercise its right to "re-open" the Plan to new Members, entitling them to share with the existing Members in the benefits of the Trust, including the surplus. The Plan was declared closed in 1984 and as the Chambers judge found, "the first time RCI gave any thought to re-opening . . . was in response to efforts by the Members to terminate the Plan and have the surplus paid to them." Any move now to re-open the Plan to other RCI employees would, given what has gone on before, rightly be regarded as no different from the stratagem adopted by RCI some years ago to avail itself of the benefit of the actuarial surplus in the Premier Trust — the purported "merger" of the Plan with other plans that were not in surplus positions. A similar result would ensue: because of its breach of trust or obligation of good faith, the

droit de modifier le Régime de manière à l'ouvrir à de nouveaux participants. Toutefois, la possibilité de rouvrir le Régime pose un problème et a fait l'objet d'observations de la part des tribunaux d'instance inférieure.

Dans la seconde action, la juge en chambre a considéré que la conclusion de la Cour d'appel, dans l'arrêt *Buschau n° 1*, selon laquelle les participants au Régime possèdent un droit distinct au surplus, empêchait Rogers d'exercer son droit de modifier le Régime de manière à le rouvrir à de nouveaux participants. Quant à l'argument de Rogers selon lequel la règle de *Saunders c. Vautier* était inapplicable en raison de son droit de modifier, la juge en chambre a conclu, dans ses motifs de 2002, que Rogers ne pouvait pas exercer son droit de modification pour faire ce qu'elle ne pouvait pas faire au moyen d'une fusion (par. 29) :

> [TRADUCTION] La Cour d'appel ne pouvait permettre aux participants de mettre fin à la fiducie que si la fiducie était fermée et qu'aucun autre bénéficiaire n'était ajouté. Selon moi, d'après la preuve qui m'a été présentée, c'est en réaction aux démarches des participants visant à mettre fin au régime et à obtenir le surplus que RCI a songé pour la première fois à rouvrir le régime à de nouveaux participants. C'est pourquoi il faut rejeter l'argument de RCI selon lequel la règle est inapplicable parce qu'elle peut modifier le régime de manière à l'ouvrir à de nouveaux participants.

La Cour d'appel n'a rien changé à cette conclusion (*Buschau n° 2*, par. 61) :

> [TRADUCTION] J'estime que les circonstances particulières de la présente affaire empêchent RCI d'exercer maintenant son droit de « rouvrir » le régime à de nouveaux participants et de leur permettre de partager avec les participants existants les prestations accumulées dans la fiducie, y compris le surplus. Le régime a été déclaré fermé en 1984 et, comme l'a dit la juge en chambre : « c'est en réaction aux démarches des participants visant à mettre fin au régime et à obtenir le surplus que RCI a songé pour la première fois à rouvrir ». Toute initiative qui viserait maintenant à rouvrir le régime à d'autres employés de RCI serait, compte tenu de ce qui s'est passé antérieurement, considérée à bon droit comme un autre stratagème de RCI semblable à celui qu'elle a employé, il y a quelques années, pour bénéficier du surplus actuariel de la fiducie de Premier — la prétendue « fusion » du régime avec d'autres régimes qui n'affichaient pas un

2006 SCC 28 (CanLII)

employer would be required to account to the existing Members as if the Plan had not been re-opened.

surplus. On arriverait à un résultat similaire : parce qu'il a manqué à son obligation de fiduciaire ou à son obligation d'agir de bonne foi, l'employeur serait tenu de rendre compte aux participants existants comme si le régime n'avait pas été rouvert.

44

If Rogers could amend the merged RCI Plan to open it to new members, it is questionable whether the Premier Trust fund could be used to fund benefits owed to new members without infringing the judgment that is binding on Rogers. Using the Premier Trust fund to fund benefits for new members or to fund benefits owed to members of a merged plan have been considered analogous by the courts below. I do not need to give a definite answer on the possibility of amending the Plan because, except to the extent that Rogers is bound by *Buschau No. 1*, the matter is best left to the Superintendent.

Si Rogers pouvait modifier le régime fusionné de RCI de manière à l'ouvrir à de nouveaux participants, il n'est pas certain que la caisse en fiducie de Premier pourrait servir à capitaliser les prestations dues aux nouveaux participants sans enfreindre le jugement qui lie Rogers. Les tribunaux d'instance inférieure ont considéré que l'utilisation de la caisse en fiducie de Premier pour capitaliser des prestations destinées à de nouveaux participants ou pour capitaliser des prestations dues aux participants d'un régime fusionné revenait au même. Je n'ai pas à me prononcer de manière définitive sur la possibilité de modifier le Régime car, sauf dans la mesure où Rogers est liée par l'arrêt *Buschau nº 1*, cela est du ressort du surintendant.

45

The members can ask the Superintendent to partially terminate the RCI Plan insofar as it relates to the Plan. The Superintendent can assess the facts and deal with any new arguments Rogers or the members may raise. He is in the best position to monitor the orderly termination of the part of the RCI Plan that relates to the members.

Les participants peuvent demander au surintendant de mettre fin en partie au régime de RCI dans la mesure où il a trait au Régime. Le surintendant peut apprécier les faits et examiner tout nouvel argument que Rogers ou les participants peuvent avancer. Il est le mieux placé pour assurer la cessation ordonnée de la partie du régime de RCI qui concerne les participants.

46

If the Superintendent decides that Rogers cannot amend the Plan to open it to new members, there may be no point in continuing the Plan if pension benefits can be provided by a third party such as an insurance company through annuities of the kind provided for upon termination of any plan under the *PBSA*.

Si le surintendant décide que Rogers ne peut pas modifier le Régime de manière à l'ouvrir à de nouveaux participants, il ne servira peut-être à rien de maintenir le Régime si un tiers, telle une compagnie d'assurances, peut verser les prestations de retraite sous forme de rentes comme celles versées à la cessation d'un régime fondée sur la *LNPP*.

47

The Superintendent could consider the Plan terminated because all contributions ceased in 1984. He could find that this cessation is, in the circumstances, a *termination* as that word is defined in the *PBSA*:

Le surintendant pourrait considérer qu'il a été mis fin au Régime, parce qu'on a arrêté complètement de payer des cotisations en 1984. Il pourrait conclure que cet arrêt de paiement constitue, dans les circonstances, une *cessation* au sens de la définition énoncée dans la LNPP :

2. (1) In this Act,

. . .

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

2006 SCC 28 (CanLII)

2006 SCC 28 (CanLII)

"termination", in relation to a pension plan, means the cessation of crediting of benefits to plan members generally, and includes the situations described in subsections 29(1) and (2);

According to the guidelines issued by the Office of the Superintendent, winding up must not be delayed without the Superintendent's consent, and the administrator wanting to manage the fund is not an acceptable reason for delay. Moreover, the trust Fund, according to its terms, must be administered for the benefit of the employees and the beneficiaries, not the employer.

48 It is up to the Superintendent to decide whether the circumstances surrounding the cessation of the contribution make the definition of "termination" mentioned above applicable and whether the delay in winding up is justified (s. 11.1).

49 If the cessation is a termination and if the delay is not justified, the Superintendent can direct that the plan be wound up in part in accordance with s. 29(11), which reads as follows:

29. . . .

(11) Where the whole of a pension plan has been terminated and the Superintendent is of the opinion that no action or insufficient action has been taken to wind up the plan, the Superintendent may direct the administrator to distribute the assets of the plan in accordance with the regulations made under paragraph 39(*j*), and may direct that any expenses incurred in connection with that distribution be paid out of the pension fund of the plan, and the administrator shall forthwith comply with any such direction.

50 It is also possible that the Superintendent could exercise his power of termination. Section 29(2)(*a*) provides as follows:

29. . . .

(2) The Superintendent may declare the whole or part of a pension plan terminated where

(*a*) there is any suspension or cessation of employer contributions in respect of all or part of the plan members;

51 Obviously, not every cessation of contributions will result in a direction by the Superintendent.

« cessation » Cessation d'un régime de pension dans le cas où il n'est plus porté de droits à prestation en faveur des participants et dans les cas visés par les paragraphes 29(1) et (2).

Selon les lignes directrices du Bureau du surintendant, la liquidation ne doit pas être retardée sans le consentement du surintendant, et la volonté de l'administrateur de gérer la caisse n'est pas une raison acceptable de la retarder. De plus, la caisse en fiducie doit, selon ses propres modalités, être gérée pour le compte des employés et des bénéficiaires, et non pour le compte de l'employeur.

Il appartient au surintendant de décider si les circonstances entourant l'arrêt de paiement des cotisations rendent applicable la définition de la notion de « cessation » mentionnée ci-dessus et si le retard mis à procéder à la liquidation est justifié (art. 11.1).

Si l'arrêt de paiement constitue une cessation et si le retard n'est pas justifié, le surintendant peut enjoindre de liquider en partie le Régime conformément au par. 29(11), dont voici le texte :

29. . . .

(11) Le surintendant peut, après la cessation totale d'un régime de pension, s'il est d'avis qu'aucune mesure n'a été prise en vue de sa liquidation ou que celles qui l'ont été sont insuffisantes à cette fin, enjoindre à l'administrateur de répartir les actifs du régime conformément aux règlements pris au titre de l'alinéa 39*j*) et ordonner que toutes dépenses afférentes à cette distribution soient payées sur le fonds de pension; l'administrateur doit se conformer sans délai à ces directives.

Le surintendant pourrait également exercer son pouvoir de cessation. L'alinéa 29(2)*a*) prévoit ceci :

29. . . .

(2) Le surintendant peut, dans les cas suivants, déclarer la cessation totale ou partielle d'un régime de pension :

a) la suspension ou l'arrêt de paiement des cotisations patronales relativement à plusieurs ou à l'ensemble des participants;

Il est évident que tout arrêt de paiement des cotisations ne donnera pas nécessairement lieu à des

Such a direction is not, however, restricted to cases in which the trust fund no longer meets the solvency requirements. The Superintendent's power in relation to solvency issues is governed by s. 29(2)(*c*), which reads as follows:

> (*c*) the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1) [proper funding].

Since s. 29(2)(*c*) deals with solvency requirements, s. 29(2)(*a*) must cover circumstances in which the cessation of contributions does not put the funding of a plan at risk.

Just as mergers of plans and trust funds can properly be approved when the circumstances demonstrate their legitimacy, they can be objected to if they violate statutory, trust or plan provisions. Contribution holidays, although legitimate for funding purposes, can nevertheless be considered illegitimate if they hide an improper refusal to terminate a plan. Determining the validity of a reason given for not terminating a plan lies with the Superintendent and properly falls within his s. 29(2)(*a*) power.

Most of the facts that the members presented to the courts in their quest to have the rule in *Saunders v. Vautier* applied could have been submitted to the Superintendent. I do not need to deal with the members' allegations that Rogers acted in bad faith, which the lower court judges stopped short of finding. Rogers did indeed attempt to appropriate the surplus. Its resistance to the actuary's recommendation to improve employee benefits, its replacement of the less malleable actuary and trustee, the internal notes, and the improper amendments to the Plan amply demonstrate that Rogers did what it could to get at the surplus. However, past conduct is relevant only if it helps to answer the forward-looking question: is there any legitimate purpose in keeping the Plan or should it be terminated and wound up? The Superintendent can rule on questions of both fact and law, and all parties can make

directives du surintendant. Cependant, des directives ne sont pas seulement données dans les cas où la caisse en fiducie n'est plus conforme aux normes de solvabilité. Le pouvoir du surintendant quant aux questions de solvabilité est régi par l'al. 29(2)*c*), qui se lit ainsi :

> *c*) le surintendant est d'avis que le régime n'est pas conforme aux critères et normes de solvabilité réglementaires, relativement à la capitalisation prévue au paragraphe 9(1) [capitalisation suffisante].

Puisque l'al. 29(2)*c*) traite des normes de solvabilité, il s'ensuit que l'al. 29(2)*a*) doit viser des circonstances où l'arrêt de paiement des cotisations ne compromet pas la capitalisation d'un régime.

52

Tout comme elles peuvent être approuvées à juste titre lorsque les circonstances en démontrent la légitimité, les fusions de régimes et de caisses en fiducie peuvent être contestées si elles contreviennent aux dispositions d'une loi, d'une fiducie ou d'un régime. Bien qu'elles soient légitimes aux fins de capitalisation, les périodes d'exonération de cotisations peuvent néanmoins être jugées illégitimes si elles cachent un refus injustifié de mettre fin à un régime. Il appartient au surintendant, conformément au pouvoir que lui confère l'al. 29(2)*a*), de déterminer la validité d'une raison donnée pour ne pas mettre fin à un régime.

53

La plupart des faits que les participants ont présentés aux tribunaux en tentant de faire appliquer la règle de *Saunders c. Vautier* auraient pu être soumis au surintendant. Je n'ai pas à examiner les allégations des participants voulant que Rogers ait agi de mauvaise foi, lesquelles n'ont pas été retenues par les juges des tribunaux d'instance inférieure. Rogers a effectivement tenté de s'approprier le surplus. Sa résistance à la recommandation de l'actuaire de bonifier les prestations des employés, son remplacement de l'actuaire et de la fiduciaire moins influençables, les notes de service internes et les modifications illicites du Régime montrent amplement que Rogers a fait ce qu'elle pouvait pour avoir accès au surplus. Toutefois, la conduite antérieure n'est pertinente que si elle aide à répondre à la question qui se pose pour l'avenir : Y a-t-il un intérêt légitime à conserver le Régime

2006 SCC 28 (CanLII)

appropriate recommendations to him. The provisions of the *PBSA* and the regulations concerning the duties of the employer are well within the Superintendent's interpretative jurisdiction.

ou faudrait-il y mettre fin et le liquider? Le surintendant peut trancher à la fois des questions de fait et des questions de droit, et les parties peuvent lui faire des recommandations appropriées. Le surintendant a toute la compétence voulue pour interpréter les dispositions de la *LNPP* et du Règlement qui portent sur les obligations de l'employeur.

2006 SCC 28 (CanLII)

54 Rogers argues that the Superintendent's role is limited to solvency issues. This position disregards his supervisory role with respect to the protection of members and beneficiaries. It also overlooks s. 29(2)(*a*), which does not mention solvency and which must cover a more diverse set of circumstances than s. 29(2)(*c*), a provision that deals solely with solvency issues.

Rogers affirme que le rôle du surintendant se limite aux questions de solvabilité. Ce point de vue ne tient pas compte de son rôle surveillance en matière de protection des participants et des bénéficiaires. Il passe également sous silence l'al. 29(2)*a*), qui ne parle pas de solvabilité et qui doit viser un ensemble plus diversifié de circonstances que l'al. 29(2)*c*), lequel porte uniquement sur des questions de solvabilité.

55 The Superintendent's broad power under s. 29(2) is clear. It was given judicial consideration in *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (C.A.). In that case, the employer intended to consolidate a number of plans in Canada and the United States. It asked the Superintendent for permission to transfer the assets of a plan which had a surplus of $4.2 million. The employees asked, based on a provision of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 (s. 69(1)(a)), similar to s. 29(2)(*a*) of the *PBSA*, that their pension plan be wound up on the basis that the employer had ceased contributing to the pension plan about 20 years before the consolidation application. The facts are strikingly similar to those in the instant case. The Ontario Court of Appeal affirmed the Divisional Court's decision, stating that due to the failure to consider the employees' request for a partial wind up prior to, or in conjunction with, the decision on the transfer application, the Superintendent's consent to the transfer was unreasonable. The following note from the reasons is worth mentioning (at para. 31, note 5):

Le pouvoir général que le par. 29(2) confère au surintendant est clair. Il a fait l'objet d'un examen judiciaire dans l'arrêt *Huus c. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (C.A.). Dans cette affaire, l'employeur voulait fusionner un certain nombre de régimes au Canada et aux États-Unis. Il a demandé au surintendant l'autorisation de transférer l'actif d'un régime qui affichait un surplus de 4,2 millions de dollars. Se fondant sur une disposition de la *Loi sur les régimes de retraite* de l'Ontario, L.R.O. 1990, ch. P.8 (l'al. 69(1)a)), semblable à l'al. 29(2)*a*) *LNPP*, les employés demandaient que leur régime de retraite soit liquidé parce que l'employeur avait cessé d'y cotiser environ 20 ans avant la demande de fusion. Les faits ont une ressemblance frappante avec ceux de la présente affaire. La Cour d'appel de l'Ontario a confirmé la décision de la Cour divisionnaire, en affirmant qu'en raison de l'omission d'examiner la demande de liquidation partielle présentée par les employés avant la décision sur la demande de transfert ou en même temps que celle-ci, le consentement du surintendant au transfert était déraisonnable. Il vaut la peine de reproduire la remarque suivante tirée des motifs de jugement (par. 31, note 5) :

I note in passing that none of the appellants takes the position that a wind-up order can flow only from an application by the employer. Although s. 68 of the [*Pension Benefits Act*] envisions a wind-up process

[TRADUCTION] Je remarque, en passant, qu'aucun des appelants ne prétend qu'un ordre de liquidation peut seulement découler d'une demande de l'employeur. Bien que l'art. 68 de la [*Loi sur les régimes de retraite*]

initiated by the employer, s. 69 is not limited in this fashion. Indeed, the steps the Superintendent took in this case, to be discussed below, indicate that the Superintendent regarded it as his duty to deal with a wind-up request from the respondent retirees.

envisage un processus de liquidation enclenché par l'employeur, l'art. 69 n'est pas ainsi limité. En effet, les démarches du surintendant en l'espèce, qui seront analysées plus loin, montrent qu'il s'estimait tenu d'examiner une demande de liquidation présentée par les retraités intimés.

56 I agree with the Ontario Court of Appeal, and it is my view that the Superintendent's power under s. 29(2)(*a*) of the *PBSA* becomes almost a duty when employees ask him to act. His power must be exercised in conformity with the remedial purpose of the provisions of the *PBSA*.

Je partage l'avis de la Cour d'appel de l'Ontario et j'estime que le pouvoir que l'al. 29(2)*a*) *LNPP* confère au surintendant devient presque une obligation lorsque des employés lui demandent d'agir. Il doit exercer son pouvoir conformément à l'objet réparateur des dispositions de la *LNPP*.

57 In the case at bar, the contributions ceased in 1984 and the Plan has since been closed. The Superintendent can review all the circumstances and decide whether the facts warrant winding up the part of the RCI Plan that relates to the Plan, which would have the effect of terminating the Trust. He can take into account the findings of fact made in the judgment that are binding on the parties.

En l'espèce, les cotisations ont cessé en 1984 et le Régime est depuis fermé. Le surintendant peut examiner l'ensemble des circonstances et décider si les faits justifient la liquidation de la partie du régime de RCI qui concerne le Régime, ce qui aurait pour effet de mettre fin à la fiducie. Il peut tenir compte des conclusions de fait du jugement qui lient les parties.

58 Although the appeal is allowed, Rogers' arguments have not prevailed. As a result, the members should not be required to pay Rogers' costs. In addition, Rogers should bear the trustee's costs. The Court of Appeal's order as to costs should however be left undisturbed.

Bien que le pourvoi soit accueilli, les arguments de Rogers n'ont pas été retenus. Par conséquent, les participants ne devraient pas être tenus de payer les dépens de Rogers. De plus, Rogers devrait payer les dépens de la fiduciaire. Par ailleurs, il n'y a pas lieu de modifier l'ordonnance de la Cour d'appel quant aux dépens.

59 For these reasons, I would allow the appeal, order Rogers to pay National Trust's costs in this Court and set aside the order of the Court of Appeal with the exception of the order as to costs, which I would affirm.

Pour ces motifs, je suis d'avis d'accueillir le pourvoi, d'ordonner à Rogers de payer les dépens de Trust National devant notre Cour et d'annuler l'ordonnance de la Cour d'appel, sauf l'ordonnance relative aux dépens, qui est confirmée.

The reasons of McLachlin C.J. and Bastarache and Charron JJ. were delivered by

Version française des motifs de la juge en chef McLachlin et des juges Bastarache et Charron rendus par

BASTARACHE J. —

LE JUGE BASTARACHE —

1. Introduction

1. Introduction

60 This appeal concerns a decision of the British Columbia Court of Appeal holding that the respondents Sandra Buschau et al. ("respondents") are

Le présent pourvoi porte sur une décision dans laquelle la Cour d'appel de la Colombie-Britannique a statué que les intimés Sandra Buschau et autres

2006 SCC 28 (CanLII)

entitled to terminate an ongoing employee pension trust by invoking the rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.), a 19th century doctrine that arose in connection with the postponement of gifts in private trusts. The rule was considered by this Court in *Halifax School for the Blind v. Chipman*, [1937] S.C.R. 196, where, at p. 215, in concurring reasons (for himself and Rinfret J.), Crocket J. addressed the origins and rationale of the rule in these terms:

It is true that in *Saunders* v. *Vautier*; *Gosling* v. *Gosling*; *Wharton* v. *Masterman*, and other cases, to which we were referred by the appellant's counsel, where there were absolute vested gifts of real estate and capital funds, entitling the donees to complete ownership and possession at a future event, the courts disregarded express directions of the testators to accumulate the rents and income in the meantime. . . .

Various reasons have been ascribed for its [the rule's] establishment. Lindley, L.J., in *Harbin* v. *Masterman*, which went to the House of Lords on appeal under the name of *Wharton* v. *Masterman*, above cited, described it as "a remarkable exception" to "the general principle that a donee or legatee can only take what is given him on the terms on which it is given." He explained it as follows:

> Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded. . . .

Herschell, L.C. said:

> The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.

Lord Davey said:

> The reason for the rule has been variously stated. It may be observed, however, that the Court of

(« intimés ») ont le droit de mettre fin à une fiducie de régime de retraite d'employés en invoquant la règle établie dans *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.), une règle du XIXe siècle liée au report de donations dans des fiducies d'intérêt privé. Notre Cour a examiné cette règle dans l'arrêt *Halifax School for the Blind c. Chipman*, [1937] R.C.S. 196, où, à la p. 215, dans des motifs concordants rédigés en son propre nom et en celui du juge Rinfret, le juge Crocket en a expliqué les origines et la raison d'être en ces termes :

[TRADUCTION] Il est vrai que dans les affaires *Saunders* c. *Vautier*, *Gosling* c. *Gosling* et *Wharton* c. *Masterman*, ainsi que dans d'autres affaires qui nous ont été mentionnées par l'avocat de l'appelante, où il était question de donations sans réserve et dévolues de biens immeubles et de fonds d'immobilisations qui conféraient aux donataires le droit à la pleine propriété et à la pleine possession à la survenance d'un événement futur, les tribunaux n'ont pas tenu compte des directives expresses des testateurs prescrivant l'accumulation des loyers et des revenus dans l'intervalle. . .

Diverses raisons ont été énoncées pour expliquer [l']établissement [de la règle]. Dans l'affaire *Harbin* c. *Masterman*, portée en appel devant la Chambre des lords sous l'intitulé *Wharton* c. *Masterman*, précité, le lord juge Lindley a qualifié cette règle d'« exception remarquable » au « principe général voulant qu'un donataire ou un légataire ne puisse accepter ce qui lui est donné ou légué qu'aux conditions auxquelles on lui fait la donation ou le legs en question ». Il s'est ainsi expliqué :

> Les conditions qui sont incompatibles avec la succession à laquelle elles se rattachent sont frappées de nullité absolue et peuvent donc être écartées. . .

Le lord chancelier Herschell a dit ceci :

> Au départ, on semble avoir supposé plutôt que décidé qu'il en était ainsi. On a apparemment considéré que c'était une conséquence nécessaire de la conclusion qu'une donation avait été dévolue, que la bénéficiaire de cette donation devait en jouir aussitôt qu'il devenait juridiquement autonome et que la jouissance de la donation ne pouvait pas être reportée à une date ultérieure, sauf si le testateur avait affecté les revenus à d'autres fins dans l'intervalle.

Lord Davey a affirmé ce qui suit :

> La raison d'être de la règle a été énoncée de différentes façons. Cependant, on peut constater que la

2006 SCC 28 (CanLII)

Chancery always leant against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest. [Footnotes omitted.]

The Court of Appeal relied on the judgment of this Court in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, as holding that the rule in *Saunders v. Vautier* was applicable to pension trusts, based on the finding in *Schmidt* that pension trusts are "classic" trusts which are subject to "all applicable trust law principles" ((2004), 24 B.C.L.R. (4th) 85, 2004 BCCA 80 ("*Buschau No. 2*"), at para. 52). The appellant employer, Rogers Communications Inc. ("RCI"), now appeals that decision of the Court of Appeal, arguing that the respondents cannot invoke the rule in *Saunders v. Vautier* to terminate the pension trust. The respondents' purpose in seeking to terminate the pension trust was to crystallize and obtain the actuarial surplus, to which they would not otherwise be entitled unless the pension plan was terminated in some other way, such as by the employer pursuant to the terms of the Plan. A previous decision of the Court of Appeal had determined that despite the amendments to the trust made by RCI, the respondents retained the right to any actual surplus upon termination ((2001), 83 B.C.L.R. (3d) 261, 2001 BCCA 16 ("*Buschau No. 1*")). It should also be noted that the pension plan itself provided that any surplus remaining upon termination after payment of the defined benefits would be distributed among the plan members.

The decision of the Court of Appeal also raises questions regarding the nature and content of an employer's obligation of good faith in a pension plan setting. In particular, it asks to what extent an employer is entitled to act in its own interests in the administration of a pension plan, consistent with its obligation to act in good faith. In *Buschau No. 2*, the Court of Appeal held that RCI's good faith obligation would preclude an amendment to re-open the Rogers Communications Inc. pension plan ("RCI Plan"), which was closed to new members in 1984.

Cour de la Chancellerie a toujours été défavorable au report de la dévolution ou de la possession à plus tard, ou à l'imposition de restrictions à la jouissance d'un droit absolu et dévolu. [Renvois omis.]

61

La Cour d'appel a considéré que la règle de *Saunders c. Vautier* s'appliquait aux fiducies de retraite en raison de la conclusion tirée par notre Cour dans l'arrêt *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611, selon laquelle les fiducies de retraite sont des fiducies « classiques » assujetties « à tous les principes applicables du droit des fiducies » ((2004), 24 B.C.L.R. (4th) 85, 2004 BCCA 80 (« *Buschau nº 2* »), par. 52). L'employeur appelant, Rogers Communications Inc. (« RCI »), se pourvoit maintenant contre cette décision de la Cour d'appel en soutenant que les intimés ne peuvent invoquer la règle de *Saunders c. Vautier* pour mettre fin à la fiducie de retraite. En cherchant à mettre fin à la fiducie de retraite, les intimés entendaient cristalliser et toucher le surplus actuariel auquel ils n'auraient pas droit par ailleurs, sauf s'il était mis fin à la fiducie d'une autre façon, comme, par exemple, sur l'initiative de l'employeur conformément aux modalités du régime. Dans une décision antérieure, la Cour d'appel avait décidé que, malgré les modifications apportées à la fiducie par RCI, les intimés avaient conservé le droit à tout surplus réel en cas de cessation ((2001), 83 B.C.L.R. (3d) 261, 2001 BCCA 16 (« *Buschau nº 1* »)). Il importe également de souligner que le régime de retraite lui-même prévoyait que tout surplus qui resterait au moment de la cessation, après le versement des prestations déterminées, serait réparti entre les participants au régime.

62

La décision de la Cour d'appel soulève également des questions concernant la nature et le contenu de l'obligation d'un employeur d'agir de bonne foi dans le contexte d'un régime de retraite. Plus particulièrement, elle soulève la question de savoir jusqu'à quel point un employeur peut agir dans son propre intérêt en gérant un régime de retraite, en conformité avec son obligation d'agir de bonne foi? Dans l'arrêt *Buschau nº 2*, la Cour d'appel a conclu que l'obligation de bonne foi de RCI empêcherait de rouvrir, par voie de modification, le régime de retraite de Rogers Communications Inc. (« régime de RCI »), qui a été fermé à de nouveaux participants en 1984.

2006 SCC 28 (CanLII)

2006 SCC 28 (CanLII)

63 National Trust Co., trustee of the pension trust under consideration in the main case (the "Trust"), also appeals the Court of Appeal's decision. It asks this Court to overturn the order made in the supplementary reasons of the Court of Appeal issued on May 18, 2004, wherein that court ordered National Trust to "tur[n] over the Trust assets, after the payment of all necessary debts and expenses, to the petitioners" ((2004), 27 B.C.L.R. (4th) 17, 2004 BCCA 282 ("*Buschau No. 3*"), at para. 16). National Trust argues that the effect of the decision of the Court of Appeal is to devolve upon it the authority and legal responsibility to give effect to and administer the termination of the Trust, an authority it says it does not possess under the terms of the RCI Plan or any applicable statute. National Trust argues that it is in no position to reconcile the decision of the court with the various legislative standards and requirements applicable to the termination of the Plan and Trust. It asks this Court to reverse the decision to impose on it duties and responsibilities it is not authorized to undertake pursuant to the Trust agreement, such duties and responsibilities belonging to the employer RCI or the Superintendent of Financial Institutions ("Superintendent"), pursuant to the applicable legislation and/or the terms of the Plan.

La Compagnie Trust National (« Trust National »), fiduciaire de la fiducie de retraite (« fiducie ») examinée dans le dossier principal, interjette également appel contre la décision de la Cour d'appel. Elle demande à notre Cour d'infirmer l'ordonnance dans laquelle la Cour d'appel lui a enjoint, dans des motifs supplémentaires déposés le 18 mai 2004, de [TRADUCTION] « remet[tre] l'actif de la fiducie aux requérants une fois acquittées toutes les dettes et dépenses nécessaires » ((2004), 27 B.C.L.R. (4th) 17, 2004 BCCA 282 (« *Buschau nº 3* »), par. 16). Trust National fait valoir que la décision de la Cour d'appel a pour effet de lui transférer le pouvoir et la responsabilité juridique de mettre en œuvre et de gérer la cessation de la fiducie, pouvoir qu'elle affirme ne pas avoir en vertu des modalités du régime de RCI ou de toute loi applicable. Elle soutient qu'elle n'est pas en mesure de concilier la décision de la cour avec les différentes normes et exigences législatives qui s'appliquent à la cessation du régime et de la fiducie. Trust National demande à notre Cour d'infirmer la décision de lui imposer des obligations et des responsabilités qu'elle ne peut pas assumer selon la convention de fiducie et qui incombent à l'employeur RCI ou au surintendant des institutions financières (« surintendant »), selon les dispositions législatives applicables ou les modalités du régime, ou les deux à la fois.

2. Background

2. Contexte

64 RCI and respondents both provided a description of the events leading to the present appeal to establish the factual background for dealing with this case. I reproduce here the essence of their descriptions. It must be noted however that there is some disagreement concerning, in particular, the actual number of members in the Plan and the role played by the trustee National Trust, also an appellant.

En vue d'établir le contexte factuel de la présente affaire, RCI et les intimés ont respectivement fourni une description des événements à l'origine du présent pourvoi. Je reproduis ici l'essentiel de leurs descriptions. Il faut cependant souligner l'existence d'un certain désaccord au sujet notamment du nombre réel de participants au régime et du rôle joué par la fiduciaire Trust National, une autre partie appelante.

65 The corporate predecessor of RCI established the Premier Pension Plan as a non-contributory defined benefit plan in January 1974 by means of two documents, a trust agreement and a plan document. Eventually, as a result of corporate acquisitions and mergers, the Premier Plan was one of

En janvier 1974, la société remplacée par RCI a mis sur pied le régime de retraite de Premier, un régime non contributif à prestations déterminées, au moyen de deux documents, soit une convention de fiducie et un document relatif au régime. À la suite d'acquisitions et de fusions de sociétés, le

several pension plans administered by RCI for the benefit of employees of RCI and its corporate affiliates.

régime de Premier a fini par devenir l'un des nombreux régimes de retraite que RCI gérait pour le compte de ses employés et de ceux de ses filiales.

Membership in the Premier Plan was compulsory for all full-time employees over the age of 25 having completed one year of service. In 1984, RCI amended the Premier Plan to close it to employees hired after July 1, 1984. The following year, RCI withdrew $968,285 from the Plan surplus and began taking contribution holidays on the recommendation of their actuary, T.I. Benefits. In 1992, RCI merged the Premier Plan with four other RCI plans by amending the plan documents to create a common plan text. No steps were taken to amend the separate Premier Trust agreement or formally merge the Premier Trust with the trusts established for the other RCI plans, but the amendments provided that any surplus funds remaining on termination would revert to RCI instead of the members. The respondents say that the merger was a device to use the Premier Plan surplus to compensate for deficits in some of the other merged plans.

66 L'adhésion au régime de Premier était obligatoire pour tous les employés à temps plein âgés de plus de 25 ans et comptant une année de service. En 1984, RCI a modifié le régime de Premier de manière à le fermer aux employés embauchés après le 1er juillet 1984. L'année suivante, sur recommandation de son cabinet d'actuaires, T.I. Benefits, RCI a retiré la somme de 968 285 $ du surplus du régime et a commencé à s'accorder des périodes d'exonération de cotisations. En 1992, RCI a fusionné le régime de Premier avec quatre autres de ses régimes en modifiant les documents relatifs à ces régimes de manière à créer un texte de régime commun. Aucune mesure n'a été prise en vue de modifier la convention de fiducie distincte relative au régime de Premier ou de fusionner officiellement la fiducie de Premier avec celles établies pour les autres régimes de RCI. Cependant, les modifications prévoyaient que tout surplus qui resterait au moment de la cessation reviendrait à RCI plutôt qu'aux participants. Les intimés affirment que la fusion était un moyen d'utiliser le surplus du régime de Premier pour compenser les déficits de certains autres régimes fusionnés.

Pursuant to the provisions of the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("*PBSA*"), and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the merged pensions plan (the RCI Plan) was registered with the Superintendent and the Canada Customs and Revenue Agency.

67 Conformément aux dispositions de la *Loi de 1985 sur les normes de prestation de pension*, L.R.C. 1985, ch. 32 (2e suppl.) (« *LNPP* »), et de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.), le régime de retraite issu de la fusion (le régime de RCI) a été agréé auprès du surintendant et de l'Agence des douanes et du revenu du Canada.

The respondents sued RCI in 1995 seeking various forms of relief, including a declaration that the merger of the Premier Plan with other plans forming the RCI Plan was unlawful and the return of the money taken out of the Trust. This action came to trial in 1998 and the merger was held to be lawful. The trial judge found that the members were entitled to the benefits they were promised under the original Plan, including the right to any surplus existing on termination of the merged plan: (1998), 54

68 En 1995, les intimés ont intenté contre RCI une action dans laquelle ils sollicitaient diverses formes de réparation, dont un jugement déclarant illégale la fusion du régime de Premier avec d'autres régimes qui était à l'origine du régime de RCI, ainsi que la restitution de la somme retirée de la fiducie. Le procès a eu lieu en 1998, et la fusion a été jugée légale. Le juge de première instance a conclu que les participants avaient droit aux avantages qui leur avaient été promis dans le cadre du régime initial et

2006 SCC 28 (CanLII)

B.C.L.R. (3d) 125. On January 11, 2001, the Court of Appeal upheld the finding that the merger was valid but held that the merger of the pension plans did not affect the existence of the Premier Trust as a separate trust. The court ordered that "the members of the Premier Plan shall be at liberty to undertake proceedings in the Supreme Court of British Columbia to terminate the Premier Trust, based either on the rule in *Saunders v. Vautier* or on the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463 to the extent either may be applicable". The Court of Appeal held that RCI had no "interest" in the Trust and that its consent was therefore not necessary under the rule in *Saunders v. Vautier* (see *Buschau No. 1*). RCI paid back the surplus that it had removed before judgment was delivered. While the decision of the Court of Appeal on this issue is not under appeal, I would note at the outset that the court's finding in *Buschau No. 1* that the Plan (and fund) and Trust can be severed and dealt with independently is no doubt responsible in large part for the difficulties posed in this appeal.

notamment à tout surplus qui existerait au moment de la cessation du régime fusionné : (1998), 54 B.C.L.R. (3d) 125. Le 11 janvier 2001, la Cour d'appel a confirmé la conclusion selon laquelle la fusion était valide, mais elle a jugé que la fusion des régimes de retraite n'avait aucun effet sur la fiducie de Premier qui continuait d'exister comme une entité distincte. La cour a ordonné que [TRADUCTION] « les participants au régime de Premier soient libres d'engager devant la Cour suprême de la Colombie-Britannique des procédures destinées à mettre fin à la fiducie de Premier en se fondant soit sur la règle de *Saunders c. Vautier* soit sur la *Trust and Settlement Variation Act*, R.S.B.C. 1996, ch. 463, dans la mesure où l'une ou l'autre pourra s'appliquer ». La Cour d'appel a décidé que RCI n'avait aucun « intérêt » dans la fiducie et qu'il n'était donc pas nécessaire d'obtenir son consentement selon la règle de *Saunders c. Vautier* (voir *Buschau n° 1*). Avant le prononcé du jugement, RCI a remboursé la partie du surplus qu'elle avait retirée. Bien que la décision de la Cour d'appel sur cette question ne soit pas portée en appel, je tiens à souligner au départ qu'il ne fait aucun doute que la conclusion tirée par cette cour dans l'arrêt *Buschau n° 1*, selon laquelle le régime (et la caisse) et la fiducie peuvent être dissociés et traités séparément, est en grande partie à l'origine des difficultés qui se posent dans le présent pourvoi.

69 On May 24, 2001, the respondents petitioned the Supreme Court of British Columbia for an order terminating the Premier Trust. This was the commencement of the present proceeding. The respondents sought, *inter alia*, an order "that the Premier Pension Plan be terminated or, alternatively, that the surplus portion of the Premier Pension Plan be terminated".

Le 24 mai 2001, les intimés ont demandé à la Cour suprême de la Colombie-Britannique de rendre une ordonnance mettant fin à la fiducie de Premier. Cette requête a marqué le début de la présente instance. Les intimés sollicitaient notamment une ordonnance enjoignant [TRADUCTION] « de mettre fin au régime de retraite de Premier ou, subsidiairement, au surplus du régime de retraite de Premier ».

70 Loo J. heard the petition in two stages. Following the first hearing in November 2001, she held that the applicability of the rule in *Saunders v. Vautier* was decided by the previous decision of the Court of Appeal, and that the rule was applicable. She ordered RCI to provide to the respondents information pertaining to the Plan "so they can obtain the necessary consents to terminate the Plan" ((2002),

La juge Loo a entendu la requête en deux étapes. En novembre 2001, au terme de la première audition, elle a conclu que la question de l'applicabilité de la règle de *Saunders c. Vautier* avait été tranchée dans la décision antérieure de la Cour d'appel, et que la règle s'appliquait. Elle a ordonné à RCI de fournir aux intimés les renseignements sur le régime [TRADUCTION] « qui leur permettront

2006 SCC 28 (CanLII)

100 B.C.L.R. (3d) 327, 2002 BCSC 624, at paras. 12 and 33).

On January 7, 2003, the respondents came to court with consents executed by the 144 members of the Plan. The respondents lacked, however, the consent of approximately 25 of the beneficiaries designated by the members pursuant to the plan provisions. The respondents could not rely on the rule in *Saunders v. Vautier* to terminate the Premier Trust because it requires the consent of all possible beneficiaries. They therefore sought to have the court consent to the termination, on behalf of the designated beneficiaries, pursuant to s. 1 of the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463.

In reasons issued on May 1, 2003 ((2003), 13 B.C.L.R. (4th) 385, 2003 BCSC 683), Loo J. held that the respondents were entitled to terminate the Premier Trust and gave the court's consent on behalf of the designated beneficiaries to such termination.

Newbury J.A. issued reasons for judgment on behalf of the Court of Appeal on February 20, 2004. She held, at paras. 11 and 22 of *Buschau No. 2*, that:

(a) Loo J. erred in holding that the applicability of the rule in *Saunders v. Vautier* was decided by the previous judgment of the Court of Appeal. The conclusion that *Saunders v. Vautier* applied was, however, correct;

(b) The respondents were not entitled to terminate the Premier Trust under the rule in *Saunders v. Vautier* because they lacked the consent of all designated beneficiaries;

(c) Loo J. erred in holding that the court had jurisdiction, under the *Trust and Settlement Variation Act*, to consent to a termination of the Premier Trust on behalf of capacitated designated beneficiaries;

d'obtenir les consentements requis pour mettre fin au régime » ((2002), 100 B.C.L.R. (3d) 327, 2002 BCSC 624, par. 12 et 33).

71

Le 7 janvier 2003, les intimés se sont présentés à la cour munis des consentements signés par les 144 participants au régime. Toutefois, ils n'avaient pas obtenu le consentement d'environ 25 des bénéficiaires que les participants avaient désignés conformément aux dispositions du régime. Les intimés ne pouvaient pas invoquer la règle de *Saunders c. Vautier* pour mettre fin à la fiducie de Premier parce qu'elle exige le consentement de tous les bénéficiaires éventuels. Ils ont donc demandé à la cour de consentir à la cessation au nom des bénéficiaires désignés, conformément à l'art. 1 de la *Trust and Settlement Variation Act*, R.S.B.C. 1996, ch. 463.

72

Dans des motifs déposés le 1er mai 2003 ((2003), 13 B.C.L.R. (4th) 385, 2003 BCSC 683), la juge Loo a décidé que les intimés avaient le droit de mettre fin à la fiducie de Premier, et a donné, au nom des bénéficiaires désignés, le consentement de la cour à cette cessation.

73

Le 20 février 2004, la juge Newbury a déposé des motifs de jugement au nom de la Cour d'appel. Elle a conclu ceci, aux par. 11 et 22 de l'arrêt *Buschau no 2* :

a) la juge Loo a commis une erreur en décidant que la question de l'applicabilité de la règle de *Saunders c. Vautier* avait été tranchée dans le jugement antérieur de la Cour d'appel. Elle a cependant eu raison de conclure que cette règle s'appliquait;

b) les intimés n'avaient pas le droit de mettre fin à la fiducie de Premier en application de la règle de *Saunders c. Vautier* parce qu'ils n'avaient pas obtenu le consentement de tous les bénéficiaires désignés;

c) la juge Loo a commis une erreur en décidant que, aux termes de la *Trust and Settlement Variation Act*, la cour avait compétence pour consentir à la cessation de la fiducie de Premier au nom de bénéficiaires désignés ayant la capacité juridique;

2006 SCC 28 (CanLII)

(d) It was not possible that RCI could reopen the Premier Plan to new members "since such a step could not, in the particular circumstances of this case, be taken in good faith by this employer *vis-à-vis* the existing beneficiaries".

d) RCI ne pouvait pas rouvrir le régime de Premier à de nouveaux participants [TRADUCTION] « étant donné que, dans les circonstances particulières de la présente affaire, ce n'était pas une mesure que cet employeur pouvait prendre de bonne foi eu égard aux bénéficiaires existants ».

74 The court held that "normally" the appeal would be allowed but, in this case, the court would withhold entering judgment for three months to give the respondents an opportunity, as suggested by the court, to revoke the designations of existing beneficiaries (who were not before the court), gather further consents and make further submissions (paras. 11 and 103).

La cour a conclu que « normalement » l'appel serait accueilli, mais qu'en l'espèce elle attendrait pendant trois mois avant de rendre jugement afin que les intimés puissent, comme elle le proposait, révoquer les désignations de bénéficiaires existants (qui n'étaient pas devant elle), obtenir d'autres consentements et présenter d'autres arguments (par. 11 et 103).

75 Subsequently, the Court of Appeal received motions for judgment from RCI and the respondents. In an order issued by the Court of Appeal on May 18, 2004 in *Buschau No. 3*, the court held that the appeal should be allowed but made, *inter alia*, the following orders:

THIS COURT ORDERS that the appeal is allowed, that the order of Loo, J. be set aside, and that the petition brought pursuant to the *Trust and Settlement Variation Act* be dismissed;

THIS COURT FURTHER ORDERS that the appellant, Rogers Communications Inc. ("RCI"), does not have an "interest" in the Trust that would make its consent to the termination under *Saunders v. Vautier* necessary;

THIS COURT ORDERS that, provided the consents of all Members and those persons who are now designated beneficiaries have been obtained for the termination of the Trust, the petitioners shall be at liberty to proceed to invoke the rule in *Saunders v. Vautier*;

. . .

THIS COURT FURTHER ORDERS that RCI cannot amend the Premier Pension Plan to permit the addition of new members.

La Cour d'appel a, par la suite, reçu des requêtes en jugement déposées par RCI et les intimés. Dans une ordonnance rendue le 18 mai 2004 dans l'arrêt *Buschau n° 3*, elle a conclu que l'appel devait être accueilli, mais elle a notamment ajouté ceci par voie d'ordonnance :

[TRADUCTION]

LA COUR ORDONNE que l'appel soit accueilli, que l'ordonnance de la juge Loo soit annulée et que la requête fondée sur la *Trust and Settlement Variation Act* soit rejetée;

LA COUR DÉCLARE EN OUTRE que l'appelante, Rogers Communications Inc. (« RCI »), n'a dans la fiducie aucun « intérêt » qui, selon *Saunders c. Vautier*, rendrait nécessaire son consentement à la cessation;

LA COUR DÉCLARE que, pourvu que tous les participants et toutes les personnes actuellement désignées comme bénéficiaires aient donné leur consentement à la cessation de la fiducie, les requérants seront libres d'invoquer la règle de *Saunders c. Vautier*;

. . .

LA COUR DÉCLARE EN OUTRE que RCI ne peut modifier le régime de retraite de Premier pour permettre l'adhésion de nouveaux participants.

76 As of March 31, 2002, the portion of assets in the master trust allocated to the Premier Trust was approximately $11 million greater than the actuarial liabilities for the Premier Plan members (RCI's factum, at para. 24).

Dès le 31 mars 2002, la part de l'actif de la fiducie principale attribuée à la fiducie de Premier représentait environ 11 millions de dollars de plus que la provision actuarielle au titre des participants au régime de Premier (mémoire de RCI, par. 24).

2006 SCC 28 (CanLII)

77 The Court of Appeal further decided that the Trustee would have to satisfy itself that the conditions under the rule in *Saunders v. Vautier* had been met and that all statutory requirements had been complied with before distribution. If necessary, the Trustee could seek direction under s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464. The court also rejected the submission that proceedings under the *Trust and Settlement Variation Act* would be required, given that the Trust could be terminated under the rule in *Saunders v. Vautier* itself (*Buschau No. 3*).

La Cour d'appel a en outre décidé que la fiduciaire devrait s'assurer que les conditions de la règle de *Saunders c. Vautier* avaient été remplies et que toutes les exigences légales avaient été respectées avant de procéder à la répartition. La fiduciaire pouvait, au besoin, présenter une demande de directives fondée sur l'art. 86 de la *Trustee Act*, R.S.B.C. 1996, ch. 464. Étant donné qu'il pouvait être mis fin à la fiducie en vertu de la règle de *Saunders c. Vautier* même, la cour a également rejeté l'argument selon lequel une instance fondée sur la *Trust and Settlement Variation Act* serait nécessaire (*Buschau n° 3*).

78 At the hearing of this appeal on November 15, 2005, this Court requested that the parties provide further written submissions regarding the interface between the rule in *Saunders v. Vautier* and the *PBSA*. This decision followed a discussion between various members of the Court and counsel concerning possible conflicts between the rule in *Saunders v. Vautier* and the *PBSA*. I might also add that the same concerns had been raised by National Trust in its factum.

Lors de l'audition du présent pourvoi le 15 novembre 2005, notre Cour a demandé aux parties de présenter d'autres observations écrites concernant l'interaction de la règle de *Saunders c. Vautier* avec la *LNPP*. Cette décision a été prise à la suite d'une discussion entre différents membres de la Cour et avocats au sujet des conflits possibles entre cette règle et la *LNPP*. J'ajouterais également que Trust National avait exprimé les mêmes préoccupations dans son mémoire.

3. Analysis

3. Analyse

79 The *PBSA* is a comprehensive statutory scheme structured to further the public policy objective of enhanced financial security for workers upon their withdrawal from the active workforce. The *PBSA*, together with the *Pension Benefits Standards Regulations*, *1985*, SOR/87-19, facilitates pension contributions from workers and employers, and protects and preserves pension funds and maximizes pension benefits, all in the interest of providing income security for workers in retirement.

La *LNPP* est un régime législatif complet conçu pour favoriser la réalisation de l'objectif de politique générale d'amélioration de la sécurité financière des travailleurs au moment où ils quittent les rangs de la population active. Conjuguée au *Règlement de 1985 sur les normes de prestation de pension*, DORS/87-19, elle facilite les cotisations de retraite des travailleurs et des employeurs, protège et préserve les caisses de retraite et maximise les prestations de retraite, tout cela dans le but d'assurer une sécurité du revenu aux travailleurs retraités.

80 Within this comprehensive scheme, s. 29 and the regulations enacted in relation thereto contain detailed provisions for the termination of pension plans and the distribution of plan assets.

Dans le cadre de ce régime complet, l'art. 29 et le règlement qui s'y rapporte contiennent des dispositions détaillées qui régissent la cessation des régimes de retraite et la répartition de leur actif.

81 Given the voluntary nature of the private pension plan system, employers are generally entitled to terminate a pension plan, as expressed in most plan documents, including the Plan at issue here. This

Étant donné que le système de régimes de retraite privés est de nature facultative, les employeurs ont généralement le droit de mettre fin à un régime de retraite, y compris celui en cause dans la présente

2006 SCC 28 (CanLII)

right is recognized in s. 29(5) of the *PBSA*, which refers to the intention of a plan administrator (who in most cases will be the employer) to terminate a pension plan. But the Superintendent is also given power to terminate pension plans in other certain specified situations. He has the power to revoke a pension plan's registration for failure to comply with directions (s. 11.1). Directions of compliance can be issued where the Superintendent is of the opinion that an administrator or employer is acting in a manner "contrary to safe and sound financial or business practices" (s. 11(1)), or that a pension plan, or the administration of a pension plan, is not compliant with the *PBSA* or regulations (s. 11(2)). If registration is revoked, a plan is deemed to have been terminated (s. 29(1)).

affaire; c'est ce que prévoient la plupart des documents relatifs à ces régimes. Ce droit est reconnu par le par. 29(5) *LNPP*, qui renvoie à l'intention de l'administrateur d'un régime de pension (qui, dans la plupart des cas, est l'employeur) de mettre fin à un régime de retraite. Toutefois, le surintendant est également habilité à mettre fin à des régimes de pension dans certaines autres situations précises. Il a le pouvoir de révoquer l'agrément d'un régime de pension pour défaut de se conformer à des directives (art. 11.1). Le surintendant peut donner des directives s'il est d'avis qu'un administrateur ou un employeur agit d'une manière « contrair[e] aux bonnes pratiques du commerce » (par. 11(1)), ou s'il estime qu'un régime de pension ou la gestion de celui-ci n'est pas conforme à la *LNPP* ou aux règlements (par. 11(2)). Si l'agrément est révoqué, le régime est réputé avoir pris fin (par. 29(1)).

82 In addition to deemed termination in consequence of the revocation of a plan's registration, s. 29(2) stipulates three other situations in which the Superintendent has power to directly order the termination of a plan. The Superintendent may exercise this power when there has been: (a) cessation or suspension of employer contributions; (b) discontinuance of the employer's business operations; or (c) the employer's failure to fund the plan in accordance with prescribed standards of solvency. In each case, the power is directed to circumstances in which the security of the promised pension benefits is threatened.

Outre la présomption de cessation qui résulte de la révocation de l'agrément d'un régime, le par. 29(2) mentionne trois autres cas où le surintendant a le pouvoir d'ordonner directement la cessation d'un régime. Le surintendant peut exercer ce pouvoir lorsqu'il y a eu a) suspension ou arrêt de paiement des cotisations patronales, b) abandon des secteurs d'activité de l'employeur ou c) omission de l'employeur de cotiser au régime conformément aux normes de solvabilité réglementaires. Dans chaque cas, le pouvoir vise des cas où la sécurité des prestations de retraite promises est menacée.

83 This is consistent with the statute governing the Office of the Superintendent which states that the objects of the Office, in respect of pension plans, are: (a) to supervise pension plans in order to determine if they meet minimum funding requirements or are complying with the other requirements of the legislation; (b) if not, to advise the administrator and take, or advise the administrator to take, necessary corrective measures; and (c) to promote the adoption by administrators of policies and procedures designed to control and manage risk (see the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp.), Part I). It is apparent from the statutory objects of the Office that the supervisory

Cela est compatible avec le texte législatif régissant le Bureau du surintendant, qui précise que le Bureau poursuit, à l'égard des régimes de pension, les objectifs suivants : a) superviser les régimes de pension pour s'assurer du respect des exigences minimales de capitalisation et des autres exigences de la mesure législative; b) en cas de non-respect de ces exigences, aviser l'administrateur et prendre les mesures nécessaires pour corriger la situation, ou forcer l'administrateur à les prendre; c) inciter les administrateurs à se doter de politiques et de procédures pour contrôler et gérer le risque (voir la *Loi sur le Bureau du surintendant des institutions financières*, L.R.C. 1985, ch. 18 (3e suppl.), partie I). Il ressort des objectifs légaux du Bureau que la

2006 SCC 28 (CanLII)

focus of the Superintendent is primarily on matters affecting the solvency or financial condition of pension plans. It is worth noting here that National Trust invokes the *PBSA* in its appeal, arguing at para. 70 of its factum that "[t]he judgment of the British Columbia Court of Appeal turns this statutory scheme on its head and places the Trustee in the role that by statute has been assigned to the administrator and to the Superintendent."

supervision assurée par le surintendant porte principalement sur les questions touchant la solvabilité ou la situation financière des régimes de pension. Il convient de noter ici que Trust National invoque la *LNPP* dans son pourvoi, en faisant valoir au par. 70 de son mémoire, que [TRADUCTION] « [l]e jugement de la Cour d'appel de la Colombie-Britannique va à l'encontre du régime législatif et confie au fiduciaire le rôle que la loi assigne à l'administrateur et au surintendant. »

2006 SCC 28 (CanLII)

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There is no provision in the *PBSA* for plan beneficiaries to terminate a pension plan. Furthermore, there is no provision in the *PBSA* for any party (employer, administrator, trustee, Superintendent, plan members or other beneficiaries) to terminate the Trust under which the pension fund contributions are held as security for the payment of plan benefits, prior to, and independent of, the termination of the Plan. Beneficiaries may request that the Superintendent exercise his discretionary power under s. 29(2), but the Superintendent's power to terminate a plan is available only where the stipulated pre-conditions are met. The Superintendent does not have a general discretion to terminate pension plans.

Aucune disposition de la *LNPP* ne permet aux bénéficiaires d'un régime de retraite de mettre fin à ce régime. De plus, aucune disposition de la *LNPP* ne permet à quiconque (employeur, administrateur, fiduciaire, surintendant, participants au régime ou autres bénéficiaires) de mettre fin à la fiducie en vertu de laquelle les cotisations à la caisse de retraite sont détenues à titre de garantie du versement des prestations du régime, avant la cessation du régime et indépendamment de celle-ci. Les bénéficiaires peuvent demander au surintendant d'exercer le pouvoir discrétionnaire que lui confère le par. 29(2), mais le pouvoir du surintendant de mettre fin à un régime ne peut être exercé que si les conditions préalables énoncées sont remplies. Le surintendant n'a aucun pouvoir discrétionnaire général de mettre fin à des régimes de retraite.

85

"[T]ermination" in relation to a pension plan is defined in the *PBSA* as the cessation of the crediting of benefits to plan members generally (s. 2(1)). Termination of a pension plan is distinguished from "winding-up" which refers to the distribution of the assets of a terminated pension plan. The *PBSA* provides that the pension fund assets are only to be distributed after the Superintendent approves a report filed by the plan administrator on the termination of a plan. The report must set out the nature of the benefits to be provided under the plan and describe the methods of allocating and distributing those benefits (s. 29(9) and (10)).

La *LNPP* définit le terme « cessation » comme étant la cessation d'un régime de pension dans le cas où il n'est plus porté de droits à prestation en faveur des participants (par. 2(1)). Une distinction est établie entre la cessation d'un régime de pension et sa « liquidation », qui désigne la répartition de l'actif d'un régime de pension à la suite de sa cessation. La *LNPP* prévoit que l'actif de la caisse de retraite ne peut être réparti qu'une fois que le surintendant a approuvé le rapport déposé par l'administrateur lors de la cessation du régime. Ce rapport doit exposer la nature des prestations à verser au titre du régime et décrire les méthodes d'affectation et de répartition de celles-ci (par. 29(9) et (10)).

86

A major issue in this appeal is whether termination of the Plan must logically precede the termination of the Trust. According to RCI, the judgment

Une question importante dans le présent pourvoi est de savoir si la cessation du régime doit logiquement précéder la cessation de la fiducie. Selon RCI,

of the British Columbia Court of Appeal reverses the legislative scheme by permitting the beneficiaries of the Premier Plan to terminate the Trust and distribute the Trust assets, which were being held as security for the pension benefits accruing under the Plan, outside the legislative scheme and prior to the termination of the pension plan itself. It argues at para. 18 of its supplemental factum that

> [i]n enacting the *PBSA, 1985*, Parliament intended to devise a comprehensive scheme for dealing with issues of pension plan regulation, including the circumstances of their termination and the winding up and distribution of assets held in pension funds. If it had contemplated granting additional rights to plan members to act on their own initiative to terminate pension trusts and distribute plan assets, it would have done so.

87 It would appear that none of the statutory grounds for termination of a pension plan are present in this case. The Premier Plan is fully funded and there is no threat to the solvency of the Plan or the security of the pension benefits. There is no issue that the RCI Plan is being administered in a manner contrary to safe and sound financial or business practices, nor of non-compliance with the requirements of the legislation.

88 RCI has suspended contributions to the Plan. However, these contribution holidays are authorized by the terms of the Plan and have been approved by the courts. The reference to "suspension or cessation of employer contributions" in s. 29(2)(*a*) of the *PBSA* must be construed as referring to situations where an employer does not make required contributions. It does not extend to contribution holidays where the employer is relieved from making contributions by reason of a surplus in the Plan.

3.1 *The Applicability of the Rule in Saunders v. Vautier*

89 RCI recognizes that there may be circumstances in which it is appropriate to apply common law trust principles to resolve issues regarding pension

le jugement de la Cour d'appel de la Colombie-Britannique va à l'encontre du régime législatif en autorisant les bénéficiaires du régime de Premier à mettre fin à la fiducie et à en répartir l'actif, qui était détenu à titre de garantie du versement des prestations de retraite accumulées en vertu du régime, en dehors du régime législatif et avant la cessation du régime de retraite lui-même. Elle fait valoir ceci au par. 18 de son mémoire supplémentaire :

> [TRADUCTION] Lorsqu'il a édicté la *LNPP de 1985*, le législateur a voulu établir un régime complet à l'égard des questions de réglementation des régimes de retraite, y compris les circonstances de leur cessation ainsi que la liquidation et la répartition de l'actif détenu dans les caisses de retraite. S'il avait songé à accorder aux participants à ces régimes des droits additionnels de procéder, de leur propre initiative, à la cessation des fiducies de retraite et à la répartition de l'actif des régimes, il l'aurait fait.

Aucune des raisons, prévues par la Loi, de mettre fin à un régime de retraite ne semblerait exister en l'espèce. Le régime de Premier est entièrement capitalisé, et la solvabilité du régime et la sécurité des prestations de retraite ne sont pas compromises. Personne ne conteste que le régime de RCI est géré d'une manière contraire aux bonnes pratiques du commerce ou non conforme aux exigences de la mesure législative.

RCI a suspendu ses cotisations au régime. Toutefois, ces périodes d'exonération de cotisations sont autorisées par les modalités du régime et ont été approuvées par les tribunaux. La mention de « la suspension ou l'arrêt de paiement des cotisations patronales », à l'al. 29(2)*a*) *LNPP*, doit être interprétée comme visant les cas où l'employeur n'effectue pas les cotisations requises. Elle ne vise pas les périodes d'exonération de cotisations pendant lesquelles l'employeur est dispensé d'effectuer des cotisations en raison de l'existence d'un surplus dans le régime.

3.1 *L'applicabilité de la règle de Saunders c. Vautier*

RCI reconnaît qu'il peut y avoir des cas où il convient d'appliquer les principes de common law en matière de fiducie pour résoudre les questions

2006 SCC 28 (CanLII)

plans which have not been directly addressed in the legislation. I agree. This was the approach taken in *Schmidt* with respect to the question of ownership of surplus on termination of a pension plan. In that case, it was acknowledged that there was a gap in the legislation and the provisions of the statute did not provide guidance on this issue. However, RCI argues that, in the present case, s. 29 contains detailed provisions regarding the circumstances and manner in which pension plans may be terminated. RCI concludes that the legislation has "occupied the field" on this issue and there is no room for the operation of a common law rule.

relatives aux régimes de retraite qui n'ont pas été directement abordées dans la mesure législative. Je partage cet avis. Tel est le point de vue qui a été adopté dans l'affaire *Schmidt* au sujet de la propriété d'un surplus à la cessation d'un régime de retraite. Dans cette affaire, on a reconnu qu'il existait une question non résolue par la loi et que les dispositions de la loi en cause ne fournissaient aucun indice de l'intention législative à cet égard. RCI fait cependant valoir qu'en l'espèce l'art. 29 contient des dispositions détaillées qui régissent les circonstances dans lesquelles il peut être mis fin à des régimes de retraite, et la manière dont cela peut être fait. Elle conclut que cette question est [TRADUCTION] « entièrement régie » par la mesure législative et il n'y a pas lieu d'appliquer une règle de common law.

90

Pension trusts are not the same as traditional trusts, as stated by the Court of Appeal at paras. 1-2 in *Buschau No. 1*. In employment pension trusts, there is a legal relationship between the parties apart from the trust and continuing obligations on the part of the administrator. In the present case, in view of its very terms (see General Rule Seven (2)), there is no entitlement to an actuarial surplus while the Plan is ongoing. As stated by the Court of Appeal, the Trust Agreement and the Plan form an "integrated whole" (*Buschau No. 2*, at para. 13). Moreover, this is a defined benefit plan, i.e., a plan that is entirely funded by the employer, where members have an equitable interest in the trust assets, a right *in personam* against the trustee to require proper administration of the trust assets, and a contingent interest to the trust assets existing on plan termination if they are alive and members at the date of termination. The employer assumes the risk in such a plan; when interest rates and investment returns are high, a surplus will be realized, and when the economy changes, unfunded liabilities will often result. The goal is to require contributions by the employer that are sufficient to provide the defined benefits over long periods of time in spite of market fluctuations. To permit termination of the Plan when a surplus has been realized independently of the terms of the Plan is not consistent with its object or the applicable statutory regime. The contract

Contrairement à ce qu'affirme la Cour d'appel aux par. 1 et 2 de l'arrêt *Buschau nº 1*, les fiducies de retraite ne sont pas des fiducies classiques. Dans les fiducies de régime de retraite d'employés, il existe un rapport juridique entre les parties indépendamment de la fiducie et des obligations permanentes de l'administrateur. En l'espèce, compte tenu des modalités mêmes du régime (voir la Septième règle générale, section 2), il n'y a aucun droit à un surplus actuariel pendant que le régime est en vigueur. Comme l'a affirmé la Cour d'appel, la convention de fiducie et le régime forment un [TRADUCTION] « tout » (*Buschau nº 2*, par. 13). Il s'agit en outre d'un régime à prestations déterminées, c'est-à-dire d'un régime entièrement capitalisé par l'employeur, où les participants ont un intérêt en equity dans l'actif de la fiducie, un droit personnel d'exiger du fiduciaire qu'il gère correctement l'actif de la fiducie et un intérêt éventuel dans l'actif de la fiducie qui subsiste à la cessation du régime s'ils sont vivants et participants à la date de la cessation. L'employeur assume le risque lié à un tel régime; lorsque les taux d'intérêt et le rendement des investissements sont élevés, un surplus est réalisé, et lorsque l'économie fluctue, il en résulte souvent un passif non capitalisé. L'objectif est d'exiger de l'employeur des cotisations suffisantes pour assurer le versement des prestations déterminées durant de longues périodes en dépit des fluctuations du marché. Permettre la cessation du

2006 SCC 28 (CanLII)

clearly contemplated a continuing plan supported by a permanent Fund; segregation of the Fund by "closing" the Premier Plan was not possible. It is therefore an error to infer that the rule in *Saunders v. Vautier* can in effect create a manner of realizing on the actuarial surplus (the Fund) in violation of the terms of the Plan; in the case of this pension Plan, absolute entitlement to the surplus would only occur once the surplus became real, that is, once the Plan and Trust had been terminated. This is because the members only have a contingent interest in the Trust surplus, which does not vest until the Plan is terminated. This is reinforced by the statement in *Schmidt*, at p. 655: "When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries" (emphasis added) (see also p. 654). As a result, the rule in *Saunders v. Vautier* cannot be invoked here, since the rule requires that the beneficiaries seeking early termination possess the sum total of vested, not contingent, interests in the trust corpus: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 1178. The question then is whether termination of this Plan can occur outside the boundaries of the *PBSA*. The Court of Appeal reasoned that *Schmidt* had implicitly accepted that the rule in *Saunders v. Vautier* could apply independently of the *PBSA* and of any contract. The real question is whether trust law can in effect prevail over the contract and governing legislation in the present case (*Buschau No. 2*).

régime lorsqu'un surplus a été réalisé, sans égard aux modalités du régime, n'est pas compatible avec son objet ou avec le régime législatif applicable. Le contrat prévoyait clairement l'existence continue d'un régime doté d'une caisse permanente; il n'était pas possible de gérer séparément la caisse en « fermant » le régime de Premier. Il est donc erroné d'inférer que la règle de *Saunders c. Vautier* peut avoir pour effet de créer une façon de réaliser le surplus actuariel (la caisse) contrairement aux modalités du régime. Dans le cas du présent régime de retraite, il ne pouvait y avoir de droit absolu au surplus qu'une fois le surplus devenu réel, c'est-à-dire une fois qu'il aurait été mis fin au régime et à la fiducie. Cela s'explique par le fait que les participants ont seulement un intérêt éventuel dans le surplus de la fiducie, qui n'est dévolu qu'à la cessation du régime. Cela est renforcé par l'énoncé figurant à la p. 655 de l'arrêt *Schmidt*, selon lequel « [à] la cessation du régime, le surplus actuariel devient un surplus réel et est dévolu aux employés bénéficiaires » (je souligne) (voir aussi p. 654). Par conséquent, la règle de *Saunders c. Vautier* ne peut pas être invoquée en l'espèce étant donné qu'elle exige que les bénéficiaires qui sollicitent la cessation anticipée possèdent tous les intérêts dévolus et non éventuels dans le capital de la fiducie : voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 1178. Il s'agit donc de savoir si la cessation du présent régime peut se produire en dehors du cadre établi par la *LNPP*. La Cour d'appel a estimé que l'arrêt *Schmidt* avait reconnu implicitement que la règle de *Saunders c. Vautier* pouvait s'appliquer indépendamment de la *LNPP* et de tout contrat. La véritable question est de savoir si, en l'espèce, le droit des fiducies peut effectivement l'emporter sur le contrat et la loi applicable (*Buschau no 2*).

91 It is important to take note of the terms of the Plan and Trust documents. As I have previously stated, these are not distinct. The terms of the Plan are very specific and somewhat atypical of plans adopted in later years. In particular, art. V(1) of the Trust Agreement reserves to the employer

Il importe de tenir compte des modalités établies dans les documents relatifs au régime et à la fiducie. Comme je l'ai déjà dit, elles ne sont pas distinctes. Les modalités du régime sont très particulières et quelque peu différentes de celles des régimes adoptés au cours d'années subséquentes. En particulier, l'art. V(1) de la convention de fiducie réserve à l'employeur

2006 SCC 28 (CanLII)

> the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the Plan (including [the Trust] Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the [Trust] to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the Plan . . . .

General Rule Five permitted, but did not oblige, the employer to allocate additional pensions or pension entitlements to plan members, retired or otherwise, if the Plan had an actuarial surplus. General Rule Six permitted members to designate a beneficiary, and to alter or revoke that designation within the bounds of the law. General Rule Seven gave the employer the right to amend, modify or change the Plan, provided that the changes did not affect certain of the members' rights or benefits. It also gave the employer the right to terminate the Plan if necessary. It went on to say:

> In the event of the termination of the Plan, the benefits being paid to Retired Members will be continued as provided for under the terms and provisions of the Plan. The balance of the assets remaining in the Trust Fund, after all liabilities to Retired Members have been satisfied, will be distributed by the Committee among the remaining Members on the basis required under the provisions of Section 12 of the Pension Benefits Standards Act.

92 The Plan clearly states then that it is the employer who may amend and terminate the Plan and that it is the employer's expectation that the Plan and Trust will continue indefinitely. In such circumstances, there could be no reasonable expectation on the part of RCI or the members that the Trust could be terminated by the members, over RCI's objections, in order that the members might obtain the surplus. The application of the rule in *Saunders v. Vautier* would contradict the reasonable contractual expectations of the parties because beneficiaries who can collapse a trust under *Saunders v. Vautier* can, with the consent of the trustees,

> [TRADUCTION] le droit de modifier, à tout moment, en totalité ou en partie, les dispositions du régime (dont la [. . .] convention [de fiducie]) pourvu qu'aucune modification touchant les droits, les obligations, la rémunération ou les responsabilités du fiduciaire ne soit effectuée sans son consentement et pourvu également que, sauf avec l'approbation du ministre du Revenu national, aucune modification n'autorise ou ne permette qu'une partie de la [fiducie] soit utilisée ou affectée à d'autres fins que le bénéfice exclusif des personnes et de leur succession, qui peuvent à l'occasion être désignées dans le régime ou conformément à celui-ci. . .

La Cinquième règle générale permettait à l'employeur, sans l'y obliger, d'accorder d'autres prestations de retraite ou droits à des prestations de retraite aux participants au régime, retraités ou non, si le régime affichait un surplus actuariel. La Sixième règle générale permettait aux participants de désigner un bénéficiaire et de modifier ou de révoquer légalement cette désignation. La Septième règle générale conférait à l'employeur le droit d'amender, de modifier ou de changer le régime, pourvu que les changements ne portent pas atteinte à certains droits ou avantages des participants. Elle accordait également à l'employeur le droit de mettre fin au régime, si nécessaire. Elle précisait en outre ceci :

> [TRADUCTION] En cas de cessation du régime, les prestations versées aux participants retraités seront maintenues conformément aux modalités et aux dispositions du régime. Après que toutes les dettes envers les participants retraités auront été acquittées, le comité répartira entre les autres participants l'actif restant de la caisse en fiducie, conformément aux dispositions de l'article 12 de la Loi sur les normes de prestation de pension.

Le régime prévoit donc clairement que c'est l'employeur qui peut modifier le régime et y mettre fin, et que l'employeur s'attend à ce que le régime et la fiducie subsistent indéfiniment. Dans ces circonstances, ni RCI ni les participants au régime ne pouvaient raisonnablement s'attendre à ce qu'en dépit des objections de RCI les participants puissent mettre fin à la fiducie afin de pouvoir toucher le surplus. L'application de la règle de *Saunders c. Vautier* irait à l'encontre des attentes contractuelles raisonnables des parties du fait que les bénéficiaires qui peuvent mettre fin à une fiducie en application de cette règle peuvent, avec le consentement

2006 SCC 28 (CanLII)

collectively agree to vary its terms. The rule would permit members of a pension plan to unilaterally vary its terms without the employer's consent.

des fiduciaires, convenir collectivement d'en modifier les modalités. La règle permettrait aux participants à un régime de retraite d'en modifier unilatéralement les modalités sans le consentement de l'employeur.

93 It is also very important to consider the legislative context in which modern pension plans operate. It would appear that, in her 2003 decision, Loo J. disregarded the provisions of the *PBSA* regarding termination, but applied the *Trust and Settlement Variation Act* where it was necessary to circumvent the difficulty in obtaining all consents necessary under the rule in *Saunders v. Vautier*. In *Buschau No. 3*, the Court of Appeal noted that the rule in *Saunders v. Vautier* could result in the termination of the Plan if all of the preconditions of the rule were met, without regard for the legislative scheme and in particular s. 29(9) which provides that on termination of a plan, the administrator must file a report with the Superintendent

> setting out the nature of the pension benefits and other benefits to be provided under the plan and a description of the methods of allocating and distributing those benefits and deciding the priorities in respect of the payment of full or partial benefits to the members.

Il est également très important de tenir compte du contexte législatif des régimes de retraite modernes. Il semblerait que, dans la décision qu'elle a rendue en 2003, la juge Loo n'a pas tenu compte des dispositions de la *LNPP* relatives à la cessation, mais a appliqué la *Trust and Settlement Variation Act* alors qu'il fallait contourner la difficulté d'obtenir tous les consentements requis selon la règle de *Saunders c. Vautier*. Dans l'arrêt *Buschau n° 3*, la Cour d'appel a souligné que l'application de cette règle pouvait entraîner la cessation du régime si toutes ses conditions préalables étaient remplies, indépendamment du régime législatif et, en particulier, du par. 29(9) qui prévoit que, lors de la cessation d'un régime, l'administrateur doit déposer auprès du surintendant un rapport

> exposant la nature des prestations de pension ou autres à servir au titre du régime, les méthodes d'affectation et de répartition de celles-ci et établissant les priorités de paiement des prestations intégrales ou partielles aux participants.

94 This means that the rule in *Saunders v. Vautier* would permit the termination of the pension plan and Trust without the involvement of the employer as plan administrator and without the approval of the Superintendent. The only logical explanation for this conclusion is that the Court of Appeal had accepted that the Trust was independent of the Plan and could be dealt with solely by reference to the Trust itself, notwithstanding, in particular, that the *PBSA* (and the terms of the Plan, at art. IX(3)) provided special protections for spouses and common law partners. The terms of the Plan could be totally disregarded. At para. 54 of its reasons in *Buschau No. 2*, the Court of Appeal seems to accept that the Trust and the Plan constitute an "integrated whole", but nevertheless concludes that this whole is subject to trust law principles and to the resulting "disappearance" of the employer's rights and powers on the sole initiative of the plan members. This is very different from the decision to apply the

Cela signifie que la règle de *Saunders c. Vautier* permettrait de mettre fin au régime et à la fiducie de retraite sans la participation de l'employeur en tant qu'administrateur du régime et sans l'approbation du surintendant. La seule explication logique de cette conclusion est que la Cour d'appel avait reconnu que la fiducie était indépendante du régime et pouvait être examinée uniquement en fonction de ses propres modalités, en dépit du fait notamment que la *LNPP* (et les modalités du régime énoncées à l'art. IX(3)) accordait des protections spéciales aux époux et aux conjoints de fait. Il n'était pas possible de faire totalement abstraction des modalités du régime. Au paragraphe 54 de l'arrêt *Buschau n° 2*, la Cour d'appel semble reconnaître que la fiducie et le régime forment un [TRADUCTION] « tout », mais elle conclut néanmoins que ce tout est assujetti aux principes du droit des fiducies et à la [TRADUCTION] « disparition » des droits et pouvoirs de l'employeur qui résulterait de la seule initiative des participants

2006 SCC 28 (CanLII)

rule only where there is no conflict with the legislative scheme as in *Schmidt*. In my view, the unique role of the employer in respect of the pension plan and pension Trust cannot be ignored; and the terms of the contract at the root of the Trust cannot be circumvented; as well, the legislative framework cannot be made irrelevant by applying the rule in *Saunders v. Vautier*.

au régime. Cela est très différent de la décision d'appliquer la règle uniquement en l'absence de conflit avec le régime législatif, comme ce fut le cas dans l'affaire *Schmidt*. À mon avis, on ne peut faire abstraction du rôle unique que l'employeur joue à l'égard du régime et de la fiducie de retraite, et on ne peut se soustraire aux clauses du contrat à l'origine de la fiducie. On ne peut pas non plus faire perdre toute pertinence au cadre législatif en appliquant la règle de *Saunders c. Vautier*.

95

In the context of the appeal brought by National Trust, particular regard must be given to s. 8(3) of the *PBSA*, which states:

8. . . .

(3) The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

It is clear that a court has no authority to assign to National Trust the responsibilities of the administrator and of the Superintendent contrary to the legislative scheme which has determined a process to terminate a pension plan. But here I believe the Court of Appeal was defining a role for National Trust in light of the distinction it had made between the termination of the Plan and the termination of the Trust, only the former being subject to the terms of the Plan and provisions of the *PBSA*.

Dans le cadre de l'appel interjeté par Trust National, il faut prêter une attention particulière au par. 8(3) *LNPP*, dont voici le texte :

8. . . .

(3) L'administrateur d'un régime de pension gère le régime et le fonds de pension en qualité de fiduciaire de l'employeur, des participants actuels ou anciens et de toutes autres personnes qui ont droit à des prestations de pension ou à des remboursements au titre du régime.

Il est clair qu'un tribunal n'a pas le pouvoir d'assigner à Trust National les responsabilités de l'administrateur et du surintendant contrairement au régime législatif qui a établi un processus de cessation de régime de retraite. Mais en l'espèce, je crois que la Cour d'appel s'est trouvée à définir un rôle pour Trust National à la lumière de la distinction qu'elle avait établie entre la cessation du régime et celle de la fiducie, selon laquelle seule la cessation du régime était assujettie aux modalités du régime et aux dispositions de la *LNPP*.

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The underlying social policy objective of the legislation is to promote the establishment and maintenance of private pension plans in order to provide income security for employees and their families in retirement. As this Court recognized in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 38, modern pension statutes are public policy legislation that recognize the "vital importance of long-term income security". The "locking-in" provisions, portability provisions, as well as the termination and winding-up provisions are all part of the objective of ensuring retirement income security. This is not consistent with

L'objectif de politique sociale qui sous-tend la mesure législative est de favoriser l'établissement et le maintien de régimes de retraite privés afin d'assurer une sécurité du revenu aux employés retraités et à leurs familles. Comme notre Cour l'a reconnu dans l'arrêt *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, [2004] 3 R.C.S. 152, 2004 CSC 54, par. 38, les lois modernes en matière de retraite sont des lois d'intérêt public qui reconnaissent « l'importance cruciale de la sécurité du revenu à long terme ». Les dispositions en matière de « blocage » et de transférabilité de même que celles relatives à la cessation et à la liquidation ont toutes pour objectif d'assurer la

2006 SCC 28 (CanLII)

the operation of the rule in *Saunders v. Vautier*, as applied by the Court of Appeal in this case, which is based on an entirely different policy objective.

sécurité du revenu de retraite. Cela n'est pas compatible avec la façon dont la Cour d'appel applique la règle de *Saunders c. Vautier* en l'espèce, laquelle repose sur un objectif de politique générale complètement différent.

97 The introduction of the *Saunders v. Vautier* principle without qualification or restriction into the private pension system would constitute a very significant derogation from an employer's right to voluntarily choose to offer or continue a pension plan. An employer motivated by labour market factors to create and maintain a pension plan for its employees for the business benefits it may derive may not be so motivated when a plan instituted for such reasons can be terminated by the unilateral action of members and other beneficiaries, without consideration of the employer's business interests. In these circumstances, the "fair and delicate balance between employer and employee interests" (*Monsanto Canada*, at para. 24) will be disrupted in a manner which is contrary to the legislative objective of encouraging the establishment and maintenance of private pension plans.

L'introduction, sans aucune réserve ni restriction, de la règle de *Saunders c. Vautier* dans le système des régimes de retraite privés constituerait une atteinte très importante au droit de l'employeur de choisir de son propre gré d'offrir ou de maintenir un régime de retraite. L'employeur qui, pour des raisons liées au marché du travail, songe à établir et à maintenir un régime de retraite pour ses employés à cause des avantages commerciaux qu'il comporte sera peut-être moins porté à le faire si les participants et autres bénéficiaires d'un régime établi pour ces raisons peuvent y mettre fin unilatéralement sans tenir compte de ses propres intérêts commerciaux. Dans ces circonstances, le « juste et délicat équilibre entre les intérêts de l'employeur et ceux de l'employé » (*Monsanto Canada*, par. 24) sera rompu d'une manière contraire à l'objectif législatif consistant à encourager l'établissement et le maintien de régimes de retraite privés.

98 The rule in *Saunders v. Vautier* requires the consent of all parties who have an interest, or who own rights of enjoyment, in the trust property. The Court of Appeal held that the rule could be applied with the consent of all members (by which they surely meant to include former members) of the Premier Plan and those persons who are now designated beneficiaries (*Buschau No. 2*). But s. 22 of the *PBSA* requires that, absent a written waiver in prescribed form, any pension benefit paid after January 1, 1987 to a member or former member who has a spouse or common law partner on the date that the first payment is made shall be a joint and survivor pension benefit, entitling the surviving spouse to a benefit of at least 60 percent of the joint benefit. This requirement is reflected in the terms of the Premier Plan (art. IX(3)). The inclusion of survivor benefits was a policy choice of the Legislature that must be honoured. These statutory rights cannot be overridden by the consent of present plan members and other beneficiaries or by the courts. Nor can s. l(b) of the *Trust and Settlement Variation*

La règle de *Saunders c. Vautier* exige le consentement de toutes les parties qui ont un intérêt dans les biens en fiducie ou qui possèdent des droits de jouissance sur ceux-ci. La Cour d'appel a conclu que la règle pouvait s'appliquer avec le consentement de tous les participants (qui, selon elle, étaient sûrement censés inclure les participants anciens) au régime de Premier et des personnes qui sont maintenant des bénéficiaires désignés (*Buschau n° 2*). Cependant, l'art. 22 *LNPP* prévoit qu'en l'absence de renonciation écrite, en la forme réglementaire, toute prestation de pension versée après le 1er janvier 1987 à un participant actuel ou ancien qui a, à la date du premier versement, un époux ou un conjoint de fait doit être une prestation réversible, ce qui permet à l'époux ou au conjoint survivant de recevoir une prestation équivalant à au moins 60 pour 100 de la prestation réversible. Cette exigence se reflète dans les modalités du régime de Premier (art. IX(3)). L'ajout de prestations de survivant constituait un choix de politique générale du législateur qu'il faut respecter. Ces droits conférés

2006 SCC 28 (CanLII)

Act assist. The current spouses and common law partners who have a present contingent interest are *sui juris*. As such, they could give their consent to termination of the Plan, and the court does not have the power to consent on their behalf unless they are legally incapacitated.

par la loi ne peuvent être écartés ni par le consentement des participants au régime et autres bénéficiaires actuels, ni par les tribunaux. L'alinéa lb) de la *Trust and Settlement Variation Act* n'est pas plus utile. Les époux et conjoints de fait actuels qui ont présentement un intérêt éventuel sont juridiquement autonomes. Par conséquent, ils pourraient donner leur consentement à la cessation du régime et la cour n'a pas le pouvoir de consentir en leur nom, sauf s'ils sont frappés d'incapacité juridique.

2006 SCC 28 (CanLII)

99

As for the interests of future possible spouses and common law partners, whose consent would also be required for termination pursuant to *Saunders v. Vautier*, those interests are more problematic in that their direct consent cannot be obtained, and asking a court to consent on their behalf would raise serious questions. RCI notes at para. 37 of its supplementary factum that, "the court may only consent on behalf of a beneficiary if the proposed trust variation is in the interests of that party. It is difficult to conceive of a circumstance in which termination of a pension trust would be in the interests of future spouses or common law partners." Consenting to the termination of the Plan on behalf of future unascertainable spouses and common law partners would presumably not be in their best interests. If plan members who are not currently married or in a common law relationship were allowed to terminate the Plan and obtain the surplus, but were then to enter into a marriage or common law relationship in the future, their future spouses or common law partners would not enjoy their statutory right to the joint and survivor benefit to which they would have been entitled had the Plan been ongoing and not terminated. Thus, even if this was sufficient, valid consents to termination of the Plan in order to satisfy the pre-conditions of the *Saunders v. Vautier* rule have not been and cannot be obtained from all possible beneficiaries here; more importantly, while the current spouses and common law partners of plan members are able to consent to termination, future spouses and common law partners who are currently unascertainable cannot give such consent, and a court would likely be reluctant to give its consent on their behalf.

Le cas des intérêts des futurs époux et conjoints de fait, dont le consentement à la cessation serait également nécessaire selon la règle de *Saunders c. Vautier*, est plus problématique parce qu'il est impossible d'obtenir directement leur consentement et que demander à la Cour de consentir en leur nom soulèverait de graves questions. RCI fait remarquer, au par. 37 de son mémoire supplémentaire, que [TRADUCTION] « la cour ne peut consentir au nom d'un bénéficiaire que si la modification que l'on propose d'apporter à la fiducie est dans l'intérêt de cette partie. Il est difficile d'imaginer une situation où la cessation d'une fiducie de retraite serait dans l'intérêt des futurs époux ou conjoints de fait. » Consentir à la cessation du régime au nom de futurs époux et conjoints de fait non identifiables ne serait probablement pas dans leur intérêt. Si on permettait aux participants au régime qui ne sont pas actuellement mariés ou en union de fait de mettre fin au régime et de toucher le surplus, mais que ceux-ci venaient ensuite à se marier ou à vivre en union de fait, leurs futurs époux ou conjoints de fait ne jouiraient pas du droit conféré pas la loi à la prestation réversible qu'ils posséderaient si le régime avait continué d'exister. Ainsi, même si cela était suffisant, le consentement valide à la cessation du régime que tous les bénéficiaires éventuels doivent donner pour que les conditions préalables de la règle de *Saunders c. Vautier* soient remplies n'a pas été et ne peut pas être obtenu en l'espèce; qui plus est, s'il est vrai que les époux et les conjoints de fait actuels des participants au régime sont en mesure de consentir à la cessation, les futurs époux et conjoints de fait actuellement non identifiables ne peuvent le faire, et un tribunal hésiterait probablement à consentir en leur nom.

100 For these reasons, I would conclude that the rule in *Saunders v. Vautier* does not apply in the circumstances of this case and that any application regarding the termination of the Plan and Trust must be dealt with in accordance with the terms of the Plan and the provisions of the *PBSA*. The respondents' suggestion that the absence of a procedure in the *PBSA* permitting a unilateral termination of the Plan by the members justifies the action under the rule of *Saunders v. Vautier* cannot be accepted. The rule simply does not apply. Members' rights are determined by the Plan itself and the *PBSA*; as indicated above, neither the terms of the Plan itself nor the provisions of the *PBSA* grant the members a right to terminate the Plan. The unilateral right of members to terminate the Plan simply does not exist in this case.

Pour ces motifs, je suis d'avis de conclure que la règle de *Saunders c. Vautier* ne s'applique pas en l'espèce et que toute demande relative à la cessation du régime et de la fiducie doit être examinée conformément aux modalités du régime et aux dispositions de la *LNPP*. L'idée des intimés, selon laquelle l'action fondée sur la règle de *Saunders c. Vautier* est justifiée par l'absence dans la *LNPP* d'une procédure qui permettrait aux participants de mettre fin unilatéralement au régime, ne peut pas être retenue. Cette règle ne s'applique tout simplement pas. Les droits des participants sont déterminés par le régime lui-même et la *LNPP*; comme nous l'avons vu, ni les modalités du régime lui-même ni les dispositions de la *LNPP* n'accordent aux participants le droit de mettre fin au régime. En l'espèce, les participants n'ont tout simplement pas le droit de mettre fin unilatéralement au régime.

3.2 *The Issue of Good Faith*

3.2 *La question de la bonne foi*

101 The Court of Appeal decided, at para. 61 of its reasons in *Buschau No. 2*, that the obligation of good faith of the employer precluded RCI from adopting any amendments to the Plan and Trust opening it to new members following its closure in 1984; it related this to what it termed the "stratagem" adopted by RCI years earlier to benefit from the actuarial surplus by merging different pension plans. The Court of Appeal then continued with a discussion of the employer's "interest" in the Plan and Trust.

La Cour d'appel a statué, au par. 61 de l'arrêt *Buschau nº 2*, que l'obligation de bonne foi de l'employeur empêchait RCI de modifier le régime et la fiducie pour permettre l'adhésion de nouveaux participants, qui avait été interdite en 1984; elle a rattaché cela à ce qu'elle a qualifié de [TRADUCTION] « stratagème » que RCI avait employé quelques années auparavant pour bénéficier du surplus actuariel et qui avait consisté à fusionner différents régimes de retraite. La Cour d'appel s'est ensuite livrée à une analyse de l'« intérêt » de l'employeur dans le régime et la fiducie.

102 It is quite obvious that the whole discussion concerning good faith had to do with fair conduct as administrator of the Plan. RCI insists that there is nothing uncommon about closed pension plans or the decision to rationalize funding and the provision of benefits after mergers. In its view, the proposed creation of an integrated pension scheme was a rational business decision that should not raise any issue regarding good faith when done within the parameters of the Plan's terms. RCI says there is no stratagem, only the exercise of a power to amend in the context — and this is fundamental — of a defined benefit plan. RCI says that "the analysis of good faith in respect of the

Il est tout à fait évident que toute l'analyse de la bonne foi avait trait au comportement équitable en tant qu'administrateur du régime. RCI maintient que les régimes de retraite fermés ou la décision de rationaliser la capitalisation et le versement de prestations à la suite de fusions n'ont rien d'inhabituel. À son avis, le projet de création d'un régime de retraite intégré constituait une décision d'affaires rationnelle qui ne devrait soulever aucune question de bonne foi si elle respecte les paramètres fixés par les modalités du régime. RCI plaide l'absence de stratagème et ajoute qu'il n'est question que de l'exercice d'un pouvoir de modification dans le contexte — ce qui est fondamental — d'un régime à

2006 SCC 28 (CanLII)

exercise of a discretionary power in a contractual context begins with careful consideration of the parties' reasonable contractual expectations" (factum, at para. 75). It is a prohibition against acting in a manner "calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" unless the employer has "reasonable and proper cause" (para. 80, quoting *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.*, [1991] 2 All E.R. 597 (Ch. D.), at p. 606). The respondents reject the contractual perspective and say that nothing done by the employer should affect or dilute their entitlements under the Plan; equitable principles should apply. I do not consider it necessary to arbitrate this debate. Section 8(10) of the *PBSA* provides sufficient guidance. The special context of pension plans requires employers who administer pension plans on behalf of their employees to always act in accordance with the spirit, purpose and terms of the pension plan; employers must always act in such a way as to ensure the protection of employees' pension benefits, not in a way that would reduce, threaten or eliminate them (see *Imperial Group*).

prestations déterminées. Selon RCI, [TRADUCTION] « l'analyse de la bonne foi concernant l'exercice d'un pouvoir discrétionnaire dans un contexte contractuel commence par un examen minutieux des attentes contractuelles raisonnables des parties » (mémoire, par. 75). L'obligation de bonne foi interdit d'agir d'une manière [TRADUCTION] « calculée ou susceptible de détruire ou de compromettre gravement le rapport de confiance entre l'employeur et l'employé », à moins que l'employeur n'ait un « motif raisonnable et valable » de le faire (par. 80, citant la décision *Imperial Group Pension Trust Ltd. c. Imperial Tobacco Ltd.*, [1991] 2 All E.R. 597 (Ch. D.), p. 606). Les intimés rejettent le point de vue contractuel et affirment qu'aucun acte de l'employeur ne devrait compromettre ou affaiblir les droits que leur confère le régime; les principes d'equity devraient s'appliquer. Je ne crois pas nécessaire d'arbitrer ce débat. Le paragraphe 8(10) *LNPP* donne des indications suffisantes. En raison du contexte particulier des régimes de retraite, l'employeur qui gère un tel régime pour le compte de ses employés doit toujours en respecter l'esprit, l'objet et les modalités; l'employeur doit toujours se comporter de manière à préserver les prestations de retraite des employés et non de manière à les réduire, à les compromettre ou à les éliminer (voir la décision *Imperial Group*).

103

It seems clear to me that the conclusion of the Court of Appeal on the issue of good faith is premised on its earlier decision that the amendment would deprive the beneficiaries of the Premier Trust of their right to terminate it under the rule in *Saunders v. Vautier.* I have found that the respondents cannot terminate the Trust pursuant to *Saunders v. Vautier.* But of course the parties could not ignore the Court of Appeal's decision in *Buschau No. 1.* As a result of that decision, a separate accounting was required for the Premier Trust. RCI then considered the possibility of making the Plan eligible to new membership so that similarly situated employees who were members of non-contributory defined benefit plans could be integrated into the Premier Plan. This is what the Court of Appeal rejected. Its reasoning is however driven by the idea that the Plan members were promised more than their pensions under the Plan, i.e., the

Il me semble clair que la conclusion de la Cour d'appel sur la question de la bonne foi était fondée sur sa décision antérieure selon laquelle la modification priverait les bénéficiaires de la fiducie de Premier de leur droit d'y mettre fin en application de la règle de *Saunders c. Vautier.* Je suis arrivé à la conclusion que les intimés ne peuvent se fonder sur cette règle pour mettre fin à la fiducie. Toutefois, il est évident que les parties ne pouvaient pas faire abstraction de l'arrêt *Buschau nº 1* de la Cour d'appel. À la suite de cette décision, une comptabilité distincte était requise pour la fiducie de Premier. RCI a alors envisagé la possibilité de rendre le régime accessible à de nouveaux participants de manière à pouvoir intégrer dans le régime de Premier les employés qui se trouvaient dans la même situation mais qui participaient à des régimes non contributifs à prestations déterminées. C'est ce que la Cour d'appel a rejeté. Son raisonnement repose toutefois

2006 SCC 28 (CanLII)

right to ask for distribution of the Trust surplus, providing they satisfied the conditions set out in *Saunders v. Vautier*. The decision regarding bad faith cannot stand where it is without a foundation. I am of the view that RCI's powers of amendment were not forfeited or estopped because of the closure of the Plan. Any termination of the Plan and amendments to it must be examined on the basis of its terms and conditions, in consideration of the applicable provisions of the *PBSA*. What would constitute an abuse of the employer's power or would otherwise offend community standards of reasonableness in the contemplated use of the Premier Plan assets for the benefit of present and future employees of RCI must be determined on that basis alone. In essence then, what is permitted and what is abusive will have to be determined in future proceedings according to the standard set in s. 8(10)(*b*) of the *PBSA* which states that "[w]here the employer is the administrator pursuant to paragraph 7(1)(*c*), if there is a material conflict of interest between the employer's role as administrator and the employer's role in any other capacity, the employer . . . (*b*) shall act in the best interests of the members of the pension plan."

4. Disposition

104 The appeal is allowed and the order of the Court of Appeal is set aside with costs in all courts to RCI and in this Court to National Trust.

Appeal allowed.

Solicitors for the appellant/respondent Rogers Communications Inc.: Nathanson, Schachter & Thompson, Vancouver.

Solicitors for the appellant/respondent National Trust Co.: Blake, Cassels & Graydon, Vancouver.

Solicitors for the respondents Sandra Buschau et al.: Laxton & Company, Vancouver.

sur l'idée qu'on avait promis aux participants au régime, en plus de leurs prestations de retraite, le droit de demander la répartition du surplus de la fiducie s'ils satisfaisaient aux conditions de la règle de *Saunders c. Vautier*. La décision concernant la mauvaise foi ne peut être maintenue si elle est dénuée de fondement. Selon moi, RCI n'a pas été déchue de ses pouvoirs de modification ni empêchée de les exercer en raison de la fermeture du régime. La cessation et la modification du régime doivent être examinées en fonction de ses modalités et des dispositions applicables de la *LNPP*. Ce sont là les seuls critères qui doivent servir à déterminer ce qui, dans l'emploi que l'on entend faire de l'actif du régime de Premier au profit des employés actuels et futurs de RCI, constituerait un abus du pouvoir de l'employeur ou contreviendrait par ailleurs aux normes sociales de raisonnabilité. Essentiellement, la question de savoir ce qui est permis et ce qui est abusif devra donc être tranchée, dans toute instance future, en fonction de la norme énoncée à l'al. 8(10)*b*) *LNPP*, qui précise que « [l]'employeur qui est l'administrateur, conformément à l'alinéa 7(1)*c*), doit, s'il y a un conflit d'intérêts sérieux entre les fonctions qu'il exerce à ce double titre [. . .] *b*) agir de façon à servir les intérêts des participants. »

4. Dispositif

Le pourvoi est accueilli et l'ordonnance de la Cour d'appel est annulée, avec dépens devant toutes les cours pour RCI et devant notre Cour pour Trust National.

Pourvoi accueilli.

Procureurs de l'appelante/intimée Rogers Communications Inc. : Nathanson, Schachter & Thompson, Vancouver.

Procureurs de l'appelante/intimée la Compagnie Trust National : Blake, Cassels & Graydon, Vancouver.

Procureurs des intimés Sandra Buschau et autres : Laxton & Company, Vancouver.

2006 SCC 28 (CanLII)

In the Matter of a Plan of Compromise or Arrangement of Indalex Limited et al.

[Indexed as: Indalex Ltd. (Re)]

104 O.R. (3d) 641

2011 ONCA 265

2011 ONCA 265 (CanLII)

Court of Appeal for Ontario,
MacPherson, Gillese and Juriansz JJ.A.
April 7, 2011

Debtors and creditors -- Companies' Creditors Arrangement Act -- Company obtaining order in CCAA proceedings permitting it to borrow funds pursuant to debtor-in-possession credit agreement -- Order creating super-priority charge in favour of debtor-in-possession lenders -- Super-priority charge not having priority over statutory deemed trust under Pension Benefits Act as deemed trust was not identified by court when charge was granted and affidavit evidence suggested such priority was unnecessary -- No finding of paramountcy made -- Valid provincial law continuing to operate -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8.

Fiduciaries -- Pensions -- Employer which acts as administrator of its pension plans having fiduciary duty to plan members -- Company initiating proceedings under Companies' Creditors Arrangement Act and obtaining court order permitting it to borrow funds pursuant to debtor-in-possession credit agreement -- Order creating super-priority charge in favour of debtor-in-possession lenders -- Company aware that its pension plans were underfunded -- Company subject to its fiduciary

duties as administrator as well as its corporate obligations during CCAA proceedings -- Conflict of interest existing between company's duties as administrator and its corporate duties -- Company breaching its common law fiduciary duties and s. 22(4) of Pension Benefits Act -- Appropriate remedy being order for payment from proceeds of sale of company of amounts sufficient to satisfy deficiencies in plans in priority to claim of debtor-in-possession lenders -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8, s. 22.

Pensions -- Winding up -- Deemed trust in s. 57(4) of Pension Benefits Act not limited to payment of amounts contemplated by s. 75(1)(a), but rather applying to all payments required by s. 75(1) -- Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(4), 75(1).

A Canadian company was the administrator of two registered pension plans, one for its salaried employees (the "Salaried Plan") and one for its executive employees (the "Executive Plan"). The Company's U.S. parent company sought Chapter 11 protection in the United States, and the Company initiated proceedings under the Companies' Creditors Arrangement Act ("CCAA"). At that time, the Salaried Plan was being wound up and both Plans were underfunded. The Company obtained a court order authorizing it to borrow funds pursuant to a debtor-in-possession ("DIP") credit agreement. The order created a super-priority charge in favour of the DIP lenders. The obligation to repay the DIP lenders was guaranteed by the U.S. parent. The Company moved for approval of the sale of its assets and for the distribution of the proceeds to the DIP lenders, which would result in there being nothing to fund the deficiencies in the Plans. Representatives of the Plans' members objected. The court approved the sale, but the Monitor retained in reserve an amount approximating the deficiencies. The sale [page642] proceeds were insufficient to pay the DIP lenders. The U.S. parent paid the shortfall. The representatives of the Plan members brought motions claiming that the reserve fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to the U.S. parent. They also claimed that during the

2011 ONCA 265 (CanLII)

CCAA proceedings, the Company breached its fiduciary obligations to the Plans' beneficiaries. The CCAA judge dismissed the Executive Plan motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments on the date of closing of the sale and no basis for a deemed trust. He dismissed the Salaried Plan motion on the basis that, as s. 31 of R.R.O. 1990, Reg. 909 permitted the Company to make up the deficiency in the Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. As there was no amount "due" under s. 57(4) of the Pension Benefits Act ("PBA") on the closing date of the sale, no deemed trust arose. The representatives of the Plans' members appealed.

Held, the appeal should be allowed.

The CCAA judge erred in his interpretation of s. 57(4) of the PBA. The words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75, and not just to amounts payable under s. 75(1)(a). The deficiency in the Salaried Plan had accrued as of the date of wind up and, pursuant to s. 57(4), was subject to a deemed trust on the closing date of the sale.

The Company breached its fiduciary obligations as administrator of the Plans during the CCAA proceedings. When managing its business, an employer wears its corporate hat. When acting as the administrator of its pension plans, it wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries. The Company could not ignore its obligations as administrator once it decided to seek CCAA protection. It breached its fiduciary obligations by doing nothing in the CCAA proceedings to fund the deficit in the underfunded Plans and taking active steps which undermined the possibility of additional funding to the Plans. It applied for CCAA protection without notice to the Plans' beneficiaries. It obtained an order that gave priority to the DIP lenders over

2011 ONCA 265 (CanLII)

"statutory trusts" without notice to the beneficiaries. It sold assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. It moved to obtain orders approving the sale and distributing the proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. Further, there was a conflict of interest between the Company's corporate duty and its duty as administrator. Even if the Company was not in breach of its common law fiduciary obligations, its actions amounted to a breach of s. 22(4) of the PBA.

The deemed trust motions were not barred by the collateral attack rule. That rule was not applicable, and even if it were, this was not a case for its strict application.

The CCAA judge's order granting a super-priority charge did not mean that the super-priority charge had the effect of overriding the deemed trust. The deemed trust was not identified by the court at the time the charge was granted, and the affidavit evidence suggested that such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continued to operate. The PBA deemed trust and the super-priority charge operated sequentially, with the deemed trust being satisfied first from the reserve fund. [page643]

Even if the conclusion that the deemed trust had priority over the secured credit was wrong, an order for payment from the reserve fund of amounts sufficient to satisfy deficiencies in the Plans was the appropriate remedy for the breaches of fiduciary obligation. That remedy was also appropriate for the Executive Plan, where it was not clear that a statutory deemed trust arose as the Plan had not been wound up at the time of sale.

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2011 ONCA 265 (CanLII)

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2011 ONCA 265 (CanLII)

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2011 ONCA 265 (CanLII)

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Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 18.3(1) [rep. S.C. 2005, c. 47, s. 131], 37

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222 [as am.], (3) [as am.]

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United States Bankruptcy Code, 11 U.S.C. tit. 11

Rules and regulations referred to

R.R.O. 1990, Reg. 909 (Pension Benefits Act), s. 31, (1), (2)

APPEAL from order of C. Campbell J., [2010] O.J. No. 974, 2010 ONSC 1114 (S.C.J.) dismissing motions for remedy for breach of deemed trust and breach of fiduciary duty.

Andrew J. Hatnay and Demetrios Yiokaris, for former executives, appellants.

Darrell L. Brown, for United Steelworkers, appellants.

Mark Bailey, for Superintendent of Financial Services.

Hugh O'Reilly and Adam Beatty, for Morneau Sobeco Limited Partnership, intervenor.

Fred Myers and Brian Empey, for Sun Indalex Finance, LLC.

2011 ONCA 265 (CanLII)

Ashley Taylor and Lesley Mercer, for monitor, FTI Consulting Canada ULC. [page645]

Harvey Chaiton and George Benchetrit, for George L. Miller, the Chapter 7 trustee of the bankruptcy estates of the US Indalex Debtors.

The judgment of the court was delivered by

[1] GILLESE J.A.: -- A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

[2] The company obtains protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended ("CCAA"). A court order enables it to borrow funds pursuant to a debtor-in-possession ("DIP") credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the "Guarantee").

[3] The company is sold through the CCAA proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

[4] The CCAA monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the Pension Benefits Act, R.S.O. 1990, c. P.8 ("PBA"). The U.S. parent company claims the money based on its payment under the Guarantee.

[5] Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the CCAA proceeding? These appeals wrestle with these difficult questions.

Overview

2011 ONCA 265 (CanLII)

[6] Indalex Limited was the sponsor and administrator of two registered pension plans: the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the "Salaried Plan") and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Executive Plan") (collectively, the "Plans").

2011 ONCA 265 (CanLII)

[7] On March 20, 2009, Indalex's parent company and its U.S.-based affiliates (collectively, "Indalex U.S.") sought Chapter 11 protection in the United States.

[8] On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. ("Indalex" or the "applicants") obtained protection from their creditors under the CCAA. [page646] At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the "Monitor") was appointed as monitor.

[9] On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

[10] On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans. Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

[11] At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the "USW"). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the "Former Executives").

[12] Both the USW and the Former Executives objected to the

planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the "Deficiencies") be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the PBA that apply to unpaid amounts owing to a pension plan by an employer.

[13] The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve (the "Reserve Fund"), an amount approximating the Deficiencies. [See Note 1 below]

[14] The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US$10.75 million, pursuant to its obligations under the Guarantee. [page647]

[15] In accordance with a process designed by the CCAA court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the CCAA proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

[16] Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the "Indalex bankruptcy motion"). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

[17] By orders dated February 18, 2010 (the "Orders under Appeal"), the CCAA judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the PBA had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

2011 ONCA 265 (CanLII)

[18] The USW and the Former Executives (together, the "appellants") appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

[19] On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") as administrator of the Plans.

[20] Morneau was granted intervenor status. It supports the appellants.

[21] The Superintendent also appeared. He, too, supports the appellants.

[22] Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

[23] The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

[24] George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the "U.S. Trustee"), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

[25] For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of [page648] reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

Background

[26] Indalex Limited is a Canadian corporation. It is the

2011 ONCA 265 (CanLII)

entity through which the Indalex group of companies operates in Canada. It is a direct wholly owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly owned subsidiary of Indalex Finance.

[27] Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada. Aluminum is a durable, light-weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

[28] Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end-users. In 2008, Indalex Limited accounted for approximately 32 per cent of the Indalex group of companies total sales to third parties.

[29] Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario ("FSCO") and the Canadian Revenue Agency.

The Salaried Plan

[30] The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

[31] The Salaried Plan contains a defined benefit and defined contribution component.

2011 ONCA 265 (CanLII)

[32] Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began CCAA proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 ($709,013), 2008 ($875,313) [page649] and 2009 ($601,000). As of December 31, 2008, the wind up deficiency was $1,795,600.

[33] All current service contributions have been made to the Salaried Plan.

[34] Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit "amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation".

The Executive Plan

[35] The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

[36] As of January 1, 2008, there were 18 members of the Executive Plan, none of whom were active employees.

[37] The Executive Plan is underfunded.

[38] As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of $2,535,100. On a solvency basis, the funding deficiency was $1,102,800 and on a wind up basis, the deficiency was $2,996,400. An actuarial review indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated $3,200,000.

[39] In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

2011 ONCA 265 (CanLII)

[40] Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40 per cent. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained CCAA protection. Between the two cuts, the Former Executives have lost between one-half and two-thirds of their pension benefits.

[41] On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the PBA in the CCAA proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

[42] At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from [page650] counsel for the Monitor dated July 13, 2009 indicated that it was expected that the Executive Plan would be wound up.

[43] On March 10, 2010, the Superintendent issued a notice of proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

Pension and corporate governance during the CCAA proceedings

[44] Keith Cooper, the senior managing director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the CCAA proceedings. On March 19, 2009, he was appointed the chief restructuring officer for all of the Indalex U.S.-based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

[45] Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and

2011 ONCA 265 (CanLII)

Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

[46] FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly owned subsidiary of FTI Consulting Inc.

[47] On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

[48] On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed to direct the affairs of all Indalex entities.

[49] On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

The CCAA Proceedings

The initial order, as amended (April 3 and 8, 2009)

[50] On April 3, 2009, pursuant to the order of Morawetz J., Indalex obtained protection from its creditors under the CCAA (the "Initial Order"). A stay of proceedings against Indalex was ordered. [page651]

[51] On April 8, 2009, the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the "DIP lenders"). JP Morgan Chase Bank, N.A. was the administrative agent (the "DIP Agent"). The DIP credit agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going-concern sale of Indalex's assets on or before August 1, 2009.

[52] Indalex's obligation to repay the DIP borrowings was

2011 ONCA 265 (CanLII)

guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

[53] Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the administration charge and the directors' charge, as those terms are defined in the Initial Order.

The Initial Order is further amended (June 12, 2009)

[54] On June 12, 2010, Morawetz J. heard and granted a motion by the applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about $5 million, from US$24.36 million to US$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the "June 12, 2009 order").

[55] Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an e-mail from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

[56] At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The sale approval order (July 20, 2009)

[57] Indalex brought two motions that were heard on July 20, 2009 by Campbell J. (the "CCAA judge").

[58] First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB ("SAPA"). Total

2011 ONCA 265 (CanLII)

consideration for the sale of Indalex and Indalex U.S. was approximately [page652] US$151,183,000. The Canadian sale proceeds were to be paid to the Monitor.

[59] As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

[60] Second, Indalex moved for approval of an interim distribution of the sale proceeds to the DIP lenders.

[61] Both the Former Executives and the USW objected to the planned distribution of the sale proceeds. They asserted statutory deemed trust claims in respect of the underfunded pension liabilities in the Plans, arguing that preference was to be given for amounts owing to the Plans pursuant to ss. 57 and 75 of the PBA. They also relied on s. 30(7) of the Ontario Personal Property Security Act, R.S.O. 1990, c. P.10 ("PPSA"), which expressly gives priority to the deemed trust in the PBA over secured creditors.

[62] The Former Executives and the USW further argued that Indalex had breached its fiduciary duty to the Plans' beneficiaries by failing to adequately meet its obligations under the Plans and by abdicating its responsibilities as administrator once CCAA proceedings had been undertaken.

[63] The court approved the sale in an order dated July 20, 2009 (the "Sale Approval order"). However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve, an amount approximating the Deficiencies.

[64] It was agreed that an expedited hearing process would be undertaken in respect of the USW and Former Executives' deemed trust claims and that the Reserve Fund held by the Monitor would be sufficient, if required, to satisfy the deemed trust claims.

The guarantee is called on

[65] On July 31, 2009, the sale to SAPA closed. The sale

2011 ONCA 265 (CanLII)

proceeds available for distribution were insufficient to repay the DIP loan in full. The Monitor made a payment of US$17,041,391.80 to the DIP Agent. This resulted in a shortfall of US$10,751,247.22 in respect of the DIP borrowings. The DIP Agent called on the Guarantee for the amount of the shortfall, which Indalex U.S. paid.

The orders under appeal (August 28, 2009)

[66] The USW and Former Executives brought motions to determine their deemed trust claims. The motions were set for hearing on August 28, 2009. Indalex then filed its bankruptcy motion, in which it sought to file a voluntary assignment in bankruptcy. [page653]

[67] By orders dated February 18, 2010, the CCAA judge dismissed the USW and Former Executives' motions [[2010] O.J. No. 974, 2010 ONSC 1114].

[68] The CCAA judge found it unnecessary to deal with Indalex's bankruptcy motion.

The Reasons of the CCAA Judge

The Former Executives' motion

[69] The CCAA judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW motion

[70] Because the Salaried Plan was in the process of being wound up, the CCAA judge dismissed the USW motion for different reasons.

[71] The CCAA judge saw the issue raised on the USW motion to be whether the PBA required Indalex to pay the wind up deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In

2011 ONCA 265 (CanLII)

resolving the issue, the CCAA judge considered ss. 57 and 75 of the PBA. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

[72] The CCAA judge also considered s. 31(1) and (2) of R.R.O. 1990, Reg. 909 (Pension Benefits Act) (the "Regulations"). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the CCAA judge stated that Indalex would have had an obligation under the PBA to pay in any deficiency as of the date of wind up.

2011 ONCA 265 (CanLII)

[73] The CCAA judge concluded [at paras. 49-51]:

I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the PBA or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the CCAA.

Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up. [page654]

Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex bankruptcy motion

[74] Having found that the deemed trust claims failed, the CCAA judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

In my view, a voluntary assignment under the BIA should not

be used to defeat a secured claim under valid Provincial legislation, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the CCAA or the BIA. For that reason I did not entertain the bankruptcy assignment motion first.
(Emphasis added)

[75] He found no conflict between the federal and provincial legislative regimes and allowed the applicants to renew their request for bankruptcy relief in a further motion.

The Issues

[76] The central issue raised on these appeals is whether the CCAA judge erred in his interpretation of s. 57(4) of the PBA and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

[77] The USW and the Former Executives ask the court to decide a second issue: whether during the CCAA proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator. [See Note 2 below]

[78] The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

[79] The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

[80] Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

Winding Up a Pension Plan

[81] To understand the wind up process, one must first understand how the pension plan operates while it is ongoing.
[page655]

2011 ONCA 265 (CanLII)

[82] A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

[83] In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

(1) Current service or "normal cost" contributions -- the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.

(2) Special payments -- a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15-year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the employer is required to make monthly special payments over a five-year period to fund the deficiency.

[84] It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

2011 ONCA 265 (CanLII)

[85] The wind up of a pension plan is defined in the PBA as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the PBA and the Regulations until all of the assets of the fund have been disbursed (s. 76). [page656]

[86] Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

[87] Under the PBA, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an employer [See Note 3 below] can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

[88] The PBA contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

-- the administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));

-- a wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));

-- no payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));

-- plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

2011 ONCA 265 (CanLII)

[89] Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1)(a) and (b) read as follows:

Liability of employer on wind up

75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act [page657] and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39(3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

[90] Section 75(1)(a) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

[91] Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets

2011 ONCA 265 (CanLII)

to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

[92] It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a). Section 75(2) stipulates that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times". Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under s. 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

The PBA Deemed Trust

[93] The central issue in these appeals is whether the CCAA judge erred in his interpretation of s. 57(4) of the PBA. Section 57(4) reads as follows:

> 57(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

(Emphasis added) [page658]

[94] The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must be read

> . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [See Note 4 below]

[95] Section 57(4) deems an employer to hold in trust an amount equal to the contributions "accrued to the date of wind up but not yet due under the plan or regulations". The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

2011 ONCA 265 (CanLII)

[96] The introductory words of s. 57(4) refer to where a pension plan is "wound up". Therefore, to answer this question, one must refer to the wind up regime created by the PBA and Regulations, a summary of which is set out above.

[97] It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the wind up date -- all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

[98] It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

[99] This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet due". In Ontario (Hydro-Electric Power Commission) v. Albright (1922), 64 S.C.R. 306, [1922] S.C.J. No. 40, at para. 23, the Supreme Court of Canada explains that money is "due" when there is a [page659] legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (i.e., is not "due" until a later date).

2011 ONCA 265 (CanLII)

[100] Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 "accrued to the date of wind up", because of s. 31 those contributions are "not yet due under the . . . regulations".

[101] There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(a), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75. In short, the words "employer contributions accrued to the date of wind up but not yet due" in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

[102] This interpretation accords with a contextual analysis of s. 57(4).

[103] As these appeals demonstrate, during the five-year "grace" period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Section 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees' interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had accrued to the date of wind up but [were] not yet due under the regulations.

[104] Further, this interpretation is consistent with the overall purpose of the PBA, which is to establish minimum

2011 ONCA 265 (CanLII)

standards, [See Note 5 below] [page660] safeguard the rights of pension plan beneficiaries [See Note 6 below] and ensure the solvency of pension plans so that pension promises will be fulfilled. [See Note 7 below] As the Supreme Court of Canada said in Monsanto, at para. 38:

> The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans.

(Citations omitted)

[105] Much reference has been made to the two cases in which s. 57(4) has been discussed: Ivaco Inc. (Re), [2005] O.J. No. 3337, 12 C.B.R. (5th) 213 (S.C.J.), affd (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.) and Toronto-Dominion Bank v. Usarco, [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.). In my view, these decisions are of little assistance in deciding this issue.

[106] Factually, Ivaco and Usarco differ from the present case. In Ivaco and Usarco, the prospect of bankruptcy was firmly before the court, whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

[107] Moreover, there are conflicting statements in Ivaco and Usarco regarding the applicability of the deemed trust to wind up deficiencies. In Usarco, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under CCAA protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together with special contributions that were to have been made but had not been. [See Note 8 below] In Ivaco, the major financers and creditors wished to have the CCAA proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat

2011 ONCA 265 (CanLII)

the bankruptcy petition. In Ivaco, Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities. [See Note 9 below] On appeal, although this court indicated that it thought that Farley J.'s [page661] statement in Usarco was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the PBA.

[108] The CCAA judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

[109] Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the PBA, was subject to a deemed trust. The CCAA judge erred in holding that no deemed trust existed with respect to that deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

[110] Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument -- the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

[111] Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences

2011 ONCA 265 (CanLII)

that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the CCAA judge acknowledged that the material filed with the court showed an intention on the part of the applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

[112] In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends [page662] on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

Did Indalex Breach its Fiduciary Obligation?

[113] The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the CCAA proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

[114] The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the PBA.

2011 ONCA 265 (CanLII)

[115] Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

> There is no provision in the PBA that creates a deemed trust in respect of any claim for damages based on an alleged breach of fiduciary duty by an employer and there is no basis in the PBA for conferring a priority with respect to such a claim. If a claim for breach of fiduciary duty on the part of Indalex exists, it is merely an unsecured claim outside the ambit of the deemed trusts created by the PBA that does not have priority over Sun's secured claim or the super-priority DIP Lenders Charge.

[116] For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the CCAA proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

[117] It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries. [See Note 10 below] These obligations arise both at common law and by virtue of s. 22 of the PBA. [page663]

[118] The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests. [See Note 11 below] The key factual characteristics of a fiduciary relationship are the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power. [See Note 12 below]

[119] It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and

2011 ONCA 265 (CanLII)

the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

[120] Section 22 of the PBA also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

Care, diligence and skill

22(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess. [page664]

. . . . .

Conflict of interest

2011 ONCA 265 (CanLII)

(4) An administrator . . . shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

[121] In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the PBA. [See Note 13 below] It is self-evident that the two roles can conflict from time to time. In Imperial Oil Ltd. v. Ontario (Superintendent of Pensions) (1995), 18 C.C.P.B. 198 (Ont. Pen. Comm.) ("Imperial Oil"), the Pension Commission of Ontario ("PCO") grappled with this statutorily sanctioned conflict in roles.

[122] In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with ten or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the "enhanced benefit"). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

[123] The Superintendent accepted the amendments for registration.

[124] Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had ten or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

[125] A group of former employees (the "Entitlement 55 Group") objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that

2011 ONCA 265 (CanLII)

the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed. [page665]

[126] Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the PBA because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the ten-year service qualification and thereby "qualified" for the enhanced benefit.

[127] The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

[128] The PCO acknowledged that the PBA allows an employer to wear "two hats" -- one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

> Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

[129] The "two hats" analogy in Imperial Oil assists in

2011 ONCA 265 (CanLII)

understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer qua corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, at paras. 81-84. On the other hand, when acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

[130] The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the CCAA proceedings. In my view, it did not. As I will explain, during the CCAA proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats. [page666]

[131] I begin from the position that Indalex had the right to make the decision to commence CCAA proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under CCAA protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, CCAA proceedings should have no effect on pension entitlements.

[132] However, just because the initial decision to commence CCAA proceedings is solely a corporate one, that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek CCAA protection. Shortly after initiating CCAA proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-priority charge. At the same time, Indalex knew that the Plans were underfunded and that unless more funds were put into

2011 ONCA 265 (CanLII)

the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the CCAA proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered -- much less protected -- during the DIP negotiations.

[133] In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the CCAA proceedings, two points need to be made.

[134] First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the CCAA proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the CCAA proceedings, he became the chief restructuring officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement. [page667] But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly owned subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

[135] In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his

2011 ONCA 265 (CanLII)

various roles, including as chief restructuring officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

[136] Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in Imperial Oil, which the respondents rely on, supports this submission.

[137] In Imperial Oil, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the PBA and in part because the amendments at issue in Imperial Oil were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in Imperial Oil to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

[138] I turn next to the question of breach.

[139] As previously noted, when Indalex commenced CCAA proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the CCAA proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for CCAA protection without notice to the Plans' beneficiaries. It obtained a CCAA order that gave priority to the DIP lenders over "statutory trusts" without notice [page668] to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. [See Note 14

2011 ONCA 265 (CanLII)

below] It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

2011 ONCA 265 (CanLII)

[140] Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

[141] The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: Davey v. Woolley, Hames, Dale & Dingwall (1982), 35 O.R. (2d) 599, [1982] O.J. No. 3158 (C.A.), at para. 8. In Davey, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

[142] The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the CCAA proceedings.

[143] Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes

impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict. [page669]

[144] Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the PBA. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the PBA, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the CCAA proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

[145] Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time, I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

Does the Collateral Attack Rule Bar the Deemed Trust Motions?

[146] The U.S. Trustee submits that even if the PBA creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the CCAA proceedings. His argument runs as follows.

[147] The Initial Order, the June 12, 2009 order and the Sale Approval order (the "Court Orders") are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants' motions seek

2011 ONCA 265 (CanLII)

to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

[148] I do not accept this submission for three reasons, the first two of which can be shortly stated.

[149] First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the CCAA judge makes no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The exceptions to this general rule are very limited and [page670] do not apply in this case: see Cusson v. Quan, [2009] 3 S.C.R. 712, [2009] S.C.J. No. 62, at paras. 36-37.

[150] Second, the USW and the Former Executives raised the matter of the deemed trusts in the CCAA proceedings. The CCAA judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

[151] Third, as I will now explain, an appreciation of the CCAA regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

[152] The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation or nullification of the order. See R. v. Wilson, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88, at

2011 ONCA 265 (CanLII)

para. 8.

[153] The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see R. v. Litchfield, [1993] 4 S.C.R. 333, [1993] S.C.J. No. 127, at para. 17. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it: see Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, at para. 72.

[154] The CCAA regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By pre-empting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

[155] The CCAA regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see Century Services Inc. v. Canada (Attorney General), [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, at para. 21. The CCAA judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring [page671] and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the CCAA proceedings will provide an opportunity for affected persons to participate in the proceedings.

[156] This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the CCAA court to vary or amend the Initial Order (the "come-back clause"). That is precisely what the appellants did. As interested parties, they went to the CCAA court to ask that the super-priority charge be varied or amended so that their claims could be properly recognized.

2011 ONCA 265 (CanLII)

[157] Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the CCAA court.

[158] The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291 (C.A.), at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order -- brought on an urgent basis to deal with seemingly desperate circumstances -- when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

[159] As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the CCAA judge endorsed the record as follows: "The issues can be raised by the retirees on any application to approve a transaction -- but that is for another day."

[160] The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to [page672] the appellants' interests became apparent, they went to the CCAA court and raised the deemed trust issue. [See Note 15 below]

2011 ONCA 265 (CanLII)

[161] Thus, as I have said, I do not view the deemed trust motions as collateral attacks on the Court Orders. The motions were raised in a timely manner in the same court in which the orders were made. They can scarcely be termed attempts to circumvent decisions rendered against the USW and the Former Executives when no decision had ever been rendered in which their claims had been squarely raised and addressed. The process the USW and the Former Executives followed is exactly that which is contemplated in CCAA proceedings and, specifically, the come-back clause.

[162] Even if the collateral attack rule were applicable, however, this is not a case for its strict application.

[163] In Litchfield, the Supreme Court of Canada recognized that there will be situations in which the collateral attack rule should not be strictly applied. In that case, a physician had been charged with a number of counts of sexual assault on his patients. On motion, a judge (not the trial judge) ordered that the counts be severed and divided and three different trials be held. After one trial, the physician was acquitted. The Crown appealed. One of the grounds of appeal related to the pre-trial severance order. The question arose as to whether the Crown's challenge to the validity of the severance order violated the collateral attack rule.

[164] At paras. 16-19 of Litchfield, Iacobucci J., writing for the majority, explains that "some flexibility" is needed in the application of the rule against collateral attacks. Strictly applied, the rule would prevent the trial judge from reviewing the severance order because the trial was not a proceeding whose specific object was the reversal, variation or nullification of the severance order. However, Iacobucci J. noted, the rule is not intended to immunize court orders from review. He reiterated the powerful rationale behind the rule: to maintain the rule of law and preserve the repute of the administration of justice. This promotes certainty and finality, key aspects of the orderly and functional administration of justice. However, he concluded that flexibility was warranted because permitting a collateral

2011 ONCA 265 (CanLII)

attack [page673] on the severance order did not offend the underlying rationale for the rule.

[165] Similarly, in R. v. Domm (1996), 31 O.R. (3d) 540, [1996] O.J. No. 4300 (C.A.), at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of Domm, he says that the rule must yield where a person has "no other effective means" of challenging the order in question.

[166] I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the CCAA court. By permitting their motions to be heard, the CCAA judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

[167] Nor can it be said, for the reasons already given about the nature of CCAA proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a CCAA proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to

2011 ONCA 265 (CanLII)

meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the CCAA process, one in which procedure triumphed over substance. As Iacobucci J. said in Litchfield, at para. 18, such a result cannot be accepted.

[168] Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application. [page674]
Do the Principles of Cross-Border Insolvencies Apply?

[169] The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when deciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

[170] While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.
How is the Reserve Fund to be Distributed?

The Salaried Plan

2011 ONCA 265 (CanLII)

[171] Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

[172] The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the PPSA, which reads as follows:

> 30(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the Employment Standards Act or under the Pension Benefits Act.

(Emphasis added) [page675]

[173] The USW contends that as s. 30(7) gives priority to the PBA deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

[174] The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the court to grant super-priority to DIP lenders in CCAA proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under CCAA protection. Without DIP funding they say, many companies under CCAA protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the CCAA, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

[175] There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages

2011 ONCA 265 (CanLII)

DIP funding in future CCAA proceedings. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

[176] The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. [See Note 16 below] I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under CCAA protection. However, this does not mean that the super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

[177] Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal [page676] and provincial laws are incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law: see Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, [2007] S.C.J. No. 22, at para. 75, and Nortel Networks Corp. (Re) (2009), 99 O.R. (3d) 708, [2009] O.J. No. 4967 (C.A.), at para. 38, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 531.

[178] In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the PBA deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under CCAA protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to

2011 ONCA 265 (CanLII)

comply with all applicable laws, including "regulatory deemed trust requirements".

[179] While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the PBA deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

[180] Does this conclusion thwart the purpose of the CCAA regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a CCAA proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a "liquidating CCAA" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining CCAA protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust [page677] priority would have frustrated Indalex's efforts to sell itself as a going-concern business.

[181] What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case-by-case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But,

2011 ONCA 265 (CanLII)

this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

[182] Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for CCAA protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex sought a going-concern sale for exactly that reason. In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely, the desire to maximize recovery for their creditors -- along with those other considerations -- would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or CCAA proceedings. In this regard, it is worth recalling that consideration for the sale exceeded $151 million, all DIP lenders were repaid in full, the Reserve Fund consists of undistributed proceeds and the total deficiencies in the Plans appear to be approximately $6.75 million.

[183] As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the CCAA judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a CCAA applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party [page678] by invoking bankruptcy proceedings when no other creditor seeks to do so.

[184] There is also the matter of Indalex U.S.'s apparent

2011 ONCA 265 (CanLII)

reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

[185] A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in Century Services, which was released after the oral hearing of the appeals. The parties were invited to make written submissions on the impact of Century Services, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

[186] Century Services deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the Excise Tax Act, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the CCAA, which expressly excludes deemed trusts in favour of the Crown from applying in CCAA proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the CCAA prevails. In sum, Century Services stands for the proposition that s. 18.3(1) of the CCAA excludes the deemed trust for unpaid GST created by s. 222 of the Excise Tax Act from applying in a CCAA proceeding.

[187] It will be readily apparent that Century Services is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

[188] First, in Century Services, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The CCAA proceedings in the present case, on

2011 ONCA 265 (CanLII)

the other hand, were successful -- they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which transition to the bankruptcy regime was inevitable because efforts under the CCAA had failed.

[189] Second, Century Services deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not [page679] be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a CCAA proceeding. Significantly, unlike the situation in Century Services, there is nothing in the CCAA that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in CCAA proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the CCAA judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the CCAA proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements. [See Note 17 below]

[190] Third, no issue of fiduciary duty arose in Century Services. In the present case, as discussed previously and again below, the impact of fiduciary duties during the CCAA proceeding plays a significant role.

[191] The respondents contend that Century Services is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") apply in CCAA proceedings. If Century Services stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities

2011 ONCA 265 (CanLII)

under the BIA: see, for example, British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78.

[192] However, in my view, Century Services does not stand for that unqualified proposition. In Century Services, Deschamps J. explains that the CCAA and BIA are to be read in an integrated fashion but she is at pains to say that the BIA scheme of liquidation and distribution is the backdrop for what happens if a CCAA reorganization is unsuccessful. [See Note 18 below] Here, as I have noted, the CCAA proceedings were successful.

[193] Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the BIA is "characterized by a [page680] rules-based approach", [See Note 19 below] whereas the CCAA "offers a more flexible mechanism with greater judicial discretion". [See Note 20 below] Permitting the PBA deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the CCAA proceedings -- greater flexibility and greater judicial discretion on the part of the CCAA court. This flexibility and discretion on the part of the CCAA court enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J., at para. 70 of Century Services.

[194] The respondents point to paras. 47, 48 and 76 of Century Services, in which Deschamps J. notes the "strange asymmetry" that would occur if the ETA Crown priority were interpreted differently in CCAA proceedings than in BIA proceedings. She says this would encourage forum shopping in cases where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims. No "strange asymmetry" would occur in cases such as the present appeals. If the CCAA judge found that recognition of the PBA deemed trust would frustrate the purpose of the CCAA proceeding and paramountcy had been invoked, the CCAA judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the CCAA court with greater flexibility and the ability to be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees". [See Note 21 below]

2011 ONCA 265 (CanLII)

[195] In para. 70 of her reasons, Deschamps J. exhorts the CCAA courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit" (emphasis added). The Plans' beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on Century Services, the deemed trusts are automatically overridden, there will be no incentive for companies that are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries "as advantageously and fairly as the circumstances permit". The incentive will be to do as Indalex did -- go to court [page681] without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

[196] Justice Deschamps also says that no "gap" should exist between the BIA and the CCAA and approves of Laskin J.A.'s reasoning to that effect, at paras. 62-63 of Ivaco. [See Note 22 below] She explains that the gap is a situation "which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy". When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the CCAA proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval order, the CCAA court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the CCAA proceedings by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans' beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the CCAA proceedings, the property interests were dealt with as part of the CCAA proceedings.

[197] However, even if I am wrong in concluding that the

2011 ONCA 265 (CanLII)

deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

[198] It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

[199] The CCAA was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the [page682] result to the pensioners of a failure to inject additional funds. It was Indalex who advised the CCAA court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

[200] I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view,

2011 ONCA 265 (CanLII)

between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

[201] Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, at para. 86, and Soulos v. Korkontzilas, (1997), 32 O.R. (3d) 716, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, at para. 34.

[202] In Soulos, at para. 36, McLachlin J. (as she then was), writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: (1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and (2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case -- one in which there is unjust enrichment -- is not relevant to these appeals, the first is.

[203] At para. 45 of Soulos, McLachin J. sets out four conditions that should "generally be satisfied" if a constructive trust based on wrongful conduct is to be ordered:

(1) the defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his or her hands;

(2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; [page683]

(3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and

2011 ONCA 265 (CanLII)

(4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[204] As I have already explained, in the circumstances of this case, Indalex's fiduciary obligations as administrator were engaged in relation to the CCAA proceedings and it is those proceedings that gave rise to the asset (i.e., the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

[205] As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan, namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

[206] In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule

2011 ONCA 265 (CanLII)

that appellate courts are not to entertain new issues on appeal.

Disposition

[207] Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to [page684] satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

[208] If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within 15 days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

Appeal allowed.

Schedule "A"

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1)-(5), 70(1), 74(1), 75(1), (2), 76

Definitions

1(1) In this Act, . . .

"administrator" means the person or persons that administer the pension plan;

. . . . .

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

. . . . .

Administrator

Requirement

2011 ONCA 265 (CanLII)

8(0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

(b) a pension committee composed of one or more representatives of,

(i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and

(ii) members of the pension plan; [page685]

(c) a pension committee composed of representatives of members of the pension plan;

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

2011 ONCA 265 (CanLII)

(h) such other person or entity as may be prescribed.

. . . . .

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

(3) For the purposes of clause (1)(b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the Business Corporations Act of the employer.
2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

. . . . .

Reduction of benefits

14(1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit. [page686]

. . . . .

Care, diligence and skill

22(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and

2011 ONCA 265 (CanLII)

investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6) No person other than a prescribed person shall be a

2011 ONCA 265 (CanLII)

trustee of a pension fund.

Responsibility for agent

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

. . . . .

Trust property

57(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as [page687] the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

Accrued contributions

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

2011 ONCA 265 (CanLII)

Wind Up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

Lien and charge

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

. . . . .

Wind up report

70(1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;
(b) the benefits to be provided under the pension plan to members, former members and other persons;
(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and
(d) such other information as is prescribed.

. . . . .

Combination of age and years of employment

74(1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the

2011 ONCA 265 (CanLII)

pension benefit; [page688]

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

. . . . .

Liability of employer on wind up

75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39(3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated

2011 ONCA 265 (CanLII)

as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

. . . . .

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed. [page689]

Schedule "B"

R.R.O. 1990, Reg. 909 (Pension Benefits Act), s. 31(1), (2) and (3)

31(1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2)(b) and (c).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

2011 ONCA 265 (CanLII)

Notes

Note 1: The Monitor retained the Reserve Fund as part of the undistributed proceeds. The undistributed proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees and amounts owing under the DIP charge.

Note 2: The appellants had raised this issue below but it had not been dealt with by the CCAA judge.

Note 3: Or, in the case of a multi-employer plan, the administrator.

Note 4: Bell ExpressVu Limited Partnership v. Rex., [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

Note 5: Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, at para. 13, relying on Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, [1998] O.J. No. 961, 158 D.L.R. (4th) 497 (C.A.), at p. 503 D.L.R.

Note 6: Ibid.

Note 7: Bourdon v. Stelco Inc., [2005] 3 S.C.R. 279, [2005] S.C.J. No. 35, at para. 24.

Note 8: At para. 26.

Note 9: At para. 11.

Note 10: Burke v. Hudson's Bay Co., [2010] 2 S.C.R. 273, [2010] S.C.J. No. 34, at paras. 39-41.

Note 11: Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, at para. 32.

Note 12: Ibid., at para. 30; Lac Minerals Ltd. v.

2011 ONCA 265 (CanLII)

International Corona Resources Ltd., [1989] 2 S.C.R. 574, [1989] S.C.J. No. 83, at p. 646 S.C.R.

Note 13: In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See Supplemental Pension Plans Act, R.S.Q., c. R-15.1, s. 147.

Note 14: On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.

Note 15: To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010 was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.

Note 16: See, for example, InterTAN Canada Ltd. (Re), [2009] O.J. No 293, 49 C.B.R. (5th) 232 (S.C.J.). And, the granting of super-priority charges is referred to with approval in Century Services, at para. 62.

Note 17: See para. 178 of these reasons.

Note 18: See, for example, para. 23.

Note 19: At para. 13, for example.

Note 20: See, for example, para. 14.

Note 21: Century Services, at para. 60.

Note 22: At para. 78.

2011 ONCA 265 (CanLII)

Monsanto Canada Inc. *Appellant*

v.

Superintendent of Financial Services *Respondent*

and between

Association of Canadian Pension Management *Appellant*

v.

Superintendent of Financial Services *Respondent*

and

Attorney General of Canada, National Trust Company, Nicole Lacroix, R. M. Smallhorn, D. G. Halsall, S. J. Galbraith, S. W. (Bud) Wesley, Canadian Labour Congress and Ontario Federation of Labour *Interveners*

Indexed as: Monsanto Canada Inc. *v.* Ontario (Superintendent of Financial Services)

Neutral citation: 2004 SCC 54.

File No.: 29586.

2004: February 16; 2004: July 29.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Pension plans — Partial wind-up — Rights and benefits on partial wind-up — Surplus — Whether pension benefits legislation requiring distribution of proportional share of actuarial surplus when defined benefit pension plan partially wound up — Pension Benefits Act, R.S.O. 1990, c. P.8, s. 70(6).

Monsanto Canada Inc. *Appelante*

c.

Surintendant des services financiers *Intimé*

et entre

Association canadienne des administrateurs de régimes de retraite *Appelante*

c.

Surintendant des services financiers *Intimé*

et

Procureur général du Canada, Compagnie Trust National, Nicole Lacroix, R. M. Smallhorn, D. G. Halsall, S. J. Galbraith, S. W. (Bud) Wesley, Congrès du travail du Canada et Fédération du travail de l'Ontario *Intervenants*

Répertorié : Monsanto Canada Inc. *c.* Ontario (Surintendant des services financiers)

Référence neutre : 2004 CSC 54.

N[o] du greffe : 29586.

2004 : 16 février; 2004 : 29 juillet.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Pensions — Régimes de retraite — Liquidation partielle — Droits et prestations à la liquidation partielle — Excédent — La législation sur les régimes de retraite exige-t-elle que l'excédent actuariel d'un régime de retraite à prestations déterminées soit réparti au moment de sa liquidation partielle en proportion de la partie liquidée du régime? — Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8, art. 70(6).

2004 SCC 54 (CanLII)

Administrative law — Judicial review — Standard of review — Financial Services Tribunal — Standard of review applicable to Tribunal's interpretation of s. 70(6) of Pension Benefits Act, R.S.O. 1990, c. P.8.

As a result of a reorganization of Monsanto Canada Inc. ("Monsanto"), 146 active members of the pension plan ("Affected Members") received notice that their employment with Monsanto would terminate. The Superintendent of Financial Services refused to approve Monsanto's partial wind-up report, for failing to provide for the distribution of surplus assets related to the part of the pension plan being wound up. A majority of the Financial Services Tribunal disagreed with the Superintendent and ordered her to approve the report, holding that s. 70(6) of the Ontario *Pension Benefits Act* provides no more than a right to participate in surplus distribution when, if ever, the plan fully winds up. The Divisional Court set aside the Tribunal's order and upheld the Superintendent's decision. The Court of Appeal dismissed the appeal.

Held: The appeal should be dismissed.

When the relevant factors of the pragmatic and functional approach are properly considered, the appropriate standard of review applicable to the Financial Services Tribunal's interpretation of s. 70(6) of the *Pension Benefits Act* is that of correctness.

Section 70(6) requires the distribution of a proportional share of actuarial surplus when a defined benefit pension plan is partially wound up. The ordinary and grammatical meaning of s. 70(6) indicates that the assessment of rights and benefits is to be conducted as if the pension plan was winding up in full on the effective date of partial wind-up. The realization of rights and benefits, including the distribution of surplus assets, then occurs for the part of the plan actually being wound up. Therefore, the Affected Members, if entitled, may receive their pro rata share of the surplus existing in the fund on a partial wind-up, as if the plan was being fully wound up on that day. The members affected by a partial wind-up are thus accorded the rights and benefits that are not less than the group would have if there were a full wind-up on the date of partial wind-up.

The scheme of the *Pension Benefits Act* and of the regulations also supports the ordinary and grammatical meaning of s. 70(6). Delaying the distribution would not be consonant with the provisions that make distribution

Droit administratif — Contrôle judiciaire — Norme de contrôle — Tribunal des services financiers — Norme de contrôle applicable à l'interprétation que le Tribunal a donnée de l'art. 70(6) de la Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8.

Par suite d'une restructuration de Monsanto Canada Inc. (« Monsanto »), 146 participants actifs au régime de retraite (les « participants touchés ») ont été avisés que leur emploi chez Monsanto prendrait fin. La surintendante des services financiers a refusé d'approuver le rapport de liquidation partielle établi par Monsanto parce qu'il ne prévoyait pas la répartition de l'excédent d'actif correspondant à la partie du régime de retraite en voie de liquidation. Le Tribunal des services financiers, à la majorité, a rejeté l'avis de la surintendante et a ordonné qu'elle approuve le rapport, déclarant que le par. 70(6) de la *Loi sur les régimes de retraite* de l'Ontario prévoit tout au plus un droit à une part de l'excédent au moment de la liquidation totale du régime, le cas échéant. La Cour divisionnaire a annulé l'ordonnance du Tribunal et confirmé la décision de la surintendante. La Cour d'appel a rejeté l'appel.

Arrêt : Le pourvoi est rejeté.

Si l'on évalue correctement les facteurs pertinents de la méthode pragmatique et fonctionnelle, la norme de contrôle applicable à l'interprétation que le Tribunal des services financiers a donnée du par. 70(6) de la *Loi sur les régimes de retraite* est celle de la décision correcte.

Le paragraphe 70(6) exige que l'excédent actuariel d'un régime de retraite à prestations déterminées soit réparti au moment de sa liquidation partielle en proportion de la partie liquidée du régime. Le sens ordinaire et grammatical du par. 70(6) indique que la détermination des droits et prestations doit être effectuée comme si le régime de retraite était liquidé totalement à la date de prise d'effet de la liquidation partielle. La réalisation des droits et prestations, y compris la distribution de l'excédent d'actif, se produit alors pour la partie du régime effectivement en voie de liquidation. En conséquence, les participants touchés peuvent recevoir, s'ils y ont droit, leur quote-part de l'excédent de la caisse au moment de la liquidation partielle, comme si le régime était liquidé totalement ce jour-là. Les droits et prestations accordés aux participants touchés par la liquidation partielle ne sont pas inférieurs à ceux que le groupe aurait s'il y avait liquidation totale du régime de retraite à la date de la liquidation partielle.

L'économie de la *Loi sur les régimes de retraite* et de ses règlements confirme également le sens ordinaire et grammatical du par. 70(6). Retarder la répartition irait à l'encontre des dispositions qui intègrent la distribution de

2004 SCC 54 (CanLII)

of surplus assets an intended part of the wind-up process, whether the wind-up is in whole or in part. In addition, the statutory scheme makes an important distinction between continuing plans and winding-up plans. The interpretation of s. 70(6) herein proposed is consistent with the logic of this aspect of the statutory scheme and the legislature's choice to treat partial wind-ups in the same manner as full wind-ups.

A purposive interpretation of s. 70(6) should be mindful of the legislative objective in the context of the statutory scheme surrounding surplus and partial wind-up. The *Pension Benefits Act* is public policy legislation that recognizes the vital importance of long-term income security. Its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans. The Act seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups. Distribution of surplus on partial wind-up is unlikely to disrupt that balance or to compromise the continuing integrity of the pension fund. Policy and practical reasons also favour an interpretation requiring distribution upon partial wind-up. Since pension plans are theoretically intended to be indeterminate in nature, it is reasonable for Affected Members to be subject to the risks of the plan while they are a part of it, but not after they have been terminated from it. The most equitable solution is thus to distribute the fortunes of favourable markets at the time Affected Members are terminated. In this way, the windfall is related to their actual time and participation in the plan. Moreover, the increasingly mobile nature of labour should be recognized. The Affected Members should be able to know their status at the time of their termination so as to arrange their affairs accordingly and not be indefinitely tied to an employer that laid them off.

Cases Cited

Discussed: *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; **referred to:** *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23; *Pushpanathan v. Canada (Minister of*

l'excédent d'actif dans le processus de liquidation, que la liquidation soit totale ou partielle. De plus, le régime législatif établit une distinction importante entre les régimes de retraite qui continuent d'exister et ceux qui sont en cours de liquidation. L'interprétation proposée du par. 70(6) est conforme à la logique de cet aspect du régime législatif et au choix du législateur de traiter les liquidations partielles et les liquidations totales de la même manière.

En donnant une interprétation téléologique du par. 70(6), il ne faut pas perdre de vue l'objectif de la Loi dans le contexte du régime législatif établi à l'égard de l'excédent et de la liquidation partielle. La *Loi sur les régimes de retraite* est une loi d'intérêt public qui reconnaît l'importance cruciale de la sécurité du revenu à long terme. Elle vise à établir des normes minimales et une supervision réglementaire destinées à protéger et à garantir les prestations et les droits des participants, des anciens participants et des autres personnes qui ont droit à des prestations en vertu de régimes de retraite complémentaires. La Loi tend, dans une certaine mesure, à assurer, entre les intérêts des employés et ceux des employeurs, un équilibre qui soit favorable aux deux groupes. La répartition de l'excédent à la liquidation partielle ne perturbera vraisemblablement pas cet équilibre et ne compromettra vraisemblablement pas l'intégrité de la caisse de retraite. Des raisons d'ordre politique et pratique justifient également une interprétation requérant la répartition lors de la liquidation partielle. Comme, en principe, les régimes de retraite sont d'une durée indéterminée, il est logique que les participants touchés soient exposés aux risques inhérents au régime tant qu'ils conservent leur emploi, mais non après l'avoir quitté. La solution la plus équitable consiste donc à distribuer le bénéfice de la conjoncture favorable au moment où les participants touchés perdent leur emploi. De cette manière, ce cadeau du ciel est relié à leur participation réelle au régime. De plus, il convient de reconnaître la mobilité croissante de la main-d'œuvre. Les participants touchés devraient pouvoir connaître leur situation au moment de la cessation de leur emploi afin de pouvoir organiser leurs affaires en conséquence. Ils ne devraient pas être liés indéfiniment à un employeur qui les a mis à pied.

Jurisprudence

Arrêt analysé : *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611; **arrêts mentionnés :** *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28; *Canada (Sous-ministre du Revenu national) c. Mattel Canada Inc.*, [2001] 2 R.C.S. 100, 2001 CSC 36; *Voice Construction Ltd. c. Construction & General Workers' Union, Local 92*, [2004] 1 R.C.S. 609, 2004 CSC 23; *Pushpanathan c.*

2004 SCC 54 (CanLII)

Citizenship and Immigration), [1998] 1 S.C.R. 982; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122.

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Freya Kristjanson and *Markus Kremer*, for the appellant Monsanto Canada Inc.

Jeffrey W. Galway and *Randy Bauslaugh*, for the appellant the Association of Canadian Pension Management.

Deborah McPhail and *Leslie McIntosh*, for the respondent.

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Freya Kristjanson et *Markus Kremer*, pour l'appelante Monsanto Canada Inc.

Jeffrey W. Galway et *Randy Bauslaugh*, pour l'appelante l'Association canadienne des administrateurs de régimes de retraite.

Deborah McPhail et *Leslie McIntosh*, pour l'intimé.

2004 SCC 54 (CanLII)

Donald J. Rennie and *Kirk Lambrecht*, *Q.C.*, for the intervener the Attorney General of Canada.

J. Brett Ledger and *Lindsay P. Hill*, for the intervener the National Trust Company.

William J. Sammon, for the intervener Nicole Lacroix.

Howard Goldblatt, *Dona Campbell* and *Ethan Poskanzer*, for the interveners the Canadian Labour Congress and the Ontario Federation of Labour.

Mark Zigler and *Ari N. Kaplan*, for the interveners R. M. Smallhorn, D. G. Halsall, S. J. Galbraith and S. W. (Bud) Wesley.

The judgment of the Court was delivered by

DESCHAMPS J. — Pension law is a field which is gaining in importance as more and more people retire and look to their pensions to sustain them during their "golden years". The complex exercise of actuarial accounting that determines how pensions should be funded is rivalled only by the complexity of the law determining the pension rights and obligations of employees and employers, which lies at the intersection of contracts, trust law, and statute law. This appeal is an attempt to bring some clarity to a relatively confined area of pension law, which has been the subject of much debate: when there is a partial wind-up of an Ontario-defined benefit pension plan, must the actuarial surplus be distributed at that time?

In particular, does s. 70(6) of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("Act"), require the distribution of a proportional share of actuarial surplus when a defined benefit pension plan is partially wound up? The Superintendent of Financial Services answered this question in the affirmative. She refused to approve the partial wind-up report of the appellant, Monsanto Canada Inc. ("Monsanto"), for failing to provide for the distribution of surplus assets related to the part of the Pension Plan

Donald J. Rennie et *Kirk Lambrecht*, *c.r.*, pour l'intervenant le procureur général du Canada.

J. Brett Ledger et *Lindsay P. Hill*, pour l'intervenante la Compagnie Trust National.

William J. Sammon, pour l'intervenante Nicole Lacroix.

Howard Goldblatt, *Dona Campbell* et *Ethan Poskanzer*, pour les intervenants le Congrès du travail du Canada et la Fédération du travail de l'Ontario.

Mark Zigler et *Ari N. Kaplan*, pour les intervenants R. M. Smallhorn, D. G. Halsall, S. J. Galbraith et S. W. (Bud) Wesley.

Version française du jugement de la Cour rendu par

1

LA JUGE DESCHAMPS — Le droit des pensions de retraite est un domaine qui a pris de l'importance avec l'augmentation du nombre de retraités qui comptent sur leur pension pour profiter de l'âge d'or. La complexité des calculs actuariels qui permettent de déterminer le financement des prestations de retraite n'a d'égal que celle des règles juridiques régissant les droits à pension ainsi que les obligations des employés et des employeurs à l'égard des régimes de retraite. Ces règles relèvent à la fois du droit des contrats, du droit des fiducies et de lois particulières. Le présent pourvoi est l'occasion de clarifier un aspect relativement restreint du droit des pensions de retraite qui a fait l'objet de nombreux débats : la liquidation partielle d'un régime de retraite à prestations déterminées en Ontario emporte-t-elle obligation de répartir l'excédent actuariel à la date de cette liquidation?

2

Plus particulièrement, en application du par. 70(6) de la *Loi sur les régimes de retraite* de l'Ontario, L.R.O. 1990, ch. P.8 (« Loi »), l'excédent actuariel d'un régime de retraite à prestations déterminées doit-il être réparti au moment de la liquidation partielle en proportion de la partie liquidée du régime? La surintendante des services financiers a répondu affirmativement à cette question. Elle a refusé d'approuver le rapport de liquidation partielle de l'appelante, Monsanto Canada Inc. (« Monsanto »),

2004 SCC 54 (CanLII)

being wound up. A majority of the Financial Services Tribunal ("Tribunal") disagreed with the Superintendent and ordered her to approve the report: (2000), 3 B.L.R (3d) 99. The majority held that s. 70(6) provides no more than a right to participate in surplus distribution when, if ever, the Plan fully winds up. The Ontario Divisional Court overturned the Tribunal on appeal ((2001), 198 D.L.R. (4th) 109) and the Court of Appeal agreed ((2002), 62 O.R. (3d) 305). Monsanto and the Association of Canadian Pension Management now appeal to this Court. The appeal, for the reasons that follow, should be dismissed.

parce que celle-ci n'y avait pas prévu la répartition de l'excédent correspondant à la partie du régime de retraite visée par la liquidation. Le Tribunal des services financiers (« Tribunal »), à la majorité, a rejeté l'avis de la surintendante et a ordonné qu'elle approuve le rapport : (2000), 3 B.L.R. (3d) 99. La majorité a jugé que le par. 70(6) prévoit tout au plus un droit à une part de l'excédent au moment de la liquidation totale du régime, le cas échéant. En appel, la Cour divisionnaire de l'Ontario a annulé la décision du Tribunal ((2001), 198 D.L.R. (4th) 109) et la Cour d'appel a souscrit à ce jugement ((2002), 62 O.R. (3d) 305). Monsanto et l'Association canadienne des administrateurs de régimes de retraite se pourvoient maintenant devant notre Cour. Je suis d'avis de rejeter le pourvoi pour les motifs exposés ci-après.

2004 SCC 54 (CanLII)

I. Facts

3 The factual foundation of the legal question raised in the present appeal can be briefly stated. Monsanto originally maintained three separate pension plans in respect of various operations. Effective January 1, 1996, these plans were consolidated to form the Pension Plan for Employees of Monsanto Canada Inc. ("Plan"). As a result of a subsequent reorganization of Monsanto, involving a staff reduction program and a plant closure, 146 active members of the Plan ("Affected Members") received notice that their employment with Monsanto would terminate between December 31, 1996 and December 31, 1998. Monsanto's report to the Superintendent provided that the partial wind-up was to be effective May 31, 1997. As of that date, the information supplied to the regulator by the actuaries for the Plan showed that there was an actuarial surplus of some $19.1 million, representing the amount by which the estimated asset value exceeded the estimated liabilities. According to the evidence, the pro rata share of the surplus related to the part of the Plan being wound up is approximately $3.1 million.

4 One of the bases for the Superintendent's refusal to approve Monsanto's report was the failure to provide for the distribution of this surplus on partial wind-up, in accordance with s. 70(6) of the Act. This

I. Les faits

Les faits à l'origine de la question de droit soulevée en l'espèce se résument brièvement. Au départ, Monsanto maintenait trois régimes de retraite distincts relatifs à des opérations diverses. Le 1er janvier 1996, ces régimes furent fusionnés pour former le Régime de retraite des employés de Monsanto Canada Inc. (« Régime »). Par suite d'une restructuration de Monsanto, qui entraîna une réduction du personnel et la fermeture d'un établissement, 146 participants actifs au Régime (« participants touchés ») furent avisés que leur emploi chez Monsanto se terminerait entre le 31 décembre 1996 et le 31 décembre 1998. Le rapport de Monsanto à la surintendante prévoyait que la liquidation partielle prendrait effet le 31 mai 1997. Les renseignements fournis à l'autorité de réglementation par les actuaires du Régime faisaient voir, à cette date, un excédent actuariel de quelque 19,1 millions de dollars, représentant l'excédent de la valeur estimative de l'actif par rapport à la valeur estimative du passif. D'après la preuve, la part de l'excédent correspondant à la partie du Régime en voie de liquidation est d'environ 3,1 millions de dollars.

Le refus de la surintendante d'approuver le rapport de Monsanto s'appuyait notamment sur le fait qu'il contrevenait au par. 70(6) de la Loi parce qu'il ne prévoyait pas la distribution de l'excédent lors de

is the only ground still in issue before this Court as the other bases for refusal were not pursued on this appeal. Also noteworthy is the fact that this matter is preliminary to the question of surplus entitlement, which is not affected by this decision and will need to be determined at a later date.

la liquidation partielle. Seul ce motif est contesté devant notre Cour, les autres ne faisant pas l'objet du présent pourvoi. Il faut également noter que cette question doit être réglée avant celle du droit à l'excédent, laquelle n'est pas visée par la présente décision et devra être tranchée ultérieurement.

II. Issue

5 The only issue in this appeal is whether the Tribunal properly interpreted s. 70(6) of the Act as not requiring distribution of the actuarial surplus on a partial plan wind-up. Thus, the analysis must proceed in two stages. First, the appropriate standard of review of the Tribunal's decision must be determined. Second, the Tribunal's interpretation of s. 70(6) must be measured against this standard. All of the relevant legislative provisions are annexed at the end of these reasons.

II. Question en litige

La seule question en litige dans le présent pourvoi est de déterminer si le Tribunal a bien interprété le par. 70(6) de la Loi en concluant qu'il n'exige pas la distribution de l'excédent actuariel lors d'une liquidation partielle d'un régime. L'analyse doit se faire en deux étapes. Il faut d'abord déterminer la norme de contrôle applicable à la décision du Tribunal. Il faut ensuite évaluer l'interprétation que le Tribunal a donnée du par. 70(6) en fonction de cette norme de contrôle. Les dispositions législatives pertinentes figurent en annexe des présents motifs.

III. Standard of Review

6 The courts below found, and the appellants and respondent agreed, that the appropriate standard of review of the Tribunal's decision was reasonableness. However, the standard of review is a question of law, and agreement between the parties cannot be determinative of the matter. An evaluation of the four factors comprising the pragmatic and functional approach is required to decide the appropriate level of deference this Court should grant in reviewing the decision.

III. Norme de contrôle

Les juridictions inférieures ont conclu que la norme de contrôle applicable à la décision du Tribunal était celle de la décision raisonnable. Les appelantes et l'intimé souscrivent à cette décision. La norme de contrôle est toutefois une question de droit et l'accord des parties ne peut être concluant sur ce point. Afin de déterminer le degré de retenue dont la Cour doit faire preuve à l'égard de la décision, il faut évaluer les facteurs de la méthode pragmatique et fonctionnelle.

A. *Privative Clause*

7 The legislature did not enact a privative clause to insulate the Tribunal's jurisdiction. To the contrary, s. 91(1) of the Act provides for a statutory right of appeal to the Divisional Court. While not determinative, this factor suggests that the legislature intended less deference to be afforded to the Tribunal on judicial review (*Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 11; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27).

A. *Clause privative*

Le législateur n'a pas édicté de clause privative destinée à soustraire les décisions du Tribunal à l'examen en appel. Au contraire, un droit d'appel devant la Cour divisionnaire est prévu au par. 91(1) de la Loi. Bien que ce facteur ne soit pas déterminant, il met en évidence l'intention du législateur d'imposer une moins grande retenue à l'égard des décisions du Tribunal lors d'un contrôle judiciaire (*Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28, par. 11; *Canada (Sous-ministre du Revenu national) c. Mattel Canada Inc.*, [2001] 2 R.C.S. 100, 2001 CSC 36, par. 27).

2004 SCC 54 (CanLII)

B. *Nature of the Problem*

8 The issue on appeal is a pure question of law, related to the interpretation of a section that has no specialized technical meaning. Statutory interpretation is an exercise in which the courts are well equipped to engage. The question here concerns the establishment of statutory rights by construing the legislature's intention from the text of s. 70(6), the legislative purpose, and the statutory context in which it is situated. Generally speaking, such legal questions will attract a more searching standard of review as being clearly within the expertise of the judiciary, unless the legal question is "at the core" of the Tribunal's expertise (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at para. 29; see also *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 34).

C. *Relative Expertise*

9 The expertise of the Tribunal relative to that of the courts must be evaluated in reference to the particular provision being invoked and interpreted and the nature of the Tribunal's expertise (*Barrie*, *supra*, at paras. 12-13; *Pushpanathan*, *supra*, at para. 28). In other words, relative expertise must be evaluated in context and in relation to the specific question under review (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 30).

10 On the one hand, we have to look at courts' expertise and the subject matter which is, as discussed in the previous sections, the statutory interpretation of s. 70(6). On its face, the provision sets out the rule of parity between situations of partial wind-up and full wind-up. Except perhaps in demonstrating the practical implications of proposed interpretations, the issue is neither factually laden nor highly technical. In this case, as it is generally, statutory interpretation is "a purely legal question . . . 'ultimately within the province of judiciary'" (*Barrie*, *supra*, at para. 16; see also *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 28).

B. *Nature du problème*

En l'espèce, la question en litige est une pure question de droit, liée à l'interprétation d'une disposition législative qui n'a pas de sens technique ou spécialisé. Les tribunaux judiciaires sont bien qualifiés pour procéder à l'interprétation des lois. En l'espèce, il s'agit de définir les droits conférés par la loi en déterminant l'intention du législateur d'après le libellé du par. 70(6), son objet et son contexte. En général, les questions de droit de cette nature commandent une norme de contrôle plus stricte, car elles relèvent clairement de l'expertise des tribunaux judiciaires, sauf s'il s'agit d'une question qui « constitue un aspect central » de l'expertise du Tribunal (*Voice Construction Ltd. c. Construction & General Workers' Union, Local 92*, [2004] 1 R.C.S. 609, 2004 CSC 23, par. 29; voir aussi *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, par. 34).

C. *Expertise relative*

L'expertise du Tribunal par rapport à celle des tribunaux judiciaires doit être évaluée en fonction de la disposition particulière qui est invoquée et interprétée ainsi que de la nature de son expertise (*Barrie*, précité, par. 12-13; *Pushpanathan*, précité, par. 28). Autrement dit, l'expertise relative doit être appréciée en tenant compte du contexte et par rapport à la question précise examinée (*Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20, par. 30).

D'une part, il faut examiner l'expertise des tribunaux judiciaires relativement à l'objet du litige, en l'occurrence, l'interprétation du par. 70(6). Il suffit de lire cette disposition pour constater qu'elle établit la règle de la parité entre une liquidation partielle et une liquidation totale. Sauf, peut-être, pour la démonstration des conséquences pratiques des différentes interprétations proposées, l'analyse n'est ni purement factuelle ni hautement technique. En l'espèce, comme en général, l'interprétation d'une loi est « une question purement de droit, qui relève donc, [. . .] "en dernière analyse de la compétence des cours de justice" » (*Barrie*, précité, par. 16; voir aussi *Ross c. Conseil scolaire du district n*^{o} *15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825, par. 28).

2004 SCC 54 (CanLII)

On the other hand, the Tribunal does not have specific expertise in this area. The Tribunal is a general body that was created under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 ("*FSCOA*"), s. 20, to replace the specialized Pension Services Commission. It is responsible for adjudication in a variety of "regulated sector[s]" (*FSCOA*, s. 1), including co-operatives, credit unions, insurance, mortgage brokers, loans and trusts, and pensions (*FSCOA*, s. 1). In addition, the nature of the Tribunal's expertise is primarily adjudicative. Unlike the former Pension Services Commission or the current Financial Services Commission, the Tribunal has no policy functions as part of its pensions mandate (see *FSCOA*, s. 22). As noted in *Mattel Canada*, *supra*, and in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, involvement in policy development will be an important consideration in evaluating a tribunal's expertise. Lastly, in appointing members to the Tribunal and assigning panels for hearings, the statute advises that, to the extent practicable, expertise and experience in the regulated sectors should be taken into account (*FSCOA*, ss. 6(4) and 7(2)). However, there is no requirement that members necessarily have special expertise in the subject matter of pensions. The Tribunal is a small entity of 6 to 12 members which further reduces the likelihood that any particular panel would have expertise in the matter being adjudicated (*FSCOA*, s. 6(3)).

11

D'autre part, le Tribunal ne possède aucune expertise particulière dans ce domaine. Cet organisme, qui a été créé par la *Loi de 1997 sur la Commission des services financiers de l'Ontario*, L.O. 1997, ch. 28 (« *LCSFO* »), art. 20, afin de remplacer un office spécialisé, soit la Commission des régimes de retraite, détient une compétence générale. Il est chargé de statuer sur les questions touchant divers « secteur[s] réglementé[s] » (*LCSFO*, art. 1), dont les coopératives, les caisses populaires, les assurances, les courtiers en hypothèques, les sociétés de prêt et de fiducie et les régimes de retraite (*LCSFO*, art. 1). De plus, l'expertise du Tribunal est surtout de nature juridictionnelle. Contrairement à l'ancienne Commission des régimes de retraite et à la Commission des services financiers de l'Ontario, le Tribunal n'a pas pour fonction d'élaborer des politiques en matière de régimes de retraite (voir *LCSFO*, art. 22). Comme l'ont précisé les arrêts *Mattel Canada*, précité, et *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324, la participation à l'élaboration de politiques est une considération importante dans l'évaluation de l'expertise du tribunal. Enfin, la loi prévoit que, pour la nomination des membres du Tribunal et pour leur affectation à une formation, il faut, dans la mesure du possible, tenir compte de l'expérience et de la compétence dans les secteurs réglementés (*LCSFO*, par. 6(4) et 7(2)). Il n'est toutefois pas requis que les membres aient une expertise particulière dans le domaine des pensions. En raison du fait que le Tribunal ne comprend que 6 à 12 membres, il est encore moins probable qu'une formation donnée possède une expertise à l'égard de la question à trancher (*LCSFO*, par. 6(3)).

Overall, there is little to indicate that the legislature intended to create a body with particular expertise over the statutory interpretation of the Act. The Tribunal would not have any greater expertise than the courts in construing s. 70(6). Thus, this factor also suggests a lower amount of deference is required to be given to the Tribunal's decisions on the issue of statutory interpretation.

12

En somme, peu d'éléments laissent croire que le législateur avait l'intention de créer un organisme doté d'une expertise particulière relativement à l'interprétation de la Loi. Le Tribunal ne possède pas une plus grande expertise que les tribunaux judiciaires pour interpréter le par. 70(6). Ce facteur tend donc lui aussi à indiquer qu'un degré de retenue moins élevé est requis à l'égard des décisions du Tribunal portant sur l'interprétation des lois.

2004 SCC 54 (CanLII)

D. *Purposes of the Legislation and the Provision*

13 The purpose of the Act was well stated in *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503:

> [T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures" . . . .

14 On the one hand, the protection of the rights of vulnerable groups is a central and long-standing function of the courts. The protectionist aim of the legislation is especially evident in s. 70(6), which seeks to preserve the equal treatment and benefits between situations of partial wind-up and full wind-up. On the other hand, pension standards legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system. In this task, the regulatory body usually has a certain advantage in being closer to the dispute and the industry. In part, this factor led the Ontario Court of Appeal in *GenCorp* to conclude that the decisions of the Pension Services Commission should be reviewed on a standard of reasonableness.

15 Here, however, the Tribunal assumes a different role and function in relation to the statutory purpose of the particular provision at issue. The determination of the meaning of s. 70(6) is not "polycentric" in nature. In other words, s. 70(6) does not grant the Tribunal broad discretionary powers nor a range of policy-laden remedial choices that involve the balancing of multiple sets of interests of competing constituencies (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56; *Pushpanathan*, *supra*, at para. 36; *Dr. Q v. College of Physicians and*

D. *Objets de la Loi et de la disposition*

L'objet de la Loi fut bien énoncé dans l'arrêt *GenCorp Canada Inc. c. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (C.A. Ont.), p. 503 :

> [TRADUCTION] [L]a *Loi sur les régimes de retraite* est manifestement une loi d'intérêt général instaurant un cadre législatif et réglementaire soigneusement conçu qui prescrit des normes minimales applicables à tous les régimes de retraite en Ontario. Elle vise à favoriser et à protéger les intérêts des participants et anciens participants aux régimes de retraite et « démontre une grande sollicitude envers les employés touchés par une fermeture d'entreprise » . . .

D'une part, la protection des droits des groupes vulnérables est une fonction centrale et ancienne des tribunaux judiciaires. L'objectif de protection de la Loi est particulièrement évident au par. 70(6), qui garantit le même traitement et les mêmes bénéfices que la liquidation soit partielle ou totale. D'autre part, la législation sur les normes des régimes de retraite crée un régime administratif complexe qui vise à établir un équilibre délicat entre les intérêts des employeurs et ceux des employés, tout en servant l'intérêt du public dans l'existence d'un système de régimes de retraite complémentaires vigoureux. Étant plus près du litige et du secteur d'activités, l'organisme de réglementation jouit, dans cette tâche, d'un certain avantage. C'est en partie pour cette raison que la Cour d'appel de l'Ontario, dans l'arrêt *GenCorp*, a conclu que les décisions de la Commission des régimes de retraite devaient être révisées en fonction de la norme de la décision raisonnable.

Cependant, en l'espèce, le Tribunal remplit une fonction et un rôle différents à l'égard de l'objet de la disposition législative en cause. L'objet du par. 70(6) n'est pas de nature « polycentrique ». Autrement dit, le par. 70(6) ne confère pas au Tribunal de vastes pouvoirs discrétionnaires et il n'exige pas de ce dernier qu'il choisisse parmi diverses réparations mettant en jeu des questions de politique ou nécessitant la pondération d'intérêts multiples de groupes opposés (voir *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 56;

2004 SCC 54 (CanLII)

Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19, at paras. 30-31). Moreover, the issues raised in s. 70(6) are legal in nature, rather than economic, broad, specialized, technical or scientific in such a way as to substantially deviate from the normal role of the courts (*Dr. Q*, *supra*, at para. 31; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 48-49). Therefore, this factor also seems to indicate less deference be accorded to the Tribunal's interpretation.

Pushpanathan, précité, par. 36; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 30-31). De plus, les questions soulevées par le par. 70(6) sont de nature juridique. Ni leur ampleur, ni leur caractère spécialisé, ni leur nature économique, technique ou scientifique ne les distinguent de façon importante des questions que les tribunaux judiciaires tranchent habituellement (*Dr Q*, précité, par. 31; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 48-49). Ce facteur semble donc indiquer lui aussi qu'une moins grande retenue s'impose à l'égard de l'interprétation donnée par le Tribunal.

2004 SCC 54 (CanLII)

E. *Conclusion on the Standard of Review*

As all four factors point to a lower degree of deference, a standard of review of correctness should be adopted in this case. There are no persuasive grounds for the Court to grant the Tribunal any deference on the pure question of law before us in this case (see also *Barrie*, *supra*, at para. 18, citing *Pushpanathan*, *supra*, at para. 37).

E. *Conclusion sur la norme de contrôle*

16 Puisque les quatre facteurs militent en faveur d'un degré de retenue moins élevé, la norme de contrôle applicable en l'espèce est celle de la décision correcte. Aucun motif convaincant ne justifie notre Cour de faire preuve de retenue à l'égard de la décision du Tribunal sur la question de droit dont elle est saisie (voir aussi *Barrie*, précité, par. 18, citant *Pushpanathan*, précité, par. 37).

IV. Statutory Interpretation of Section 70(6)

I now turn to the essence of this appeal: the question of the interpretation of s. 70(6). The provision reads:

70. . . .

(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

IV. Interprétation du par. 70(6)

17 J'examine maintenant le fond du pourvoi, soit la question de l'interprétation du par. 70(6). La disposition est ainsi libellée :

70. . . .

(6) À la liquidation partielle d'un régime de retraite, les participants, les anciens participants et les autres personnes qui ont droit à des prestations en vertu du régime de retraite ont des droits et prestations qui ne sont pas inférieurs aux droits et prestations qu'ils auraient à la liquidation totale du régime de retraite à la date de prise d'effet de la liquidation partielle.

The appellants argue that the effect of the provision is to afford Affected Members a vested right, as of the effective date of partial wind-up, to participate in surplus distribution when, if ever, the Plan fully winds up, assuming they are so entitled under the Plan agreement. In contrast, the respondent contends that s. 70(6) requires that the distribution of the surplus actually occurs on the effective date of the partial wind-up. The main area of

18 Les appelantes soutiennent que la disposition a pour effet de reconnaître aux participants touchés, à compter de la date de la liquidation partielle, un droit acquis de recevoir une part de l'excédent lorsque le Régime sera liquidé en totalité, le cas échéant, si le Régime leur accorde un tel droit. À l'inverse, l'intimé prétend qu'en application du par. 70(6) la répartition de l'excédent doit être faite à la date de la prise d'effet de la liquidation

contention between the parties is the import of the last phrase: "on the effective date of the partial wind up".

partielle. Le principal point en litige réside donc dans la portée du dernier membre de phrase de la disposition : « à la date de prise d'effet de la liquidation partielle ».

19 The established approach to statutory interpretation was recently reiterated by Iacobucci J. in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

I will examine each of these factors in turn, beginning first with the background context.

La méthode d'interprétation des lois établie a récemment été réitérée par le juge Iacobucci dans l'arrêt *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26, citant E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87 :

> [TRADUCTION] Aujourd'hui, il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

J'examinerai chacun de ces facteurs en débutant par le contexte historique.

A. *Historical Context*

20 Pension plans have a long history in Canada, first appearing in the late 19th century. However, it was not until after the Second World War that the development of pension plans flourished in tandem with the economic growth and prosperity of the era (see *Report of the Royal Commission on the Status of Pensions in Ontario* (1980), vol. I, at p. 35; R. L. Deaton, *The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* (1989), at p. 79). In the early days, pensions were commonly regarded as gratuitous rewards for long and faithful service, subject to the discretion and financial health of the employer (see *Report of the Royal Commission on the Status of Pensions in Ontario*, *supra*, at p. 2; *Mercer Pension Manual* (loose-leaf ed.), at p. 1-9). However, particularly as pensions became a more familiar sight at the collective bargaining table, a competing conception as an enforceable employee right developed (see E. E. Gillese, "Pension Plans and the Law of Trusts" (1996), 75 *Can. Bar Rev.* 221, at pp. 226-27; Deaton, *supra*, at pp. 122-23). The enactment of minimum standards legislation in Ontario, first in 1963 and again in 1987, "considerably expanded the rights of plan members. It altered, again, the power balance between employers and employees

A. *Contexte historique*

Les régimes de retraite existent depuis longtemps au Canada, leur origine datant de la fin du 19e siècle. Le développement des régimes de retraite ne prend cependant son essor qu'après la deuxième Guerre mondiale, avec la croissance économique et la prospérité de l'époque (voir le *Report of the Royal Commission on the Status of Pensions in Ontario* (1980), vol. I, p. 35; R. L. Deaton, *The Political Economy of Pensions : Power, Politics and Social Change in Canada, Britain and the United States* (1989), p. 79). Au départ, les pensions étaient généralement considérées comme une récompense gratuite pour de longs et loyaux services. Leur attribution dépendait du bon vouloir et de la santé financière de l'employeur (voir *Report of the Royal Commission on the Status of Pensions in Ontario*, *op. cit.*, p. 2; *Mercer Pension Manual* (éd. feuilles mobiles), p. 1-9). Par ailleurs, lorsque le droit à la pension a commencé à être revendiqué de plus en plus fréquemment à la table de négociation collective, une nouvelle conception s'est développée, suivant laquelle il s'agit d'un droit dont les employés peuvent légitimement se réclamer (voir E. E. Gillese, « Pension Plans and the Law of Trusts » (1996), 75 *R. du B. can.* 221, p. 226-227; Deaton, *op. cit.*, p. 122-123). L'adoption de la législation sur les

2004 SCC 54 (CanLII)

in the matter of pensions" (Gillese, *supra*, at p. 228).

normes minimales du travail en Ontario, d'abord en 1963, puis en 1987 [TRADUCTION] « a considérablement étendu les droits des participants aux régimes. Elle a modifié, une fois de plus, l'équilibre des forces entre les employeurs et les employés dans le domaine des pensions » (Gillese, *loc. cit.*, p. 228).

21

The notion of a pension fund actuarial surplus, by contrast, has had a much shorter history. Surpluses, in any noticeable form, generally did not appear before the early 80s when millions of dollars in actuarial surplus were developing in some funds (see, e.g., J. Dewetering, *Occupational Pension Plans: Selected Policy Issues* (1991), at p. 17; Deaton, *supra*, at p. 134). Surplus can only arise in defined benefit plans, like the one provided by Monsanto, because, in contrast to defined contribution plans, benefits or plan liabilities are not contingent on the level of nor the return on contributions. Members are guaranteed specific benefits at retirement in an amount fixed by a determined formula. Contributions are made each year on the basis of an actuary's estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out ("current service cost"). These estimates are generally conservative in nature and based on a narrow range of assumptions consistent with actuarial standards and practices. This exercise is inherently somewhat speculative, and in the event of changes in market conditions or other unforeseeable future experience, the present value of the assets of the fund may actually be lower or greater than originally estimated.

En revanche, la notion d'excédent actuariel de la caisse de retraite a un passé beaucoup plus récent. De façon générale, ce n'est qu'au début des années 80 que des excédents significatifs ont été signalés. Certaines caisses ont commencé à afficher des excédents actuariels s'élevant à des millions de dollars (voir, p. ex., J. Dewetering, *Régimes de retraite professionnels : quelques aspects* (1991), p. 21; Deaton, *op. cit.*, p. 134). Seuls les régimes à prestations déterminées, comme celui offert par Monsanto, peuvent accumuler un excédent, parce que, contrairement aux régimes à cotisations déterminées, les prestations, ou le passif du régime, ne varient pas en fonction des fonds provenant des cotisations ni du produit du placement des cotisations. Les participants sont assurés de toucher à leur retraite des prestations établies d'avance, calculées selon une formule définie. Les cotisations sont versées annuellement, selon une évaluation actuarielle de la somme qui doit être investie immédiatement afin que les prestations prévues puissent être payées à l'employé à sa retraite (« coût des services courants »). Ces évaluations, qui sont fondées sur un ensemble limité d'hypothèses établies selon des normes et pratiques actuarielles, sont généralement prudentes. Cet exercice est nécessairement spéculatif. Ainsi, en cas de changements dans la conjoncture du marché ou de modifications imprévisibles de la statistique actuarielle, la valeur actuelle de l'actif de la caisse peut en fait être inférieure ou supérieure à l'évaluation initiale.

22

If, in a given year, the assets of the fund, evaluated as a going concern, are found to be insufficient to cover the current service cost, there is said to be an "unfunded liability" and the employer will be called upon to make up the deficit through contributions (see, generally, s. 4(1) of the *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909). If the plan is underfunded on wind-up, then

Si, pour une année donnée, l'actif de la caisse, selon une évaluation à long terme, est insuffisant pour couvrir le coût des services courants, on dit que le régime a un « passif non capitalisé ». L'employeur est alors tenu de combler le déficit par des cotisations (voir généralement le par. 4(1) du règlement général de la *Loi sur les régimes de retraite*, R.R.O. 1990, règl. 909). Si le régime est insuffisamment

2004 SCC 54 (CanLII)

benefits will be reduced, subject to the application in Ontario of the Pension Benefits Guarantee Fund (ss. 77 and 84(1) of the Act). In contrast, if the value of the assets are greater than originally estimated, the fund is said to have a surplus, being "the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan" (s. 1 of the Act). The surplus is considered "actuarial" because it has not yet been concretely realized through the liquidation of assets and the payment of liabilities.

23 Consequently, in the 80s, the surplus issue became a hotly contested one. Employers claimed the surplus as the result of their assumption of risk, while employees maintained that the fund, including the surplus, represented deferred wages belonging to them. It was in this context that the legislature re-enacted s. 70(6) as part of the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, virtually unchanged from the previous version introduced in 1969 (O. Reg. 103/66, s. 11, as am. by O. Reg. 91/69, s. 3; see Legislative Assembly of Ontario, *Hansard — Official Report of Debates*, 33rd Parl., January 13, 1986 to June 25, 1987). Also at this time, definitions of "partial wind up" and "surplus" were included in the scheme. Concurrently, a moratorium was placed on surplus withdrawals from ongoing plans in 1986 (R.R.O. 1980, Reg. 746, s. 21(2), as am. by O. Reg. 31/87), which was extended to plans on wind-up in 1988 (O. Reg. 708/87, s. 7a (added by O. Reg. 100/88)). The surplus sharing regulation was enacted to replace the moratorium (O. Reg. 708/87, s. 7c (added by O. Reg. 412/90)), requiring that no payments be made from the surplus of a pension plan that is being wound up in whole or in part unless it is (a) made to or for the benefit of members, former members or persons other than the employer who are entitled to payments; or (b) made to the employer with the written agreement of a prescribed number of members (R.R.O. 1990, Reg. 909, s. 8(1)). This regulation, designed to encourage agreement and sharing between employers and employees, ceases to have effect after December 31, 2004 (Reg. 909, s. 8(3)).

capitalisé à la liquidation, les prestations sont alors réduites, sous réserve de l'application, en Ontario, du Fonds de garantie des prestations de retraite (art. 77 et par. 84(1) de la Loi). Au contraire, si la valeur de l'actif excède l'évaluation initiale, on dit que la caisse a un excédent, soit « [l']excédent de la valeur de l'actif de la caisse de retraite liée à un régime de retraite par rapport à la valeur du passif relatif au régime de retraite » (art. 1 de la Loi). L'excédent est dit « actuariel », car il n'est pas concrètement réalisé par la liquidation de l'actif et le paiement du passif.

Dans les années 80, la question des excédents est devenue très controversée. Les employeurs réclamaient l'excédent au motif qu'ils assumaient les risques, alors que les employés affirmaient que la caisse, y compris l'excédent, représentait des salaires différés leur appartenant. C'est dans ce contexte que le législateur a réédicté le par. 70(6) en l'incorporant dans la *Loi de 1987 sur les régimes de retraite*, L.O. 1987, ch. 35, dans une version quasiment identique à celle de 1969 (Règl. de l'Ont. 103/66, art. 11, mod. par Règl. de l'Ont. 91/69, art. 3; voir Assemblée législative de l'Ontario, *Hansard — Official Report of Debates*, 33e lég., 13 janvier 1986 au 25 juin 1987). C'est aussi à cette époque que les définitions des termes « liquidation partielle » et « excédent » ont été incorporées dans la Loi. En même temps, un moratoire fut décrété en 1986 sur les retraits des excédents des régimes en vigueur (R.R.O. 1980, règl. 746, par. 21(2), mod. par Règl. de l'Ont. 31/87). En 1988, il a été étendu aux régimes en liquidation (Règl. de l'Ont. 708/87, art. 7a (ajouté par Règl. de l'Ont. 100/88)). Le règlement visant le partage de l'excédent a remplacé le moratoire (Règl. de l'Ont. 708/87, art. 7c (ajouté par Règl. de l'Ont. 412/90)). Selon ce règlement, aucun paiement ne peut être fait à même l'excédent d'un régime en liquidation totale ou partielle, sauf, selon le cas, a) s'il doit être fait aux participants, aux anciens participants et à d'autres personnes, autres qu'un employeur, qui ont droit à des paiements, ou au profit de ceux-ci; b) s'il doit être fait à un employeur, avec l'accord écrit d'un certain nombre de personnes désignées (R.R.O. 1990, règl. 909, par. 8(1)). Ce règlement, destiné à encourager la conclusion d'accords entre les parties et le partage entre les employeurs et les employés, cesse d'avoir effet après le 31 décembre 2004 (règl. 909, par. 8(3)).

2004 SCC 54 (CanLII)

24

This historical context, though not determinative, may provide some insight into the legislature's intention regarding the effect of s. 70(6). Through its statutory interventions, the legislature has sought to clarify some aspects of the relationship between employers and employees in pension matters. Steps have been taken to improve many employee rights but the importance of maintaining a fair and delicate balance between employer and employee interests, in a way which promotes private pensions, has also been a consistent theme. It is in light of this background that the legal meaning of the provision must be interpreted in accordance with the accepted approach to statutory interpretation.

Ce contexte historique, quoique non décisif, est révélateur de l'intention du législateur à l'égard de l'effet du par. 70(6). Par ses interventions législatives, il visait à clarifier certains aspects de la relation employeur-employés en matière de régimes de retraite. Des mesures furent prises pour améliorer de nombreux droits accordés aux employés, mais l'importance de maintenir un juste et délicat équilibre entre les intérêts de l'employeur et ceux de l'employé de manière à favoriser les régimes de retraite complémentaires fut aussi un thème récurrent. Conformément à la méthode d'interprétation des lois reconnue, c'est à la lumière de ce contexte que le sens de la disposition doit être déterminé.

2004 SCC 54 (CanLII)

B. *Grammatical and Ordinary Sense*

B. *Sens grammatical et ordinaire*

25

As noted by the Court of Appeal, s. 70(6) specifies the timing, group and rights to which the section applies. First, the timing is the partial wind-up of a pension plan. Second, the specified group of "members, former members and other persons entitled to benefits under the pension plan" is generally meant to refer to the members affected by a partial wind-up (para. 41). Lastly, the rights accorded are those rights and benefits that are not less than the group would have if there were a full wind-up on the date of partial wind-up (para. 42). The parties agree with these propositions.

Tel que l'a fait remarquer la Cour d'appel, le par. 70(6) précise le moment, le groupe et les droits qu'il vise. Premièrement, le moment est la liquidation partielle du régime de retraite. Deuxièmement, le groupe spécifié, à savoir « les participants, les anciens participants et les autres personnes qui ont droit à des prestations en vertu du régime de retraite » s'entend généralement des participants touchés par la liquidation partielle (par. 41). Enfin, les droits accordés sont les droits et prestations qui ne sont pas inférieurs à ceux que le groupe aurait s'il y avait liquidation totale du régime de retraite à la date de la liquidation partielle (par. 42). Les parties s'entendent sur ces points.

26

Where the disagreement lies is with regard to the timing of distribution following a partial wind-up of a plan in which there is an actuarial surplus. The respondent reasons that, since (i) s. 70(6) requires the rights and benefits on a partial wind-up to not be less than those available on full wind-up, and (ii) all parties agree that surplus distribution would occur on a full wind-up (Court of Appeal judgment, at para. 43; see also s. 79(4)), then (iii) s. 70(6) must require surplus distribution on a partial wind-up. In contrast, the appellants argue that, at most, s. 70(6) requires the vesting of the right to participate in surplus distribution in a potential future full wind-up because it is only on final wind-up that an actual, rather than actuarial, surplus can exist. In my opinion, the former interpretation accords

Là où il y a désaccord, c'est sur le moment de la distribution de l'excédent actuariel, s'il en est, à la suite de la liquidation partielle. D'après la thèse de l'intimé, puisque (i) le par. 70(6) exige que les droits et prestations à la liquidation partielle ne soient pas inférieurs à ceux qu'engendrerait une liquidation totale et que (ii) toutes les parties conviennent qu'il y aurait une distribution de l'excédent à la liquidation totale (jugement de la Cour d'appel, par. 43; voir aussi le par. 79(4)), (iii) le par. 70(6) doit dès lors exiger une distribution de l'excédent à la liquidation partielle. Au contraire, les appelantes soutiennent que le par. 70(6) crée tout au plus le droit de participer dans la distribution de l'excédent lors d'une éventuelle liquidation totale, parce que ce n'est qu'à la liquidation totale que l'excédent devient réel et

better with the ordinary and grammatical meaning of the section.

non actuariel. À mon avis, la première interprétation est plus conforme au sens ordinaire et grammatical de la disposition.

27

First, the section mandates that the Affected Members "shall have", on the effective date of the partial wind-up, the rights and benefits they "would have" on a full wind-up. This wording transposes the timing of the rights and benefits exigible on full wind-up up to the effective date of partial wind-up. It does not connote any delay until the future date of full wind-up before the exercise of acquired rights.

Premièrement, la disposition prévoit que les participants touchés « ont », à la date de prise d'effet de la liquidation partielle, les droits et les prestations « qu'ils auraient » à la liquidation totale. Ce libellé transpose à la date de prise d'effet de la liquidation partielle le moment où les droits et prestations exigibles à la liquidation totale sont réalisés. Il ne laisse pas entendre qu'il faille attendre jusqu'à la date de la liquidation totale pour exercer les droits acquis.

28

Second, the phrase "on the effective date" (emphasis added) suggests more immediacy than other possible alternatives, such as "as of". If the provision was worded "shall have rights and benefits . . . as of the effective date", this would be more indicative of a situation where rights were being vested presently but paid out in the future. The actual wording of "shall have rights and benefits . . . on the effective date" (emphasis added) indicates a more immediate realization of rights and benefits.

Deuxièmement, la locution « à la date de prise d'effet » (je souligne) suggère une application plus immédiate que d'autres variantes possibles, telles que « à compter de ». Si la disposition précisait « ont des droits et prestations [. . .] à compter de la date de prise d'effet », cela signifierait davantage que des droits sont acquis à ce moment, mais que le paiement ne se fera qu'ultérieurement. Le libellé « ont des droits et prestations [. . .] à la date de prise d'effet » (je souligne) comporte l'idée d'une réalisation immédiate des droits et prestations.

29

Third, the appellants' proposed interpretation, as adopted by the majority of the Tribunal, in effect reads out this last phrase of the provision. In my opinion, without the phrase "on the effective date of the partial wind up", it may have been open to read s. 70(6) as only vesting rights to be exercised on full wind-up. However, the presence of this phrase confirms that rights and benefits are not only measured but also realized on the effective date of partial wind-up.

Troisièmement, l'interprétation proposée par les appelantes et adoptée à la majorité par le Tribunal fait en réalité abstraction des derniers mots de la disposition. À mon avis, sans la mention « à la date de prise d'effet de la liquidation partielle », il aurait été possible d'interpréter le par. 70(6) comme conférant seulement un droit acquis à exercer au moment d'une liquidation totale. Or, la présence de cette mention confirme que les droits et prestations sont non seulement déterminés mais aussi réalisés à la date de prise d'effet de la liquidation partielle.

30

Lastly, s. 70(6) acts as a residual deeming provision rather than being an independent delineation of substantive rights. As a matter of logic, if it equalizes the position of the full and partial wind-up groups, and it is clear that there is surplus distribution on full wind-up, then there should also be surplus distribution on partial wind-up.

Enfin, le par. 70(6) est une disposition résiduelle, qui crée une présomption plutôt qu'une disposition délimitant des droits substantiels. Logiquement, si la disposition a pour effet d'établir l'égalité entre les groupes touchés par une liquidation partielle et ceux touchés par une liquidation totale et s'il est clair qu'il y aura répartition d'un excédent à la liquidation totale, il doit alors y avoir aussi distribution de l'excédent lors de la liquidation partielle.

2004 SCC 54 (CanLII)

31

In sum, the provision indicates that the assessment of rights and benefits is to be conducted as if the Plan was winding up in full on the effective date of partial wind-up. The realization of rights and benefits, including the distribution of surplus assets, then occurs for the part of the Plan actually being wound up. Therefore, the Affected Members, if entitled, may receive their pro rata share of the surplus existing in the fund on a partial wind-up, as if the Plan was being fully wound up on that day.

En résumé, la disposition prévoit que la détermination des droits et prestations doit être effectuée comme si le Régime était liquidé totalement à la date de prise d'effet de la liquidation partielle. La réalisation des droits et prestations, incluant la distribution de l'excédent d'actif, se produit alors pour la partie du Régime qui est effectivement en liquidation. En conséquence, les participants touchés peuvent recevoir, s'ils y ont droit, leur quote-part de l'excédent de la caisse à la liquidation partielle, comme si le Régime était liquidé totalement ce jour-là.

C. *Scheme of the Act*

C. *Économie de la Loi*

32

The statutory scheme further supports this conclusion. First, the definitions of "wind up" and "partial wind up" in s. 1 of the Act closely parallel one another, both requiring a distribution of assets:

"partial wind up" means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan;

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

It then follows that s. 70(1)(c) requires the administrator to file as part of its full or partial wind-up report, "the methods of allocating and distributing the assets of the pension plan". Similarly, s. 28.1(2) of Reg. 909 requires that the administrator of the Plan give to each person entitled to a pension a statement setting out, among other things: "[t]he method of distributing the surplus assets", "[t]he formula for allocating the surplus among the plan beneficiaries" and "[a]n estimate of the amount allocated to the person." Thus, delaying the distribution would not be consonant with these provisions that make distribution of surplus assets an intended part of the wind-up process, whether the wind-up is in whole or in part.

L'économie de la Loi soutient aussi cette conclusion. D'abord, les définitions de « liquidation » et de « liquidation partielle », de l'article premier de la Loi, sont très similaires, exigeant toutes deux une distribution de l'actif :

« liquidation » Cessation d'un régime de retraite et répartition de l'actif de la caisse de retraite.

« liquidation partielle » Cessation d'une partie d'un régime de retraite et répartition de l'actif de la caisse de retraite qui se rapporte à cette partie du régime de retraite.

De plus, l'al. 70(1)c) oblige l'administrateur à inclure dans le rapport de liquidation totale ou partielle qu'il dépose « les méthodes d'attribution et de répartition de l'actif du régime de retraite ». De même, en application du par. 28.1(2) du règl. 909, l'administrateur du régime doit donner à chaque personne qui a droit à une pension une déclaration indiquant notamment « [l]e mode de distribution de l'excédent d'actif », « [l]a formule de répartition de l'excédent entre les bénéficiaires du régime » et « [l]a somme estimative attribuée à la personne. » Ainsi, retarder la répartition irait à l'encontre de ces dispositions, qui ont pour effet d'intégrer la distribution de l'excédent d'actif dans le processus de liquidation, qu'elle soit totale ou partielle.

33

Second, the statutory scheme makes an important distinction between continuing plans and winding-up plans. The partial wind-up falls, for all purposes, in the latter group, even though there is a remaining

Ensuite, le régime législatif établit une distinction importante entre les régimes de retraite qui continuent d'exister et ceux qui sont en cours de liquidation. La liquidation partielle est incluse, à

2004 SCC 54 (CanLII)

part of the Plan that continues to exist. Under the scheme, in evaluating rights and procedural requirements, partial wind-up is treated the same as a full wind-up, which coincides with the purpose and effect of s. 70(6). For instance, in s. 78(1) the general rule is established that "[n]o money may be paid out of a pension fund to the employer without the prior consent of the Superintendent." Sections 79(1) and 79(3) then provide for exceptions to this rule depending on whether the application for payment is being made with regard to a plan that is continuing or one that is winding up. As with the additional conditions set out in the regulations (Reg. 909, ss. 8 to 10 and 25 to 28.1), it is much more difficult to justify surplus withdrawal from a continuing plan than from a plan winding up in whole or in part. The interpretation of s. 70(6) herein proposed is consistent with the logic of this aspect of the statutory scheme and the legislature's choice to treat partial wind-ups in the same manner as full wind-ups. As a result, a partial wind-up requires a full wind-up to notionally occur for the purposes of evaluating the pro rata share of the assets and liabilities related to the partial wind-up, followed by the continuation of the remainder of the Plan.

toutes fins, dans la deuxième catégorie, même si une partie du régime continue d'exister. Selon le régime législatif, l'évaluation des droits et la procédure de liquidation sont les mêmes, que la liquidation soit partielle ou totale. Cela coïncide avec l'objet et l'effet du par. 70(6). Ainsi, le par. 78(1) établit la règle générale selon laquelle « [a]ucune somme ne peut être prélevée sur une caisse de retraite pour payer un employeur sans le consentement préalable du surintendant. » Des exceptions à cette règle sont prévues aux par. 79(1) et (3), selon que la demande de paiement est présentée à l'égard d'un régime de retraite qui continue d'exister ou d'un régime en liquidation. Comme pour les autres conditions énoncées au règlement (règl. 909, art. 8 à 10 et 25 à 28.1), il est beaucoup plus difficile de justifier le retrait d'un excédent d'un régime qui continue d'exister que d'un régime en liquidation totale ou partielle. L'interprétation du par. 70(6) proposée ici est conforme à la logique de cet aspect du régime législatif et au choix du législateur de traiter les liquidations partielles et les liquidations totales de la même manière. Ainsi, pour l'évaluation de la part de l'actif et du passif qui correspond à la partie du régime en cours de liquidation, il faut présupposer la mise en œuvre d'une liquidation totale fictive. Le reste du régime continue d'exister par la suite.

34

Lastly, in this statutory scheme, the role of s. 70(6) appears to be as a residual deeming provision reflecting the legislature's intent of assuring that rights on partial wind-up are not less than those available on full wind-up, whether granted under the Act or under the terms of the Pension Plan. In almost every section where wind-up is mentioned, the legislature has already clarified that it is referring to wind-up "in whole or in part". This is the case when referring to grow-in rights (s. 74(1)) and immediate vesting rights (s. 73(1)(b)). These are special rights that members affected by a wind-up acquire but that ordinary retirees or individuals leaving employment do not. Provisions regarding the procedural requirements on wind-up similarly specify application on wind-up both "in whole or in part" (see, e.g., ss. 68 to 70). One of the rare instances in the Act where both are not expressly included is with regard to transfer rights on wind-up, which only mentions "wind up" (s. 73(2)). The appellants seem to agree,

Enfin, dans ce régime législatif, le par. 70(6) apparaît comme une disposition résiduelle qui crée une présomption, reflétant ainsi l'intention du législateur de veiller à ce que les droits à la liquidation partielle ne soient pas inférieurs à ceux dévolus lors de la liquidation totale, que ces derniers soient issus de la Loi ou du régime de retraite. Dans presque toutes les dispositions qui renvoient à une liquidation, le législateur a déjà précisé qu'il s'agit d'une « liquidation partielle ou totale ». Tels sont les cas des droits réputés acquis (par. 74(1)) et des droits dévolus immédiatement (al. 73(1)b)). Ces droits spéciaux sont conférés aux participants touchés par une liquidation, mais non aux retraités ordinaires ou aux personnes qui quittent leur emploi. Les dispositions concernant les modalités de la liquidation précisent aussi qu'elles s'appliquent tant aux liquidations totales qu'aux liquidations partielles (voir, p. ex., les art. 68 à 70). L'une des rares dispositions de la Loi où les deux types de liquidation ne

2004 SCC 54 (CanLII)

correctly in my opinion, that those rights would still have effect on partial wind-up even though it is not explicitly mentioned. Presumably, this must result from the application of s. 70(6), and controverts any sort of *expressio unius est exclusio alterius* logic for s. 73(2).

sont pas expressément inclus concerne les droits de transfert à la liquidation, où l'on retrouve seulement le terme « liquidation » (par. 73(2)). Les appelantes semblent concéder, à bon droit selon moi, que ces droits produiraient aussi leurs effets lors d'une liquidation partielle, même si cela n'est pas explicitement prévu. On peut supposer que cela résulte de l'application du par. 70(6) et que toute application de la règle *expressio unius est exclusio alterius* (la mention explicite de l'un signifie l'exclusion de l'autre) est écartée pour le par. 73(2).

2004 SCC 54 (CanLII)

35

As a last point, it is worth commenting on the approach of the majority judgment of the Tribunal in disregarding the regulations in construing the meaning of s. 70(6). While it is true that a statute sits higher in the hierarchy of statutory instruments, it is well recognized that regulations can assist in ascertaining the legislature's intention with regard to a particular matter, especially where the statute and regulations are "closely meshed" (see *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 26; *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 282). In this case, the statute and the regulations form an integrated scheme on the subject of surplus treatment and the thrust of s. 70(6) can be gleaned in light of this broader context.

En dernière analyse, il est utile de commenter l'approche adoptée par les membres majoritaires du Tribunal, qui n'ont pas tenu compte du règlement lors de l'interprétation du par. 70(6). Même s'il est vrai qu'une loi est supérieure à un règlement dans la hiérarchie des normes, il est bien établi que le recours aux règlements est utile dans la détermination de l'intention du législateur à l'égard d'un aspect particulier, surtout lorsque la loi et le règlement sont [TRADUCTION] « étroitement liés » (voir *R. c. Campbell*, [1999] 1 R.C.S. 565, par. 26; *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 282). En l'espèce, la loi et ses règlements forment un tout à l'égard de la question du traitement de l'excédent et le sens général du par. 70(6) peut être dégagé de ce contexte global.

36

In summary, the scheme of the Act and of the regulations supports the ordinary and grammatical meaning of s. 70(6) as requiring distribution of surplus at the time of partial wind-up.

Bref, l'économie de la Loi et de ses règlements mettent en évidence que le sens ordinaire et grammatical du par. 70(6) commande une répartition de l'excédent lors d'une liquidation partielle.

D. *Object of the Act*

D. *Objet de la Loi*

37

A purposive interpretation of s. 70(6) should be mindful of the legislative objective in the context of the statutory scheme surrounding surplus and partial wind-up.

Lors de l'interprétation téléologique du par. 70(6), il est important de ne pas perdre de vue l'objectif de la Loi dans le contexte du régime législatif établi à l'égard de l'excédent et de la liquidation partielle.

38

The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and

La Loi, qui est d'intérêt public, reconnaît l'importance cruciale de la sécurité du revenu à long terme. Cette intervention législative dans l'administration des régimes de retraite à participation volontaire vise à établir des normes minimales et une supervision réglementaire afin de protéger et de garantir les prestations et les droits des participants, des anciens

others entitled to receive benefits under private pension plans (see *GenCorp*, *supra*; *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, at p. 646, it is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards.

participants et des autres personnes qui ont droit à des prestations en vertu des régimes de retraite complémentaires (voir *GenCorp*, précité; *Firestone Canada Inc. c. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 (C.A.), p. 127). Comme l'a reconnu notre Cour dans l'arrêt *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611, p. 646, ceci devient particulièrement important dans un contexte où les pensions sont maintenant généralement accordées moyennant une contrepartie et qu'elles ne sont plus de simples récompenses gratuites. Par ailleurs, en raison de la nature volontaire des régimes de retraite complémentaires, il faut équilibrer soigneusement les interventions dans ce domaine. Cette prudence est nécessaire pour éviter de décourager les employeurs de prendre des décisions avantageuses pour leurs employés en ce qui concerne ces régimes. La Loi tend donc, dans une certaine mesure, à assurer, entre les intérêts des employés et ceux des employeurs, un équilibre favorable aux deux groupes et à l'intérêt du grand public à ce que des normes soient établies en matière de pensions.

39 Employers often argue that the risk and responsibility of a defined benefit plan are borne by the employer and, thus, it should be allowed the control and flexibility to manage the plan as it sees fit. It is contended that requiring distribution of surplus weighs the balance too heavily in favour of the employees and will result in funds being contributed to according to less cautious actuarial estimates, fewer defined benefit plans, and fewer private pension plans overall. While important considerations, these arguments are unpersuasive. First, the requirement of distribution is value-neutral to the question of entitlement, which must be determined separately under the provisions of the Plan and the Act. Second, the statutory scheme protects against underfunding by requiring employers and administrators to follow accepted actuarial practice in their valuations (Reg. 909, s. 16). Lastly, the provision of pensions serves a number of labour market functions which benefit the corporate sector, including attracting a labour supply, reducing turnover, improving morale, increasing productivity and efficiency, promoting loyalty to the corporation, and so on (Deaton, *supra*, at p. 119). In short, there are many reasons for employers to maintain pension plans

Il n'est pas rare que les employeurs s'appuient sur le fait qu'ils supportent le risque et la responsabilité du régime de retraite à prestations déterminées pour prétendre qu'ils devraient disposer du contrôle et de la souplesse nécessaires pour gérer le régime à leur manière. On a aussi prétendu qu'exiger la répartition de l'excédent ferait trop pencher la balance en faveur des employés et qu'il en résulterait que les cotisations seraient versées selon des évaluations actuarielles moins prudentes, et qu'il y aurait moins de régimes à prestations déterminées et moins de régimes de retraite complémentaires dans l'ensemble. En dépit de leur intérêt, ces arguments ne sont pas persuasifs. Premièrement, l'obligation de répartition n'est pas liée à la question du droit à l'excédent, qui doit être décidée séparément selon les dispositions du Régime et de la Loi. Deuxièmement, le régime législatif contrôle le niveau du financement en obligeant les employeurs et les administrateurs à suivre les normes actuarielles reconnues pour l'évaluation de la solvabilité du régime (règl. 909, art. 16). Enfin, la mise en place de régimes de retraite remplit certaines fonctions sur le marché du travail au profit des entreprises. Elles permettent

2004 SCC 54 (CanLII)

and a construction of s. 70(6) that is in accordance with the terms of the statute is unlikely to disrupt the balance between employer and employee interests.

notamment d'attirer la main-d'œuvre, de réduire le roulement du personnel, d'améliorer le moral, d'augmenter la productivité et le rendement et de promouvoir la loyauté envers l'entreprise (Deaton, *op. cit.*, p. 119). Bref, les employeurs ont bien des raisons d'offrir des régimes de retraite et une interprétation du par. 70(6) qui correspond au libellé de la Loi ne perturbera vraisemblablement pas l'équilibre entre les intérêts des employeurs et des employés.

2004 SCC 54 (CanLII)

40

As between employees, it is difficult to see how this interpretation of s. 70(6) results in any unfairness to the ongoing members, as was argued before us in this appeal. Requiring that the pro rata share of the actuarial surplus be distributed at the time of partial wind-up is unlikely to compromise the continuing integrity of the pension fund. By definition, the fund will still be in surplus after the distribution, except that the amount of surplus will be reduced in proportion to the size and level of entitlement, if any, of the partial wind-up group and subject to the statutory restrictions on withdrawal of surplus by the employer. In this case, approximately $16 million in actuarial surplus would have remained in the fund even if the entire surplus related to the partial wind-up was distributed.

Quant aux effets entre les employés, il est difficile de voir comment cette interprétation du par. 70(6) entraîne un résultat inéquitable pour les participants qui conservent leur emploi, comme ce fut plaidé devant nous en l'espèce. Exiger que la part proportionnelle de l'excédent actuariel soit répartie à la liquidation partielle ne compromettra vraisemblablement pas l'intégrité de la caisse de retraite. Par définition, la caisse aura encore un excédent après la répartition, sauf que le montant de l'excédent sera diminué proportionnellement à l'importance et au niveau des droits à pension, le cas échéant, du groupe visé par la liquidation et sera sujet aux restrictions législatives relatives aux retraits d'un excédent par l'employeur. En l'espèce, environ 16 millions de dollars d'excédent actuariel seraient restés dans la caisse même si la totalité de l'excédent lié à la liquidation partielle avait été distribuée.

41

By contrast, if Affected Members are required to await a full wind-up at some indeterminate future date to share in the distribution of surplus, it would place them in a worse position than continuing employees. Affected Members are placed in a significantly different position from continuing employees because they have just lost their jobs, their level of pensionable earnings are reduced, and they will rarely be able to replicate the same level of benefits elsewhere. Since pension plans are theoretically intended to be indeterminate in nature, Affected Members may no longer be reachable if a full wind-up occurs. It makes sense for the Affected Members to be subject to the risks of the Plan while they are a part of it, but not after they have been terminated from it. This same rationale would equally apply to future Affected Members if another partial

Par contre, si les participants touchés devaient attendre la liquidation totale à une date ultérieure indéterminée pour recevoir leur part de l'excédent, ils se trouveraient dans une moins bonne situation que les employés qui restent. Le sort des employés qui restent est sensiblement différent de celui des participants touchés, car ces derniers viennent de perdre leur emploi, leur niveau de gains ouvrant droit à pension est limité et ils pourront rarement trouver ailleurs un même niveau de prestations. Comme, en principe, les régimes de retraite sont d'une durée indéterminée, les participants touchés lors de la liquidation partielle seront peut-être impossibles à joindre au moment de la liquidation totale. Il est logique que les employés qui conservent leur emploi soient exposés aux risques inhérents au Régime, mais cette logique ne s'applique

wind-up occurs and to all members at the time of a full wind-up, so that each group would bear the consequences of market forces at the time of their termination from the Plan. This seems to be the fairest distribution of risk and in accordance with the object of the Act.

plus à ceux qui l'ont quitté. Le même raisonnement s'appliquerait également aux futurs participants touchés si une autre liquidation partielle survenait et à tous les participants au moment d'une liquidation totale, de sorte que chaque groupe supporterait les conséquences des forces du marché au moment de sa désaffiliation du Régime. Cela semble constituer la plus juste répartition des risques et être conforme à l'objet de la Loi.

42 There are also policy and practical reasons supporting an interpretation requiring distribution upon partial wind-up. A surplus is, in effect, a windfall because it was not within the expectations of either the employer or the employees when the regime was implemented. The employer contributes to the fund as much as is necessary to match the funding target of the Plan on a going concern basis, taking into consideration actuarial estimates and assumptions. The basic expectation of the employees when joining the Plan is to receive periodic pension benefits on retirement. The fluctuation in the value of the assets is essentially the result of unforeseen market performance or plan experience. As discussed earlier, the most equitable solution is to distribute the fortunes of favourable markets at the time Affected Members are terminated. In this way, the windfall is related to their actual time and participation in the plan rather than being subject to the experience of a plan of which they are no longer a part.

Des raisons d'ordre politique et pratique justifient aussi une interprétation requérant une répartition lors de la liquidation partielle. Un excédent est, en réalité, un cadeau du ciel, auquel ni l'employeur ni les employés ne s'attendent lorsque le régime est mis en place. L'employeur verse à la caisse les cotisations qui sont requises pour réaliser l'objectif de financement à long terme du Régime, selon des évaluations et des hypothèses actuarielles. L'expectative fondamentale des employés qui adhèrent au Régime est de recevoir des prestations de pension périodiques à la retraite. La fluctuation de la valeur de l'actif résulte essentiellement du rendement imprévu du marché ou de l'évolution du régime. Comme je l'ai précisé précédemment, la solution la plus équitable consiste à distribuer les bénéfices d'une conjoncture favorable au moment où les participants touchés perdent leur emploi. De cette manière, ce cadeau du ciel est relié à leur participation réelle au Régime plutôt que de dépendre de l'évolution du régime après le moment où leurs liens avec celui-ci sont rompus.

43 Moreover, the increasingly mobile nature of labour should be recognized. When a group of employees is terminated and that part of the Plan is wound up, those accounts should generally be settled concurrently. The Affected Members should be able to know their status at the time of their termination so as to arrange their affairs accordingly and not be indefinitely tied to an employer that laid them off. On the flip side, if Affected Members only have a right to surplus distribution on full wind-up, assuming they are so entitled to receive it, they may no longer be alive to realize their right when, if ever, a full wind-up occurs. Even if they are, they may be difficult to locate or contact. As a practical matter, it is at the time of termination that

De plus, il convient de reconnaître la mobilité croissante de la main-d'œuvre. Lorsqu'un groupe d'employés perdent leur emploi et qu'une partie du Régime est liquidée, leurs comptes devraient généralement être réglés simultanément. Les participants touchés devraient pouvoir connaître leur situation au moment de la cessation de leur emploi afin d'être en mesure d'organiser leurs affaires en conséquence. Ils ne devraient pas être liés indéfiniment à un employeur qui les a mis à pied. D'ailleurs, si les participants touchés avaient un droit à la répartition de l'excédent seulement au moment de la liquidation totale, en présumant qu'ils y ont droit, il se peut qu'ils ne soient plus vivants pour réaliser leur droit, si une liquidation

2004 SCC 54 (CanLII)

their right to surplus, if any, is most needed, considering they have just lost their jobs and their source of regular income.

totale survient effectivement un jour. Même s'ils vivent toujours, il se peut qu'il soit difficile de les trouver ou de les joindre. En pratique, c'est au moment de la cessation de leur emploi que leur droit à l'excédent, le cas échéant, est le plus utile, étant donné qu'ils viennent de perdre leur emploi et leur source de revenu régulier.

2004 SCC 54 (CanLII)

44

Furthermore, the argument that actuarial surplus is notional and thus too unreliable to justify the liquidation of any Plan assets is unconvincing. Although the assessment of an actuarial surplus is of necessity an estimate, it does not follow that the distribution of surplus would be unsound. Actuarial estimates of pension values are used for many purposes, including the sale of corporations or divisions of corporations, the division of matrimonial property, and the taking of contribution holidays by employers. Further, while the actuarial assumptions at play can vary, some uniformity can be found by requiring particular methods of valuation for certain purposes. For instance, the regulations prescribe that a "going concern valuation" (defined in Reg. 909, s. 1(2)) be used for valuing continuing pension plans (see, e.g., Reg. 909, s. 13(1) or 26). In contrast, a "solvency valuation" or "wind-up valuation" can be used when plans are actually or notionally wound up. This is in line with the different purposes underlying the regulation of continuing as opposed to winding up plans. In the former, the main concern is capital regulation to ensure adequate contribution levels based on estimates of current service costs to maintain fund integrity. In the latter, for wind-ups in whole or in part, the main concern is severing the terminated part of the Plan and ensuring Affected Members receive their legal entitlements, if any, as beneficiaries through the distribution of assets related to the part of the Plan being wound up.

En outre, l'argument voulant que l'excédent actuariel soit fictif et qu'il ne soit pas possible de s'y fier pour liquider une quelconque partie de l'actif du Régime n'est pas convaincant. Même si l'évaluation d'un excédent actuariel est nécessairement une estimation, il ne s'ensuit pas que sa distribution est mal fondée. Les évaluations actuarielles de la valeur de la pension servent plusieurs fins, telles que la vente ou les divisions d'entreprises, le partage des biens matrimoniaux et les exonérations de cotisations des employeurs. De plus, même si les hypothèses actuarielles en cause peuvent varier, il est possible d'atteindre une certaine uniformité en imposant des méthodes d'évaluation précises dans certains cas. Par exemple, le règlement prescrit qu'une « évaluation à long terme » (définie dans le règl. 909, par. 1(2)) doit être utilisée pour l'évaluation d'un régime qui continue d'exister (voir, p. ex., le règl. 909, par. 13(1) ou l'art. 26). À l'inverse, une « évaluation de solvabilité » ou une « évaluation de liquidation » peut être utilisée en cas de liquidation effective ou fictive. Cela s'explique par les objectifs différents qui sous-tendent la réglementation des régimes qui continuent d'exister par rapport à ceux qui sont en liquidation. Dans le premier cas, la préoccupation majeure est de prévoir des mesures liées à assurer la capitalisation afin d'assurer que les niveaux de cotisations, fixés en fonction de l'estimation des coûts des services courants, soient suffisants pour préserver l'intégrité de la caisse. Dans le deuxième cas, qu'il s'agisse de liquidation totale ou partielle, la préoccupation majeure est de s'assurer que la partie du Régime qui est liquidée est mise à part et que les participants touchés reçoivent ce à quoi ils ont droit, le cas échéant, en tant que bénéficiaires, par la répartition de l'actif lié à la partie du Régime en liquidation.

45

Lastly, distribution upon partial wind up is consistent with the trust principles outlined in *Schmidt*,

Enfin, la répartition à la liquidation partielle se concilie harmonieusement avec les principes du

supra, regarding surplus entitlement and contribution holidays. Although that case dealt with a situation of entitlement to surplus on a full wind-up, which is not in issue here, the appellants placed much weight on the distinction made by Cory J. between actual and actuarial surplus. Cory J. held at pp. 654-55 that:

> Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.
>
> . . .
>
> When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. [Emphasis added.]

46 Section 70(6) provides for distribution of surplus only at the time of plan termination, be it partial or full. The definition of "partial wind up" in s. 1 of the Act explicitly refers to the "termination" of "that part of the pension plan". Also, surplus is ascertainable at that time according to current valuation methods. Neither s. 70(6) nor this appeal affects the ability of an employer to take contribution holidays while the Plan is ongoing and the Plan allows for it. Therefore, requiring distribution on partial wind-up is fully compatible with this Court's decision in *Schmidt* and the principles discussed therein. Upon partial wind-up, the pro rata share of the surplus ceases to be notional. It is then actual.

47 Section 70(6) was enacted to ensure that Affected Members on partial wind-up are not in a worse position than a future full wind-up group. This requirement of equity provided by s. 70(6) is in relation to other rights provided for under the Act. As far as the distribution of surplus is concerned, the object of the Act and s. 70(6) strongly promote an interpretation that requires this

droit des fiducies exposés dans l'arrêt *Schmidt*, précité, à l'égard du droit à un surplus de caisse de retraite et de la période d'exonération de cotisations. Bien que cet arrêt porte sur le droit au surplus en cas de liquidation totale, ce qui n'est pas le cas en l'espèce, les appelantes ont beaucoup insisté sur la distinction faite par le juge Cory entre les surplus réel et actuariel. Ce dernier précise (p. 654-655) :

> Les employés ne peuvent revendiquer aucun droit au surplus d'un régime existant puisqu'il n'est pas définitif. Le droit à tout surplus n'est cristallisé que lorsque celui-ci devient vérifiable à la cessation du régime. Par conséquent, le fait de s'accorder une période d'exonération de cotisations ne représente ni un empiétement sur la fiducie, ni une réduction des prestations acquises.
>
> . . .
>
> À la cessation du régime, le surplus actuariel devient un surplus réel et est dévolu aux employés bénéficiaires. [Je souligne.]

Le paragraphe 70(6) prévoit la répartition de l'excédent seulement à la cessation du régime, qu'elle soit partielle ou totale. La définition de « liquidation partielle », à l'article premier de la Loi, renvoie explicitement à la « cessation » de « cette partie du régime de retraite ». De plus, l'excédent est vérifiable à ce moment selon les méthodes d'évaluation alors en vigueur. Ni le paragraphe 70(6) ni le présent pourvoi n'empêchent l'employeur de se prévaloir de périodes d'exonération de cotisations lorsque le Régime continue d'exister et qu'il le permet. Exiger la répartition lors de la liquidation partielle est dès lors compatible avec la décision de notre Cour dans l'arrêt *Schmidt* et les principes qui y sont analysés. À la liquidation partielle, la part proportionnelle de l'excédent cesse d'être fictive. Elle devient réelle.

Le paragraphe 70(6) a été adopté pour assurer aux participants touchés par une liquidation partielle un traitement aussi favorable que celui réservé aux groupes visés par une liquidation totale. Le paragraphe 70(6), qui exprime un souci d'équité, fait écho aux autres dispositions de la Loi. Pour ce qui est de la répartition de l'excédent, l'objet de la Loi et le par. 70(6) militent fortement en faveur d'une

2004 SCC 54 (CanLII)

distribution to occur at the time of the partial wind-up rather than later.

interprétation selon laquelle cette répartition doit avoir lieu lors de la liquidation partielle et non après.

V. Conclusion

V. Conclusion

48

In light of all of the above, I conclude that s. 70(6) requires the distribution of actuarial surplus related to the part of the Plan being wound up, on the effective date of the partial wind-up. As a consequence, I agree with the Court of Appeal's interpretation and find that the Tribunal incorrectly interpreted the provision at first instance.

En raison de ce qui précède, je conclus que le par. 70(6) commande que la répartition de l'excédent actuariel qui se rapporte au groupe touché par la liquidation partielle soit effectuée à la date de la prise d'effet de cette liquidation. En conséquence, je souscris à l'interprétation de la Cour d'appel et conclus que le Tribunal a mal interprété la disposition en première instance.

49

This result is also consistent with the historical context of pension law. Statutory interventions in pension law have sought to clarify and regulate the relationship between employers and employees in order to promote the pension system while adjusting imbalances of power. With regard to surplus and its distribution on wind-up, the legislature has implemented some measures in this regard, be it to improve the position of employees if the Plan fails to provide for distribution (s. 79(4) of the Act) or to require consent of members for the withdrawal of surplus by employers (Reg. 909, s. 8). However, these steps have also been tailored in such a way as to avoid placing too heavy a burden on employers in exercising their rights under the Plan or discouraging them from maintaining pension funds for their workforce. Distribution of surplus on partial wind-up reflects this balance because it does not reduce or remove any entitlements of the employers. In contrast, failure to require distribution could negatively impact the potential entitlements of affected employees of the partial wind-up group. Considering the text, scheme and purpose of the Act against this background discloses an intent of the legislature to require surplus distribution on partial wind-up of a plan.

Ce résultat est aussi conforme avec le contexte historique du droit des pensions. Les interventions du législateur dans le domaine des régimes de retraite visaient à expliquer et à réglementer la relation employeur-employés afin de promouvoir le système des régimes de retraite tout en rééquilibrant les forces en présence. En ce qui a trait aux excédents et à leur répartition lors de la liquidation, le législateur a mis en œuvre des mesures destinées à améliorer la situation des employés lorsqu'un régime ne prévoit pas de répartition (par. 79(4) de la Loi) ou à exiger l'accord des participants pour le retrait d'un excédent par l'employeur (règl. 909, art. 8). Ces mesures ont toutefois été conçues de façon à ne pas imposer un fardeau trop lourd aux employeurs qui exercent leurs droits en vertu du Régime et à ne pas les décourager de maintenir un régime de retraite pour leur personnel. La répartition de l'excédent à la liquidation partielle reflète cet équilibre, parce qu'elle ne réduit ou ne supprime pas les droits des employeurs. À l'inverse, ne pas exiger cette répartition pourrait porter atteinte aux droits que pourraient avoir les employés du groupe touché par la liquidation partielle. Sur cette toile de fond, le libellé, l'esprit et l'objet de la Loi mettent en évidence que le législateur avait l'intention d'exiger la répartition de l'excédent lors de la liquidation partielle du régime de retraite.

50

The vital importance of pension schemes in the modern labour market is evident. Pension funds are a significant asset for employers and an invaluable nest egg for an aging workforce. Legislative schemes that establish minimum standards and

Sur le marché moderne du travail, il est évident que les régimes de retraite revêtent une importance cruciale. Les caisses de retraite représentent un élément d'actif important pour les employeurs et un inestimable coussin de sécurité pour une

2004 SCC 54 (CanLII)

ensure the protection of employee benefits are an element of sound financial and social policy. The facilitation and encouragement of pension plan participation advance the interests of employees, employers, and the public. As part of the legislature's statutory structure that aims to accommodate the interests of ongoing and terminated employees, it enacted s. 70(6) to require actual distribution of the pro rata share of actuarial surplus on plan wind-up, be it full or partial.

main-d'œuvre vieillissante. Les régimes législatifs qui établissent des normes minimales et qui assurent la protection des avantages sociaux des employés s'inscrivent dans une politique financière et sociale saine. Faciliter et encourager la mise en place de régimes de retraite favorisent les intérêts des employés, des employeurs et du public. Dans le cadre d'un aménagement législatif visant à concilier les intérêts des employés qui restent et de ceux qui ont perdu leur emploi, le législateur a édicté le par. 70(6), qui prescrit la répartition effective d'une part proportionnelle de l'excédent actuariel lors de la liquidation du régime, qu'elle soit totale ou partielle.

51 The appeal is dismissed with costs.

Le pourvoi est rejeté avec dépens.

APPENDIX

Statutory Provisions

(1) *Pension Benefits Act*, R.S.O. 1990, c. P.8

1. In this Act,

. . .

"partial wind up" means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan;

. . .

"surplus" means the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan, both calculated in the prescribed manner;

. . .

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

. . .

68. (1) The employer or, in the case of a multi-employer pension plan, the administrator may wind up the pension plan in whole or in part.

(2) The administrator shall give written notice of proposal to wind up the pension plan to,

(a) the Superintendent;

ANNEXE

Dispositions législatives

(1) *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8

1 Les définitions qui suivent s'appliquent à la présente loi.

. . .

« excédent » L'excédent de la valeur de l'actif de la caisse de retraite liée à un régime de retraite par rapport à la valeur du passif relatif au régime de retraite, les deux sommes étant calculées de la manière prescrite.

. . .

« liquidation » Cessation d'un régime de retraite et répartition de l'actif de la caisse de retraite.

« liquidation partielle » Cessation d'une partie d'un régime de retraite et répartition de l'actif de la caisse de retraite qui se rapporte à cette partie du régime de retraite.

. . .

68 (1) L'employeur ou, dans le cas d'un régime de retraite interentreprises, l'administrateur peut liquider totalement ou partiellement un régime de retraite.

(2) L'administrateur donne un avis écrit de son intention de liquider le régime de retraite :

a) au surintendant;

2004 SCC 54 (CanLII)

(b) each member of the pension plan;

(c) each former member of the pension plan;

(d) each trade union that represents members of the pension plan;

(e) the advisory committee of the pension plan; and

(f) any other person entitled to a payment from the pension fund.

(3) In the case of a proposal to wind up only part of a pension plan, the administrator is not required to give written notice of the proposal to members, former members or other persons entitled to payment from the pension fund if they will not be affected by the proposed partial wind up.

(4) The notice of proposal to wind up shall contain the information prescribed by the regulations.

(5) The effective date of the wind up shall not be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension benefits, or, in any other case, on the date notice is given to members.

(6) The Superintendent by order may change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change.

69. (1) The Superintendent by order may require the wind up of a pension plan in whole or in part if,

(a) there is a cessation or suspension of employer contributions to the pension fund;

(b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;

(c) the employer is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada);

(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;

(f) all or part of the employer's business or all or part of the assets of the employer's business are

b) à chaque participant au régime de retraite;

c) à chaque ancien participant au régime de retraite;

d) à chaque syndicat qui représente les participants au régime de retraite;

e) au comité consultatif du régime de retraite;

f) à toute autre personne qui a droit à un paiement sur la caisse de retraite.

(3) Dans le cas de l'intention de liquider seulement en partie un régime de retraite, l'administrateur n'est pas tenu de donner un avis écrit de son intention aux participants, aux anciens participants ou aux autres personnes qui ont droit à un paiement sur la caisse de retraite si la liquidation partielle projetée n'a pas d'incidence sur eux.

(4) L'avis d'intention de liquider contient les renseignements prescrits par les règlements.

(5) La date de prise d'effet de la liquidation n'est pas antérieure à la date où les cotisations des participants, s'il y en a, cessent d'être déduites, dans le cas des prestations de pension contributives, ou, dans tous les autres cas, à la date où l'avis est donné aux participants.

(6) Le surintendant peut, par ordre, changer la date de prise d'effet de la liquidation s'il est d'avis qu'il existe des motifs raisonnables de le faire.

69 (1) Le surintendant peut, par ordre, exiger la liquidation partielle ou totale d'un régime de retraite dans les cas suivants :

a) il y a cessation ou suspension des cotisations de l'employeur à la caisse de retraite;

b) l'employeur ne verse pas de cotisations à la caisse de retraite comme l'exigent la présente loi ou les règlements;

c) l'employeur est en faillite au sens de la *Loi sur la faillite et l'insolvabilité* (Canada);

d) un nombre important de participants au régime de retraite ont vu leur emploi prendre fin par suite de la cessation de la totalité ou d'une partie des affaires de l'employeur ou par suite de la réorganisation des affaires de l'employeur;

e) la totalité ou une partie importante des affaires que l'employeur fait dans un lieu en particulier ont cessé;

f) la totalité ou une partie des affaires de l'employeur, ou la totalité ou une partie de l'actif

2004 SCC 54 (CanLII)

sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;

(g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;

(h) in the case of a multi-employer pension plan,

(i) there is a significant reduction in the number of members, or

(ii) there is a cessation of contributions under the pension plan or a significant reduction in such contributions; or

(i) any other prescribed event or prescribed circumstance occurs.

(2) In an order under subsection (1), the Superintendent shall specify the effective date of the wind up, the persons or class or classes of persons to whom the administrator shall give notice of the order and the information that shall be given in the notice.

70. (1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(d) such other information as is prescribed.

(2) No payment shall be made out of the pension fund in respect of which notice of proposal to wind up has been given until the Superintendent has approved the wind up report.

(3) Subsection (2) does not apply to prevent continuation of payment of a pension or any other benefit the payment of which commenced before the giving of the notice of proposal to wind up the pension plan or to prevent any other payment that is prescribed or that is approved by the Superintendent.

relatif aux affaires de l'employeur sont vendus, cédés ou autrement aliénés et la personne qui acquiert ces affaires ou cet actif n'offre pas de régime de retraite aux participants au régime de retraite de l'employeur, qui sont devenus des employés de la personne;

g) le passif du Fonds de garantie augmentera vraisemblablement de façon importante si le régime de retraite n'est pas totalement ou partiellement liquidé;

h) dans le cas d'un régime de retraite interentreprises :

(i) ou bien il y a une réduction importante du nombre des participants,

(ii) ou bien il y a cessation des cotisations versées aux termes du régime de retraite ou une réduction importante de ces cotisations;

i) d'autres circonstances ou événements prescrits se produisent.

(2) Dans un ordre prévu au paragraphe (1), le surintendant précise la date de prise d'effet de la liquidation, les personnes, la ou les catégories de personnes auxquelles l'administrateur doit donner avis de l'ordre et les renseignements qui doivent être inclus dans l'avis.

70 (1) L'administrateur d'un régime de retraite, lorsque ce régime doit être totalement ou partiellement liquidé, dépose un rapport de liquidation qui indique ce qui suit :

a) l'actif et le passif du régime de retraite;

b) les prestations qui seront fournies aux participants, aux anciens participants ou aux autres personnes aux termes du régime de retraite;

c) les méthodes d'attribution et de répartition de l'actif du régime de retraite, et la méthode de détermination des priorités pour le paiement des prestations;

d) les autres renseignements prescrits.

(2) Aucun paiement n'est effectué sur la caisse de retraite qui a fait l'objet d'un avis d'intention de liquider tant que le surintendant n'a pas approuvé le rapport de liquidation.

(3) Le paragraphe (2) n'a pas pour effet d'empêcher la continuation du paiement d'une pension ou de toute autre prestation si ce paiement a commencé avant la remise de l'avis d'intention de liquider le régime de retraite, ou d'empêcher tout autre paiement qui est prescrit ou qui est approuvé par le surintendant.

2004 SCC 54 (CanLII)

(4) An administrator shall not make payment out of the pension fund except in accordance with the wind up report approved by the Superintendent.

(5) The Superintendent may refuse to approve a wind up report that does not meet the requirements of this Act and the regulations or that does not protect the interests of the members and former members of the pension plan.

(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

73. (1) For the purpose of determining the amounts of pension benefits and any other benefits and entitlements on the winding up of a pension plan, in whole or in part,

(a) the employment of each member of the pension plan affected by the winding up shall be deemed to have been terminated on the effective date of the wind up;

(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and

(c) provision shall be made for the rights under section 74.

(2) A person entitled to a pension benefit on the wind up of a pension plan, other than a person who is receiving a pension, is entitled to the rights under subsection 42(1) (transfer) of a member who terminates employment and, for the purpose, subsection 42(3) does not apply.

74. (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(4) Un administrateur ne fait des paiements sur la caisse de retraite qu'en conformité avec le rapport de liquidation approuvé par le surintendant.

(5) Le surintendant peut refuser d'approuver un rapport de liquidation qui ne répond pas aux exigences de la présente loi et des règlements, ou qui ne protège pas les intérêts des participants et des anciens participants au régime de retraite.

(6) À la liquidation partielle d'un régime de retraite, les participants, les anciens participants et les autres personnes qui ont droit à des prestations en vertu du régime de retraite ont des droits et prestations qui ne sont pas inférieurs aux droits et prestations qu'ils auraient à la liquidation totale du régime de retraite à la date de prise d'effet de la liquidation partielle.

73 (1) Afin de déterminer les montants des prestations de retraite et des autres prestations et droits à la liquidation totale ou partielle d'un régime de retraite :

a) l'emploi de chaque participant au régime de retraite touché par la liquidation est réputé avoir pris fin à la date de prise d'effet de la liquidation;

b) les prestations de retraite de chaque participant à la date de prise d'effet de la liquidation sont déterminées comme si le participant avait rempli toutes les conditions d'admissibilité à une pension différée;

c) il est tenu compte des droits prévus à l'article 74.

(2) Une personne qui a droit à une prestation de retraite à la liquidation d'un régime de retraite, autre qu'une personne qui touche une pension, peut se prévaloir des droits prévus au paragraphe 42(1) (transfert) à l'intention du participant qui met fin à son emploi et, à cette fin, le paragraphe 42(3) ne s'applique pas.

74 (1) En Ontario, un participant à un régime de retraite dont le total de l'âge plus le nombre d'années d'emploi continu ou d'affiliation continue est d'au moins cinquante-cinq, à la date de prise d'effet de la liquidation totale ou partielle, a droit à l'une des pensions suivantes :

a) une pension conforme aux conditions du régime de retraite si, aux termes du régime de retraite, le participant est admissible au paiement immédiat d'une prestation de retraite;

b) une pension conforme aux conditions du régime de retraite, commençant à la plus antérieure des dates suivantes :

2004 SCC 54 (CanLII)

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

77. Subject to the application of the Guarantee Fund, where the money in a pension fund is not sufficient to pay all the pension benefits and other benefits on the wind up of the pension plan in whole or in part, the pension benefits and other benefits shall be reduced in the prescribed manner.

78. (1) No money may be paid out of a pension fund to the employer without the prior consent of the Superintendent.

79. (1) Subject to section 89 (hearing and appeal), the Superintendent shall not consent to payment of money that is surplus to the employer out of a continuing pension plan unless,

(a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;

(b) the pension plan provides for the withdrawal of surplus by the employer while the pension plan continues in existence, or the applicant satisfies the Superintendent that the applicant is otherwise entitled to withdraw the surplus;

(c) where all pension benefits under the pension plan are guaranteed by an insurance company, an amount equal to at least two years of the employer's current service costs is retained in the pension fund as surplus;

(d) where the members are not required to make contributions under the pension plan, the greater of,

(i) an amount equal to two years of the employer's current service costs, or

(i) la date normale de retraite prévue par le régime de retraite,

(ii) la date à laquelle le participant aurait droit à une pension non réduite aux termes du régime de retraite si celui-ci n'était pas liquidé et que l'affiliation du participant avait continué jusqu'à cette date;

c) une pension réduite dont le montant correspond à celui à verser aux termes du régime de retraite commençant à la date à laquelle le participant aurait droit à la pension réduite en vertu du régime de retraite si celui-ci n'était pas liquidé et que l'affiliation du participant avait continué jusqu'à cette date.

77 Sous réserve de l'application du Fonds de garantie, si les sommes de la caisse de retraite ne suffisent pas à payer toutes les prestations de retraite et autres prestations à la liquidation totale ou partielle du régime de retraite, les prestations de retraite et autres prestations sont réduites de la manière prescrite.

78 (1) Aucune somme ne peut être prélevée sur une caisse de retraite pour payer un employeur sans le consentement préalable du surintendant.

79 (1) Sous réserve de l'article 89 (audience et appel), le surintendant ne consent à effectuer un paiement à un employeur, par prélèvement sur un régime de retraite qui continue d'exister, d'une somme excédentaire qu'aux conditions suivantes :

a) le surintendant est convaincu, d'après les rapports fournis avec la demande, qu'il y a un excédent dans le régime de retraite;

b) le régime de retraite prévoit le retrait d'un excédent par l'employeur pendant que le régime de retraite continue d'exister, ou l'auteur de la demande convainc le surintendant qu'il a, d'une autre façon, le droit de retirer l'excédent;

c) si toutes les prestations de retraite prévues par le régime de retraite sont garanties par une compagnie d'assurance, un montant au moins égal à deux ans de coûts des services courants de l'employeur est retenu dans la caisse de retraite comme excédent;

d) si les participants ne sont pas tenus de cotiser au régime de retraite, est retenu dans la caisse de retraite comme excédent le plus élevé des montants suivants :

(i) soit un montant égal à deux ans de coûts des services courants de l'employeur,

2004 SCC 54 (CanLII)

(ii) an amount equal to 25 per cent of the liabilities of the pension plan calculated as prescribed,

is retained in the pension fund as surplus;

(e) where members are required to make contributions under the pension plan, all surplus attributable to contributions paid by members and the greater of,

(i) an amount equal to two years of the employer's current service costs, or

(ii) an amount equal to 25 per cent of the liabilities of the pension plan calculated as prescribed,

are retained in the pension fund as surplus; and

(f) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

. . .

(3) Subject to section 89 (hearing and appeal), the Superintendent shall not consent to an application by an employer in respect of surplus in a pension plan that is being wound up in whole or in part unless,

(a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;

(b) the pension plan provides for payment of surplus to the employer on the wind up of the pension plan;

(c) provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of termination of the pension plan; and

(d) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

(4) A pension plan that does not provide for payment of surplus money on the wind up of the pension plan shall be construed to require that surplus money accrued after the 31st day of December, 1986 shall be distributed proportionately on the wind up of the pension plan among members, former members and any other persons entitled

(ii) soit un montant égal à 25 pour cent du passif du régime de retraite calculé selon ce qui est prescrit;

e) si les participants sont tenus de cotiser au régime de retraite, sont retenus dans la caisse de retraite comme excédent tout l'excédent imputable aux cotisations versées par les participants et le plus élevé des montants suivants :

(i) soit un montant égal à deux ans de coûts des services courants de l'employeur,

(ii) soit un montant égal à 25 pour cent du passif du régime de retraite calculé selon ce qui est prescrit;

f) l'auteur de la demande et le régime de retraite se conforment à toutes les autres exigences prescrites en vertu d'autres articles de la présente loi à l'égard du prélèvement de sommes excédentaires sur la caisse de retraite.

. . .

(3) Sous réserve de l'article 89 (audience et appel), le surintendant ne consent à une demande d'un employeur à l'égard de l'excédent d'un régime de retraite qui est, en totalité ou en partie, en cours de liquidation que si les conditions suivantes sont réunies :

a) le surintendant est convaincu, d'après les rapports fournis avec la demande, qu'il y a un excédent dans le régime de retraite;

b) le régime de retraite prévoit le paiement de l'excédent à l'employeur à la liquidation du régime de retraite;

c) le paiement de l'ensemble du passif du régime de retraite tel qu'il a été calculé aux fins de la cessation du régime de retraite a été prévu;

d) l'auteur de la demande et le régime de retraite se conforment à toutes les autres exigences prescrites en vertu d'autres articles de la présente loi à l'égard du prélèvement de sommes excédentaires sur une caisse de retraite.

(4) Un régime de retraite qui ne prévoit pas le paiement de sommes excédentaires à la liquidation du régime de retraite s'interprète comme exigeant que les sommes excédentaires accumulées après le 31 décembre 1986 soient réparties proportionnellement, à la liquidation du régime de retraite, entre les participants, les anciens

2004 SCC 54 (CanLII)

to payments under the pension plan on the date of the wind up.

84. (1) If the Superintendent by order declares that the Guarantee Fund applies to a pension plan, the following are guaranteed by the Guarantee Fund, subject to the limitations and qualifications as are set out in this Act or are prescribed:

1. Any pension in respect of employment in Ontario.

2. Any deferred pension in respect of employment in Ontario to which a former member is entitled, if the former member's employment or membership was terminated before the 1st day of January, 1988 and the former member was at least forty-five years of age and had at least ten years of continuous employment with the employer, or was a member of the pension plan for a continuous period of at least ten years, at the date of termination of employment.

3. A percentage of any defined pension benefits in respect of employment in Ontario to which a member or former member is entitled under section 36 or 37 (deferred pension), or both, if the member's or former member's employment or membership was terminated on or after the 1st day of January, 1988, equal to 20 per cent if the combination of the member's or former member's age plus years of employment or membership in the pension plan equals fifty, plus an additional 2/3 of 1 per cent for each additional one-twelfth credit of age and employment or membership to a maximum of 100 per cent.

4. All additional voluntary contributions, and the interest thereon, made by members or former members while employed in Ontario.

5. The minimum value of all required contributions made to the pension plan by a member or former member in respect of employment in Ontario plus interest.

6. That part of a deferred pension guaranteed under this subsection to which a former spouse or same-sex partner of a member or of a former member is entitled under a domestic contract or an order under the *Family Law Act*.

participants et les autres personnes qui ont droit à des paiements aux termes du régime de retraite à la date de la liquidation.

84 (1) Si le surintendant déclare par ordre que le Fonds de garantie s'applique à un régime de retraite, le Fonds de garantie, sous réserve des restrictions et des conditions requises qui sont énoncées dans la présente loi ou prescrites, garantit ce qui suit :

1. Les pensions à l'égard de l'emploi en Ontario.

2. Une pension différée à l'égard de l'emploi en Ontario à laquelle un ancien participant a droit, si l'emploi ou l'affiliation de l'ancien participant a pris fin avant le 1er janvier 1988 et que l'ancien participant était âgé d'au moins quarante-cinq ans et avait accumulé au moins dix années d'emploi continu chez l'employeur, ou avait été participant au régime de retraite pendant une période continue d'au moins dix ans, à la date de cessation d'emploi.

3. Un pourcentage de prestations de pension déterminées à l'égard de l'emploi en Ontario auxquelles un participant ou un ancien participant a droit en vertu de l'article 36 ou 37 (pension différée), ou des deux, si l'emploi ou l'affiliation du participant ou de l'ancien participant a pris fin le 1er janvier 1988 ou par la suite, soit 20 pour cent si le total de l'âge du participant ou de l'ancien participant plus ses années d'emploi ou d'affiliation au régime de retraite est de cinquante, plus 2/3 de 1 pour cent pour chaque douzième de crédit additionnel pour l'âge et l'emploi ou l'affiliation, jusqu'à concurrence de 100 pour cent.

4. Toutes les cotisations facultatives supplémentaires, et l'intérêt sur ces cotisations, versées par des participants ou des anciens participants pendant qu'ils travaillent en Ontario.

5. La valeur minimale de toutes les cotisations requises versées au régime de retraite par un participant ou un ancien participant à l'égard de l'emploi en Ontario, et l'intérêt sur ces cotisations.

6. La partie d'une pension différée garantie en vertu du présent article à laquelle l'ancien conjoint ou partenaire de même sexe d'un participant ou d'un ancien participant a droit en vertu d'un contrat familial conclu ou d'une ordonnance rendue en vertu de la *Loi sur le droit de la famille*.

2004 SCC 54 (CanLII)

7. Any pension to which a survivor of a former member is entitled under subsection 48(1) (death before commencement of payment).

91. (1) A party to a proceeding before the Tribunal under section 89 may appeal to the Divisional Court from the decision or order of the Tribunal.

(2) *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909

1. . . .

(2) In this Part,

. . .

"going concern valuation" means a valuation of the assets and liabilities of a pension plan using methods and actuarial assumptions that are consistent with accepted actuarial practice for the valuation of a continuing pension plan;

4. (1) Every pension plan shall set out the obligation of the employer or any person required to make contributions on behalf of an employer, to contribute both in respect of the normal cost and any going concern unfunded actuarial liabilities and solvency deficiencies under the plan.

8. (1) No payment may be made from surplus out of a pension plan that is being wound up in whole or in part unless,

(a) the payment is to be made to or for the benefit of members, former members and other persons, other than an employer, who are entitled to payments under the pension plan on the date of wind up; or

(b) the payment is to be made to an employer with the written agreement of,

(i) the employer,

(ii) the collective bargaining agent of the members of the plan or, if there is no collective bargaining agent, at least two-thirds of the members of the plan, and

(iii) such number of former members and other persons who are entitled to payments under the pension plan on the date of the wind up as the Superintendent considers appropriate in the circumstances.

7. Toute pension à laquelle un survivant d'un ancien participant a droit en vertu du paragraphe 48(1) (décès avant le commencement du paiement).

91 (1) Une partie à une instance tenue devant le Tribunal en vertu de l'article 89 peut interjeter appel de la décision du Tribunal devant la Cour divisionnaire.

(2) *Loi sur les régimes de retraite*, Dispositions générales, R.R.O. 1990, règl. 909

1 . . .

(2) Les définitions qui suivent s'appliquent à la présente partie.

. . .

« évaluation à long terme » Évaluation de l'actif et du passif d'un régime selon des hypothèses actuarielles et des méthodes qui sont compatibles avec les normes actuarielles reconnues pour l'évaluation d'un régime qui continue d'exister.

4 (1) Le régime énonce l'obligation qu'a l'employeur ou toute personne qui est tenue de le faire pour le compte de celui-ci de cotiser à la fois à l'égard du coût normal, du passif actuariel à long terme non capitalisé et du déficit de solvabilité du régime.

8 (1) Aucun paiement ne peut être prélevé sur l'excédent d'un régime qui est en voie d'être liquidé en totalité ou en partie, sauf, selon le cas :

a) si le paiement doit être fait aux participants, aux anciens participants et à d'autres personnes, autres qu'un employeur, qui ont droit à des paiements prévus par le régime à la date de la liquidation, ou au profit de ceux-ci;

b) si le paiement doit être fait à un employeur, avec l'accord écrit des personnes suivantes :

(i) l'employeur,

(ii) l'agent de négociation collective des participants au régime ou, s'il n'y en a pas, au moins les deux tiers des participants au régime,

(iii) le nombre d'anciens participants et d'autres personnes, jugé approprié par le surintendant dans les circonstances, qui ont droit à des paiements prévus par le régime à la date de liquidation.

2004 SCC 54 (CanLII)

(2) Despite subsection (1), a payment may be made from surplus out of a pension plan that is being wound up in whole or in part if,

(a) the payment would have been permitted by this section as it read immediately before the 18th day of December, 1991; and

(b) notice of proposal to wind up the pension plan was given to the Superintendent of Pensions before December 18, 1991.

(3) Subsections (1) and (2) do not apply after December 31, 2004.

9. If an amendment to a pension plan with defined benefits converts the defined benefits to defined contribution benefits, the employer may offset the employer's contributions for normal costs against the amount of surplus, if any, in the pension fund after the conversion.

10. (1) The criteria described in this section must be met before the Superintendent may consent to the payment of money that is surplus out of a continuing pension plan to the employer.

(2) All persons who are entitled to receive benefits under the pension plan and all members must consent to the terms upon which the surplus is to be paid out of the plan.

(3) All persons in respect of whom the administrator has purchased a pension, deferred pension or ancillary benefit, other than those persons who requested that the administrator do so, must consent to the terms upon which the surplus is to be paid out of the pension plan.

(4) The pension plan must provide that a former member's contributions to the plan and the interest on the contributions shall not be used to provide more than 50 per cent of the commuted value of a pension or deferred pension in respect of contributory benefits to which the member is entitled under the plan on termination of membership or employment.

(5) The pension plan must provide that a former member who is entitled to a pension or deferred pension on termination of employment or membership is entitled to payment from the pension fund of a lump sum payment equal to the amount by which the former member's contributions under the plan and the interest on the contributions exceed one-half of the commuted value of the former member's pension or deferred pension in respect of the contributory benefits.

. . .

(2) Malgré le paragraphe (1), un paiement peut être prélevé sur l'excédent d'un régime qui est en voie d'être liquidé en totalité ou en partie, si les conditions suivantes sont remplies :

a) le paiement aurait été autorisé par le présent article tel qu'il existait immédiatement avant le 18 décembre 1991;

b) l'avis de proposition de liquidation du régime a été donné au surintendant des régimes de retraite avant le 18 décembre 1991.

(3) Les paragraphes (1) et (2) ne s'appliquent plus après le 31 décembre 2004.

9 Si la modification d'un régime à prestations déterminées convertit les prestations déterminées en prestations à cotisation déterminée, l'employeur peut compenser ses cotisations au titre des coûts normaux par le montant de l'excédent éventuel du régime après la conversion.

10 (1) Il doit être satisfait aux critères énoncés au présent article avant que le surintendant ne puisse donner son consentement au paiement à l'employeur de sommes excédentaires d'un régime qui continue d'exister.

(2) Les personnes qui ont le droit de recevoir des prestations dans le cadre du régime ainsi que les participants doivent donner leur consentement aux conditions auxquelles l'excédent sera prélevé sur le régime.

(3) Les personnes à l'égard desquelles l'administrateur a constitué une pension, une pension différée ou une prestation accessoire, autres que celles qui ont demandé à l'administrateur de le faire, doivent donner leur consentement aux conditions auxquelles l'excédent sera prélevé sur le régime.

(4) Le régime doit prévoir que les cotisations d'un ancien participant et les intérêts sur celles-ci ne doivent pas être utilisés pour fournir plus de 50 pour cent de la valeur de rachat d'une pension ou d'une pension différée relativement aux prestations contributives auxquelles le participant a droit dans le cadre du régime à la cessation de son affiliation ou de son emploi.

(5) Le régime doit prévoir qu'un ancien participant qui a droit à une pension ou à une pension différée à la cessation de son emploi ou de son affiliation a droit au paiement d'une somme globale sur la caisse de retraite dont le montant est égal au montant de l'excédent des cotisations de l'ancien participant au régime et des intérêts sur celles-ci sur la moitié de la valeur de rachat de la pension ou de la pension différée de l'ancien participant relativement aux prestations contributives.

. . .

2004 SCC 54 (CanLII)

(8) If surplus is allocated to a person to increase the person's benefits, the person must be offered the choice of receiving the surplus in the form of inflation adjustments to the existing benefits.

(9) The inflation adjustments that are provided must be made,

(a) by indexing the benefits in accordance with a formula based upon increases in the annual Consumer Price Index;

(b) by providing an annual percentage increase in the amount of the benefits or an annual increase of a specified dollar amount; or

(c) by a combination of the methods described in clauses (a) and (b).

(10) For the purpose of subsection (9), the employer may select the method for providing the inflation adjustments.

(11) The pension plan must state who is entitled, or must provide a mechanism for determining who is entitled, to any surplus in the plan after the payment of surplus to which the Superintendent is being asked to consent.

(12) Subsection (11) applies with respect to applications under section 78 of the Act made after the 31st day of October, 1990.

10.1 (1) This section applies with respect to a payment from surplus out of a pension plan to the employer,

(a) if a court has appointed an individual to represent persons described in subclause 8(1)(b)(iii), persons described in subsection 10(2) (but not members) or persons described in subsection 10(3); and

(b) if the Superintendent is satisfied, on the basis of such information and evidence as he or she may require from the employer or administrator, that,

(i) in the case of a proposed payment to the employer from surplus out of a pension plan that is being wound up in whole or in part, the employer has obtained the written agreement referred to in clause 8(1)(b) of 90 per cent of the former members who are in receipt of a pension payable from the pension fund on the date of the wind up, or

(ii) in the case of a proposed payment of money that is surplus out of a continuing pension

(8) Si un excédent est attribué à une personne afin d'augmenter ses prestations, celle-ci doit se voir offrir le choix de recevoir l'excédent sous forme de rajustement lié à l'inflation, des prestations existantes.

(9) Les rajustements liés à l'inflation qui sont offerts doivent être faits de l'une des façons suivantes :

a) en indexant les prestations conformément à une formule fondée sur les augmentations de l'indice annuel des prix à la consommation;

b) en fournissant une augmentation annuelle du montant des prestations selon un pourcentage ou une somme fixe en dollars;

c) en combinant les méthodes prévues aux alinéas a) et b).

(10) Pour l'application du paragraphe (9), l'employeur peut choisir la méthode applicable aux rajustements liés à l'inflation.

(11) Le régime doit soit préciser qui a droit à un excédent du régime existant après le paiement d'un excédent à l'égard duquel il est demandé au surintendant de donner son consentement, soit prévoir un mécanisme permettant de déterminer qui y a droit.

(12) Le paragraphe (11) s'applique aux demandes faites en vertu de l'article 78 de la Loi après le 31 octobre 1990.

10.1 (1) Le présent article s'applique à l'égard d'un paiement à l'employeur de sommes excédentaires d'un régime si les conditions suivantes sont réunies :

a) un tribunal a nommé un particulier pour représenter des personnes visées au sous-alinéa 8(1)b)(iii), des personnes visées au paragraphe 10(2) (mais non les participants) ou des personnes visées au paragraphe 10(3);

b) le surintendant est convaincu, sur la foi des renseignements et de la preuve qu'il peut exiger de l'employeur ou de l'administrateur, de ce qui suit :

(i) dans le cas d'un paiement projeté à l'employeur de sommes excédentaires d'un régime qui est en voie d'être liquidé en totalité ou en partie, l'employeur a obtenu l'accord écrit visé à l'alinéa 8(1)b) de 90 pour cent des anciens participants qui touchent une pension payable par prélèvement sur la caisse de retraite à la date de liquidation,

(ii) dans le cas d'un paiement projeté à l'employeur de sommes excédentaires d'un

2004 SCC 54 (CanLII)

plan to the employer, the employer has obtained the consent of 90 per cent of the former members who are in receipt of a pension payable from the pension fund, whose consent is required by subsection 10(2).

(2) The court-appointed representative is authorized to give the written agreement referred to in clause 8(1)(b) on behalf of the former members in receipt of a pension payable from the pension fund, who he or she represents. However, the representative is not authorized to give written agreement on behalf of former members who have agreed or have objected to the payment from surplus.

(3) The court-appointed representative is authorized to give the consent required by subsection 10(2) on behalf of the former members in receipt of a pension payable from the pension fund, who he or she represents. However, the representative is not authorized to consent on behalf of former members who have consented or have objected to the terms upon which the surplus is to be paid out of the plan.

13. (1) Within sixty days after the date of establishment of a plan, the administrator shall submit a report on the basis of a going concern valuation that sets out,

(a) the normal cost, in the first year during which the plan is registered and the rule for computing the normal cost in subsequent years up to the date of the next report;

(b) an estimate of the normal cost, in the subsequent years up to the date of the next report;

(c) where applicable, the estimated aggregate employee contributions to the pension plan during each year up to the date of the succeeding report;

(d) the past service unfunded actuarial liability, if any, under the pension plan as at the date on which the plan qualified for registration;

(e) the special payments required to liquidate the past service unfunded actuarial liability in accordance with section 5;

(f) any other going concern unfunded liability;

(g) the special payments required to liquidate any going concern unfunded liability referred to in clause (f);

régime qui continue d'exister, l'employeur a obtenu le consentement de 90 pour cent des anciens participants qui touchent une pension payable par prélèvement sur la caisse de retraite et dont le consentement est exigé par le paragraphe 10(2).

(2) Le représentant nommé par le tribunal est autorisé à donner l'accord écrit visé à l'alinéa 8(1)b) au nom des anciens participants qui touchent une pension payable par prélèvement sur la caisse de retraite et qu'il représente. Toutefois, il n'est pas autorisé à donner cet accord au nom des anciens participants qui ont donné leur accord ou qui se sont opposés au paiement des sommes excédentaires.

(3) Le représentant nommé par le tribunal est autorisé à donner le consentement exigé par le paragraphe 10(2) au nom des personnes qui touchent une pension payable par prélèvement sur la caisse de retraite et qu'il représente. Toutefois, il n'est pas autorisé à donner ce consentement au nom des anciens participants qui ont donné leur consentement ou qui se sont opposés aux conditions auxquelles l'excédent sera prélevé sur le régime.

13 (1) Dans les soixante jours qui suivent la date d'établissement d'un régime, l'administrateur présente un rapport, préparé d'après une évaluation à long terme, qui précise les éléments suivants :

a) le coût normal pour le premier exercice pendant lequel le régime est enregistré et la règle de calcul du coût normal pour les exercices suivants jusqu'à la date du prochain rapport;

b) l'estimation du coût normal pour les exercices suivants jusqu'à la date du prochain rapport;

c) le cas échéant, le montant estimatif total des cotisations des employés qui seront versées au régime pendant chaque exercice jusqu'à la date du rapport suivant;

d) le cas échéant, le passif actuariel pour services antérieurs non capitalisé du régime à la date à laquelle le régime est devenu admissible à l'enregistrement;

e) les paiements spéciaux nécessaires pour acquitter le passif actuariel pour services antérieurs non capitalisé conformément à l'article 5;

f) tout autre passif à long terme non capitalisé;

g) les paiements spéciaux nécessaires pour acquitter le passif à long terme non capitalisé visé à l'alinéa f);

2004 SCC 54 (CanLII)

(j) where the plan provides for an escalated adjustment, whether and to what extent,

(i) liability for the future cost of the adjustment has been included in the determination of any going concern unfunded actuarial liability, or

(ii) the cost for the escalated adjustment is included in the normal cost.

(1.1) The report shall also set out, on the basis of a solvency valuation,

(a) whether there is a solvency deficiency;

(b) if there is a solvency deficiency, the amount of the solvency deficiency and the special payments required to liquidate it in accordance with section 5;

(c) whether the transfer ratio is less than one; and

(d) if the transfer ratio is less than one, the transfer ratio.

16. (1) An actuary preparing a report under section 70 of the Act or under section 3, 5.3, 13 or 14 shall use methods and actuarial assumptions that are consistent with accepted actuarial practice and with the requirements of the Act and this Regulation.

(2) An actuary preparing a report under section 4 shall use his or her best effort to meet the standards set out in subsection (1).

(3) The person preparing a report referred to in subsection (1) or (2) shall certify that it meets the requirements of subsection (1) or (2), as the case may be.

(4) The person preparing a report referred to in subsection (2) shall disclose in the report any respect in which the report does not meet the standards set out in subsection (1).

25. (1) The following information is prescribed for the purposes of a notice respecting an application under subsection 78(2) of the Act:

1. The name of the pension plan and its provincial registration number.
2. The valuation date of the report provided with the application and the amount of surplus in the pension plan.
3. The surplus attributable to employee and employer contributions.
4. The amount of surplus withdrawal requested.

j) lorsque le régime prévoit un rajustement indexé, la question de savoir si et dans quelle mesure :

(i) le passif rattaché au coût futur du rajustement a été inclus dans la détermination d’un passif actuariel à long terme non capitalisé,

(ii) le coût du rajustement a été inclus dans le coût normal.

(1.1) Le rapport précise également, d’après une évaluation de solvabilité, les éléments suivants :

a) la question de savoir s’il existe un déficit de solvabilité;

b) s’il existe un déficit de solvabilité, son montant et celui des paiements spéciaux nécessaires pour l’acquitter conformément à l’article 5;

c) la question de savoir si le ratio de transfert est inférieur à un;

d) le ratio de transfert, s’il est inférieur à un.

16 (1) L’actuaire qui prépare un rapport prévu à l’article 70 de la Loi ou à l’article 3, 5.3, 13 ou 14 utilise des hypothèses actuarielles et des méthodes compatibles avec les normes actuarielles reconnues ainsi qu’avec les exigences de la Loi et du présent règlement.

(2) L’actuaire qui prépare un rapport prévu à l’article 4 s’efforce, au mieux de ses capacités, de satisfaire aux normes énoncées au paragraphe (1).

(3) La personne qui prépare un rapport visé au paragraphe (1) ou (2) certifie qu’il satisfait aux exigences prévues au paragraphe (1) ou (2), selon le cas.

(4) La personne qui prépare un rapport visé au paragraphe (2) y révèle tout élément qui ne satisfait pas aux normes énoncées au paragraphe (1).

25 (1) Les renseignements qui suivent sont des renseignements prescrits aux fins de l’avis de demande prévu au paragraphe 78(2) de la Loi :

1. Le nom du régime et son numéro d’enregistrement provincial.
2. La date d’évaluation du rapport fourni avec la demande et le montant de l’excédent du régime.
3. L’excédent imputable aux cotisations des employés et de l’employeur.
4. La valeur du retrait d’excédent demandé.

2004 SCC 54 (CanLII)

5. A statement that submissions in respect of the application may be made in writing to the Superintendent within thirty days after receipt of the notice.

6. The contractual authority for surplus withdrawals.

7. Notice that copies of the report and certificates filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(2) The employer shall file a copy of the notice required by subsection 78(2) of the Act before transmitting it to the persons required by that subsection.

. . .

(4) An application by an employer for the consent of the Superintendent to a payment from a continuing pension plan under subsection 78(1) of the Act shall be accompanied by a certified copy of the notice referred to in subsection (1), a statement that subsection 78(2) of the Act has been complied with, details as to the classes of persons who received notice and the date the last notice was distributed.

(5) An application referred to in subsection (1) shall be accompanied by a current report prepared on the basis of a going concern valuation demonstrating that a surplus as determined in accordance with section 26 exists and that there are no special payments required to be made to the pension fund.

26. (1) For purposes of determining surplus in a continuing pension plan,

(a) the value of the assets of the pension plan shall be calculated on the basis of the market value of the investments held by the pension fund plus any cash balances and accrued or receivable items; and

(b) the value of the liabilities of the pension plan shall be the greater of the calculation of,

(i) the going concern liabilities, or

(ii) the solvency liabilities.

(2) For purposes of subclauses 79(1)(d)(ii) and 79(1)(e)(ii) of the Act, the liabilities of the pension plan shall be calculated as the solvency liabilities.

5. Une déclaration selon laquelle des observations écrites peuvent, dans les trente jours qui suivent la date de réception de l'avis, être présentées au surintendant à l'égard de la demande.

6. Les modalités contractuelles qui permettent les retraits d'excédent.

7. Un avis indiquant que des copies du rapport et des certificats déposés auprès du surintendant à l'appui de la demande relative à l'excédent peuvent être consultées aux bureaux de l'employeur, et des renseignements sur la façon d'obtenir des copies du rapport.

(2) L'employeur dépose une copie de l'avis exigé par le paragraphe 78(2) de la Loi avant de le transmettre aux personnes visées à ce paragraphe.

. . .

(4) La demande que présente un employeur en vue d'obtenir, conformément au paragraphe 78(1) de la Loi, le consentement du surintendant pour le prélèvement d'une somme sur un régime qui continue d'exister est accompagnée d'une copie certifiée conforme de l'avis visé au paragraphe (1), d'une déclaration selon laquelle le paragraphe 78(2) de la Loi a été respecté, de détails sur les catégories de personnes qui ont reçu l'avis et de la date à laquelle le dernier avis a été distribué.

(5) La demande visée au paragraphe (1) est accompagnée d'un rapport courant, préparé d'après une évaluation à long terme, qui montre qu'il existe un excédent déterminé conformément à l'article 26 et qu'aucun paiement spécial ne doit être fait à la caisse de retraite.

26 (1) Pour déterminer l'excédent d'un régime qui continue d'exister :

a) la valeur de l'actif du régime est calculée sur la base de la valeur marchande des placements détenus par la caisse de retraite, plus le solde de trésorerie et les revenus accumulés ou à recevoir;

b) la valeur du passif du régime est égale au plus élevé des passifs suivants :

(i) le passif à long terme,

(ii) le passif de solvabilité.

(2) Pour l'application des sous-alinéas 79(1)d)(ii) et e)(ii) de la Loi, le passif du régime est calculé comme s'il s'agissait du passif de solvabilité.

2004 SCC 54 (CanLII)

28. . . .

(5) A notice required under subsection 78(2) of the Act for a plan that is being wound up shall contain,

(a) the name of the pension plan and its provincial registration number;

(b) the valuation date of the report provided with the application and amount of surplus in the pension plan;

(c) the surplus attributable to employee and employer contributions;

(d) the amount of surplus withdrawal requested;

(e) a statement that submissions may be made in writing to the Superintendent within thirty days of receipt of the notice;

(f) the contractual authority for surplus reversion; and

(g) notice that copies of the wind up report filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(6) An application by an employer for the consent of the Superintendent to a payment from a pension plan that is being wound up shall be accompanied by a certified copy of the notice referred to in subsection (5), a statement that subsection 78(2) of the Act has been complied with, the date the last notice was distributed and details as to the classes of persons who received notice.

28.1 (1) This section applies if there is a surplus on the wind up of a pension plan in whole or in part.

(2) The administrator of the pension plan shall give to each person entitled to a pension, deferred pension or other benefit or to a refund in respect of the pension plan a statement setting out the following information:

1. The name of the pension plan and its provincial registration number.
2. The member's name and date of birth.
3. The method of distributing the surplus assets.
4. The formula for allocating the surplus among the plan beneficiaries.

28 . . .

(5) L'avis exigé par le paragraphe 78(2) de la Loi à l'égard d'un régime qui est en cours de liquidation comprend les éléments suivants :

a) le nom du régime et son numéro d'enregistrement provincial;

b) la date d'évaluation du rapport fourni avec la demande et le montant de l'excédent du régime;

c) l'excédent imputable aux cotisations des employés et de l'employeur;

d) la valeur du retrait d'excédent demandé;

e) une déclaration selon laquelle des observations écrites peuvent, dans les trente jours qui suivent la date de réception de l'avis, être présentées au surintendant;

f) les modalités contractuelles qui permettent le versement de l'excédent;

g) un avis indiquant que des copies du rapport de liquidation déposé auprès du surintendant à l'appui de la demande relative à l'excédent peuvent être consultées aux bureaux de l'employeur, et des renseignements sur la façon d'en obtenir des copies.

(6) La demande que présente un employeur en vue d'obtenir le consentement du surintendant pour le prélèvement d'une somme sur un régime en cours de liquidation est accompagnée d'une copie certifiée conforme de l'avis visé au paragraphe (5), d'une déclaration selon laquelle le paragraphe 78(2) de la Loi a été respecté, de la date à laquelle le dernier avis a été distribué et de détails sur les catégories de personnes qui ont reçu l'avis.

28.1 (1) Le présent article s'applique s'il y a un excédent lors de la liquidation totale ou partielle d'un régime.

(2) L'administrateur du régime donne à chaque personne qui a droit à une pension, à une pension différée ou à une autre prestation, ou encore à un remboursement, à l'égard du régime, une déclaration indiquant les renseignements suivants :

1. Le nom du régime et son numéro d'enregistrement provincial.
2. Le nom du participant et sa date de naissance.
3. Le mode de distribution de l'excédent d'actif.
4. La formule de répartition de l'excédent entre les bénéficiaires du régime.

2004 SCC 54 (CanLII)

5. An estimate of the amount allocated to the person.
6. The options available to the person concerning the method for distributing the amount allocated to the person and the period within which any election respecting the options must be made.
7. The method of distribution that will be used, if an election is not made within the specified period.
8. The name and details of the person to be contacted with respect to any questions arising out of the statement.
9. Notice that the allocation of surplus and the options available for distributing it are subject to the approval of the Superintendent and of the Canada Customs and Revenue Agency, and may be adjusted accordingly.

5. La somme estimative attribuée à la personne.
6. Les options qui s'offrent à la personne quant au mode de distribution de la somme qui lui est attribuée et le délai imparti pour faire un choix à leur égard.
7. Le mode de distribution qui sera utilisé en cas d'omission de faire un choix dans le délai imparti.
8. Le nom et les coordonnées de la personne avec laquelle le destinataire peut communiquer s'il a des questions au sujet de la déclaration.
9. Un avis indiquant que la répartition de l'excédent et les options offertes quant à sa distribution sont assujetties à l'approbation du surintendant et de l'Agence des douanes et du revenu du Canada et qu'elles peuvent être rajustées en conséquence.

(3) *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28

1. In this Act,

. . .

"regulated sector" means a sector that consists of,

(a) all co-operative corporations to which the *Co-operative Corporations Act* applies;

(b) all credit unions, caisses populaires and leagues to which the *Credit Unions and Caisses Populaires Act, 1994* applies;

(c) all persons engaged in the business of insurance and governed by the *Insurance Act*;

(d) all corporations registered or incorporated under the *Loan and Trust Corporations Act*;

(e) all mortgage brokers registered under the *Mortgage Brokers Act*; or

(f) all persons who establish or administer a pension plan within the meaning of the *Pension Benefits Act* and all employers or other persons on their behalf who are required to contribute to any such pension plan;

6. (1) There is hereby established a tribunal to be known in English as the Financial Services Tribunal and in French as Tribunal des services financiers.

. . .

(3) *Loi de 1997 sur la Commission des services financiers de l'Ontario*, L.O. 1997, ch. 28

1. Les définitions qui suivent s'appliquent à la présente loi.

. . .

« secteur réglementé » Secteur comprenant, selon le cas :

a) les sociétés coopératives visées par la *Loi sur les sociétés coopératives*;

b) les caisses et les fédérations visées par la *Loi de 1994 sur les caisses populaires et les credit unions*;

c) les personnes qui effectuent des opérations d'assurance et qui sont régies par la *Loi sur les assurances*;

d) les sociétés constituées ou enregistrées en vertu de la *Loi sur les sociétés de prêt et de fiducie*;

e) les courtiers en hypothèques inscrits aux termes de la *Loi sur les courtiers en hypothèques*;

f) les personnes qui mettent sur pied ou administrent un régime de retraite au sens de la *Loi sur les régimes de retraite* et les employeurs ou d'autres personnes en leur nom qui sont tenus de contribuer à ce régime de retraite.

6. (1) Est créé un tribunal appelé Tribunal des services financiers en français et Financial Services Tribunal en anglais.

. . .

2004 SCC 54 (CanLII)

(3) In addition to the chair and the two vice-chairs, the Lieutenant Governor in Council shall appoint at least six persons, and not more than 12, as members of the Tribunal for the length of time not exceeding three years that the Lieutenant Governor in Council specifies and may reappoint any member to the Tribunal.

(4) In appointing members to the Tribunal, the Lieutenant Governor in Council shall, to the extent practicable, appoint members who have experience and expertise in the regulated sectors.

7. (1) A matter referred to the Tribunal may be heard and determined by a panel consisting of one or more members of the Tribunal, as assigned by the chair of the Tribunal.

(2) In assigning members of the Tribunal to a panel, the chair shall take into consideration the requirements, if any, for experience and expertise to enable the panel to decide the issues raised in any matter before the Tribunal.

20. The Tribunal has exclusive jurisdiction to,

(a) exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it; and

(b) determine all questions of fact or law that arise in any proceeding before it under any Act mentioned in clause (a).

21. . . .

(4) An order of the Tribunal is final and conclusive for all purposes unless the Act under which the Tribunal made it provides for an appeal.

22. For a proceeding before the Tribunal, the Tribunal may,

(a) make rules for the practice and procedure to be observed;

(b) determine what constitutes adequate public notice;

(c) before or during the proceeding, conduct any inquiry or inspection that the Tribunal considers necessary; or

(d) in determining any matter, consider any relevant information obtained by the Tribunal in addition to evidence given at the proceeding, if the Tribunal first informs the parties to the proceeding of the additional information and gives them an opportunity to explain or refute it.

(3) Outre le président et les deux vice-présidents, le lieutenant-gouverneur en conseil nomme au moins six et au plus 12 personnes, à titre de membres du Tribunal pour un mandat reconductible d'une durée qu'il précise et qui ne peut dépasser trois ans.

(4) Dans toute la mesure du possible, le lieutenant-gouverneur en conseil nomme à titre de membres du Tribunal des personnes qui ont de l'expérience et des compétences dans les secteurs réglementés.

7. (1) Un comité de un ou plusieurs membres du Tribunal, nommés par le président du Tribunal, peut connaître des affaires dont est saisi le Tribunal.

(2) Lorsqu'il affecte des membres du Tribunal à un comité, le président tient compte de l'expérience et des compétences qui sont nécessaires, le cas échéant, au comité pour trancher les questions soulevées dans toute affaire portée devant le Tribunal.

20. Le Tribunal a compétence exclusive pour :

a) exercer les pouvoirs qui lui sont conférés par la présente loi et toute autre loi qui lui confère des pouvoirs ou lui assigne des fonctions;

b) trancher les questions de fait ou de droit soulevées dans les instances introduites devant lui aux termes d'une loi visée à l'alinéa a).

21. . . .

(4) L'ordonnance du Tribunal est définitive à tous égards à moins que la Loi en vertu de laquelle le Tribunal l'a rendue ne prévoie un appel.

22. Le Tribunal peut, à l'égard des instances introduites devant lui :

a) adopter les règles de pratique et de procédure à observer;

b) décider ce qui constitue un avis suffisant au public;

c) avant ou durant l'instance, mener les enquêtes ou les inspections qu'il juge nécessaires;

d) pour prendre sa décision, examiner les renseignements pertinents qu'il a obtenus, en plus des témoignages reçus pendant l'instance, s'il communique d'abord aux parties à l'instance ces autres renseignements et leur donne l'occasion de s'expliquer ou de les contester.

2004 SCC 54 (CanLII)

Appeal dismissed with costs.

Solicitors for the appellant Monsanto Canada Inc.: Borden Ladner Gervais, Toronto.

Solicitors for the appellant the Association of Canadian Pension Management: Blake, Cassels & Graydon, Toronto.

Solicitor for the respondent: Ministry of the Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the National Trust Company: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener Nicole Lacroix: Barnes, Sammon, Ottawa.

Solicitors for the interveners the Canadian Labour Congress and the Ontario Federation of Labour: Sack Goldblatt Mitchell, Toronto.

Solicitors for the interveners R. M. Smallhorn, D. G. Halsall, S. J. Galbraith and S. W. (Bud) Wesley: Koskie Minsky, Toronto.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante Monsanto Canada Inc. : Borden Ladner Gervais, Toronto.

Procureurs de l'appelante l'Association canadienne des administrateurs de régimes de retraite : Blake, Cassels & Graydon, Toronto.

Procureur de l'intimé : Ministère du Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureurs de l'intervenante la Compagnie Trust National : Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intervenante Nicole Lacroix : Barnes, Sammon, Ottawa.

Procureurs des intervenants le Congrès du travail du Canada et la Fédération du travail de l'Ontario : Sack Goldblatt Mitchell, Toronto.

Procureurs des intervenants R. M. Smallhorn, D. G. Halsall, S. J. Galbraith et S. W. (Bud) Wesley : Koskie Minsky, Toronto.

2004 SCC 54 (CanLII)

City of Montréal *Appellant*

v.

2952-1366 Québec Inc. *Respondent*

and

Attorney General of Ontario *Intervener*

Indexed as: Montréal (City) *v.* 2952-1366 Québec Inc.

Neutral citation: 2005 SCC 62.

File No.: 29413.

2004: October 14; 2005: November 3.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Municipal law — By-laws — Validity — Nuisances — Loudspeaker set up by business in entrance to its club so that passers-by would hear sound of show under way inside — Business convicted under municipal by-law prohibiting noise produced by sound equipment that can be heard from outside — Scope of by-law — Whether by-law exceeding jurisdiction conferred on municipality by its enabling legislation — Charter of the city of Montreal, 1960, S.Q. 1959-60, c. 102, arts. 516, 517(l), 520(72) — By-law concerning noise, R.B.C.M. 1994, c. B-3, art. 9(1).

Constitutional law — Charter of Rights — Freedom of expression — Municipal by-law prohibiting noise produced by sound equipment that can be heard from outside — Whether by-law infringing freedom of expression — If so, whether infringement can be justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — By-law concerning noise, R.B.C.M. 1994, c. B-3, art. 9(1).

Constitutional law — Charter of Rights — Freedom of expression — Public property — Approach for application of s. 2(b) of Canadian Charter of Rights and Freedoms to public property.

Ville de Montréal *Appelante*

c.

2952-1366 Québec Inc. *Intimée*

et

Procureur général de l'Ontario *Intervenant*

Répertorié : Montréal (Ville) *c.* 2952-1366 Québec Inc.

Référence neutre : 2005 CSC 62.

N° du greffe : 29413.

2004 : 14 octobre; 2005 : 3 novembre.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit municipal — Règlements — Validité — Nuisances — Haut-parleur installé par un commerçant dans l'entrée de son bar de façon à ce que le son du spectacle présenté à l'intérieur soit entendu par les passants — Commerçant condamné en vertu du règlement municipal prohibant le bruit produit au moyen d'appareils sonores lorsqu'il s'entend à l'extérieur — Portée du règlement — Le règlement outrepasse-t-il la compétence conférée à la municipalité par sa loi habilitante? — Charte de la Ville de Montréal, 1960, S.Q. 1959-1960, ch. 102, art. 516, 517l), 520 (72) — Règlement sur le bruit, R.R.V.M. 1994, ch. B-3, art. 9(1).

Droit constitutionnel — Charte des droits — Liberté d'expression — Règlement municipal prohibant le bruit produit au moyen d'appareils sonores lorsqu'il s'entend à l'extérieur — Le règlement porte-t-il atteinte à la liberté d'expression? — Dans l'affirmative, cette atteinte est-elle justifiable? — Charte canadienne des droits et libertés, art. 1, 2b) — Règlement sur le bruit, R.R.V.M. 1994, ch. B-3, art. 9(1).

Droit constitutionnel — Charte des droits — Liberté d'expression — Propriété publique — Application de l'art. 2b) de la Charte canadienne des droits et libertés à une propriété publique.

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

A business operating a club featuring female dancers in downtown Montréal set up, in the entrance to its establishment, a loudspeaker that amplified the music and commentary accompanying the show under way inside so that passers-by would hear them. The business was found guilty in the Municipal Court of an offence under s. 9(1) of the City of Montréal's *By-law concerning noise*, which provides that "the following noises, where they can be heard from the outside, are specifically prohibited: (1) noise produced by sound equipment, whether it is inside a building or installed or used outside". The Superior Court quashed the conviction on the basis that the By-law infringed the respondent's freedom of expression and that this infringement could not be justified. The Court of Appeal upheld that decision. It held that the City could not define an activity as a nuisance if it was not a nuisance and that the prohibition constituted an unjustified violation of the right to freedom of expression.

Held (Binnie J. dissenting): The appeal should be allowed. The municipal by-law is valid.

Per McLachlin C.J. and Bastarache, LeBel, Deschamps, Abella and Charron JJ.: Article 9(1) of the By-law is not overbroad, and it applies only to sounds that stand out over the environmental noise. Although this provision, drafted using general language, is ambiguous, a contextual interpretation resolves the ambiguity and enables the scope of art. 9(1) to be determined. The history of the By-law shows that the lawmakers' purpose was to control noises that interfere with peaceful enjoyment of the urban environment. It is clear from the legislative purpose that the scope of art. 9(1) does not include sounds resulting solely from human activity that is peaceable and respectful of the municipal community. The immediate context of art. 9 supports this interpretation. It indicates that the concept of noise that adversely affects the enjoyment of the environment is implicit in art. 9 and that the activities prohibited under it are activities that produce noises that can be detected as separate from the environmental noise. [11] [16] [26] [34]

The City has the power to adopt art. 9(1) of the By-law by virtue of its power to define and regulate nuisances pursuant to arts. 517(*l*) and 520(72) of the *Charter of the city of Montreal, 1960*. Only an exercise of this regulatory power in bad faith or for improper or unreasonable purposes will justify judicial review. To control noise, the City did not establish an absolute prohibition, but chose to target certain types of sounds that are more likely to stand out over other environmental noise. This choice is of course consistent with its delegated power and in no way constitutes an

Un commerçant, qui exploite un bar avec spectacles de danseuses au centre-ville de Montréal, a installé dans l'entrée de son établissement un haut-parleur amplifiant la trame sonore du spectacle présenté à l'intérieur, pour que les passants l'entendent. Il est reconnu coupable en Cour municipale d'une infraction au par. 9(1) du *Règlement sur le bruit* de la ville de Montréal, selon lequel « est spécifiquement prohibé lorsqu'il s'entend à l'extérieur : (1) le bruit produit au moyen d'appareils sonores, qu'ils soient situés à l'intérieur d'un bâtiment ou qu'ils soient installés ou utilisés à l'extérieur ». La Cour supérieure annule la déclaration de culpabilité au motif que le Règlement brime la liberté d'expression du commerçant et que cette atteinte ne peut être justifiée. La Cour d'appel confirme cette décision. Elle statue que la Ville ne peut définir comme nuisance une activité qui n'en est pas une et que la prohibition constitue une violation injustifiée du droit à la liberté d'expression.

Arrêt (le juge Binnie est dissident) : Le pourvoi est accueilli. Le règlement municipal est valide.

La juge en chef McLachlin et les juges Bastarache, LeBel, Deschamps, Abella et Charron : Le paragraphe 9(1) du Règlement n'a pas une portée trop large et ne couvre que les sons qui ressortent du bruit d'ambiance. Bien que cette disposition rédigée en termes généraux révèle des ambiguïtés, une interprétation contextuelle les résout et permet de cerner la portée du par. 9(1). L'historique du Règlement révèle que le but recherché par le législateur est le contrôle des bruits qui constituent une interférence avec la jouissance paisible de l'environnement urbain. Le recours à l'objectif législatif dicte d'exclure de la portée du par. 9(1) les sons qui ne constituent que le résultat de l'activité humaine paisible et respectueuse de la communauté municipale. Le contexte immédiat de l'art. 9 appuie cette interprétation. Il fait ressortir que la notion de bruit qui nuit à la jouissance de l'environnement est implicite à l'art. 9 et que les activités qui y sont prohibées sont celles qui produisent un bruit repérable distinctement du bruit d'ambiance. [11] [16] [26] [34]

La Ville a compétence pour adopter le par. 9(1) du Règlement en vertu de son pouvoir de définir et de réglementer les nuisances prévu aux par. 517*l*) et 520(72) de la *Charte de la Ville de Montréal, 1960*. Seul un exercice de mauvaise foi, ou à des fins illégitimes ou déraisonnables, de ce pouvoir de réglementation justifiera la révision judiciaire. Pour contrôler le bruit, la Ville n'a pas créé de prohibition absolue, mais a choisi de cibler certains types de sons qui sont plus susceptibles de ressortir de l'ensemble des autres bruits ambiants. Ce choix s'inscrit naturellement dans son pouvoir délégué

unreasonable or improper exercise of that power. [41] [45] [48] [54]

Article 9(1) infringes s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The noise emitted by a loudspeaker onto the public street had expressive content, and the method and location of the expression did not exclude it from the scope of s. 2(*b*). The form of the expression is non-violent and the evidence did not establish that the method or location of the expression impedes the function of city streets or fails to promote the values that underlie the free expression guarantee. The ban on emitting amplified noise onto public streets constitutes a limit on free expression because it has the effect of restricting expression which promotes the value of self-fulfilment and human flourishing. [58] [60-68] [84-85]

While the conclusion that the expression on public property at issue in this case falls within the protected sphere of s. 2(*b*) is consistent with the divergent approaches set out in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, the test for the application of s. 2(*b*) to public property should be clarified and the following approach adopted. The basic question is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes s. 2(*b*) is intended to serve — namely democratic discourse, truth finding and self-fulfilment. To answer this question, one should consider the historical or actual function of the place and whether other aspects of the place suggest that expression within it would undermine the values underlying free expression. Applying this approach confirms the conclusion that the expression at issue falls within the scope of s. 2(*b*). [70] [74] [81]

Article 9(1) is justified under s. 1 of the *Canadian Charter*. The objective of combatting pollution of the environment by noise is pressing and substantial, and the impugned measure also meets the proportionality test. First, the limit on noise produced by sound equipment is rationally connected to the City's objective. Second, the measure impairs freedom of expression in a reasonably minimal way. Elected officials must be accorded a measure of latitude, particularly on environmental issues, where views and interest conflict and precision is elusive. Here, the City contended there was no other practical way to deal with the complex problem the City was facing. To regulate the volume of noise

et ne constitue nullement un exercice déraisonnable ou irrégulier de ce pouvoir. [41] [45] [48] [54]

Le paragraphe 9(1) contrevient à l'al. 2*b*) de la *Charte canadienne des droits et libertés*. Le bruit émis dans la rue au moyen d'un haut-parleur avait un contenu expressif; le lieu et le mode d'expression n'excluaient pas cette activité expressive du champ de protection de l'al. 2*b*). La forme d'expression n'était pas violente et la preuve n'a pas établi que le mode d'expression et le lieu en cause faisaient obstacle à la fonction des rues de la municipalité ou ne favorisaient pas les valeurs sous-jacentes à la liberté d'expression. L'interdiction d'émettre un bruit amplifié sur les voies publiques restreint la liberté d'expression parce qu'elle a pour effet de limiter une expression qui favorise des valeurs comme l'enrichissement et l'épanouissement personnels. [58] [60-68] [84-85]

Bien que la conclusion portant que l'expression sur une propriété publique en cause en l'espèce entre dans le champ de protection de l'al. 2*b*) concorde avec les différentes façons d'aborder cette question décrites dans *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139, le critère servant à déterminer si l'al. 2*b*) s'applique à l'expression sur une propriété publique doit être précisé et la méthode suivante adoptée. La question fondamentale consiste à déterminer s'il s'agit d'un endroit public où l'on s'attendrait à ce que la liberté d'expression bénéficie d'une protection constitutionnelle parce que l'expression, dans ce lieu, ne va pas à l'encontre des objectifs que l'al. 2*b*) est censé favoriser — soit le débat démocratique, la recherche de la vérité et l'épanouissement personnel. Pour trancher cette question, il faut examiner la fonction historique ou réelle de l'endroit et les autres caractéristiques du lieu qui laissent croire que le fait de s'y exprimer minerait les valeurs sous-jacentes à la liberté d'expression. L'application de cette méthode confirme la conclusion que l'expression en cause entre dans le champ de protection de l'al. 2*b*). [70] [74] [81]

Le paragraphe 9(1) est justifié au sens de l'article premier de la *Charte canadienne*. L'objectif de la répression de la pollution par le bruit est urgent et réel et la mesure contestée satisfait au critère de la proportionnalité. Premièrement, la restriction concernant le bruit produit au moyen d'appareils sonores a un lien rationnel avec l'objectif de la Ville. Deuxièmement, cette mesure porte une atteinte raisonnablement minimale au droit à la liberté d'expression. Les représentants élus doivent bénéficier d'une certaine latitude, particulièrement dans le domaine de la protection de l'environnement, où les avis divergent, les intérêts s'opposent et la précision est inatteignable. La Ville a soutenu qu'aucun autre moyen

2005 SCC 62 (CanLII)

measurable by sound level meter would be unrealistic and would not achieve the City's goal of eliminating, subject to exception, a certain type of sound. Lastly, the prejudicial effects on free expression flowing from the regulation of noise produced by sound equipment that interferes with the peaceful use and enjoyment of the urban environment are proportionate to the beneficial effects of reducing noise pollution on the street and in the neighbourhood. [89-99]

pratique ne lui permettait vraiment de régler le problème complexe auquel elle faisait face. Réglementer l'intensité du bruit mesurable à l'aide de sonomètres n'est pas réaliste et ne permettrait pas à la Ville de réaliser son objectif d'éliminer, sauf exception, un certain type de son. Enfin, les effets préjudiciables sur la liberté d'expression de la réglementation du bruit produit au moyen d'appareils sonores qui interfère avec l'utilisation et la jouissance paisibles de l'environnement urbain sont proportionnés à son effet bénéfique de réduire la pollution par le bruit dans la rue et les environs. [89-99]

Per Binnie J. (dissenting): Article 9(1), when construed in accordance with the modern "contextual" rules of statutory interpretation, still means what it says. It imposes a general ban on "noise produced by sound equipment". Anti-noise by-law measures are of three types. The first prohibits noise that exceeds objective measurable limits (e.g., a set level of decibels). The second prohibits noise by subjective criteria (e.g., noise that interferes with the quality of life). The third prohibits noise by source (e.g., sounding car horns in a hospital zone). The majority judgment converts a type 3 provision into a type 2 provision, an interpretation that contradicts the City's intent both as expressed in the By-law and as submitted to this Court in written and oral argument. Interpreted as the City intended it to be interpreted, art. 9(1) is *ultra vires*. [102-103]

Le juge Binnie (dissident) : Le sens du par. 9(1), interprété selon les règles modernes d'interprétation contextuelle des lois et règlements, est exactement celui exprimé par son libellé. Il impose une interdiction générale du « bruit produit au moyen d'appareils sonores ». Les mesures réglementaires antibruit sont de trois types. Le premier consiste à interdire le bruit qui excède une limite objective mesurable (p. ex. un niveau prescrit de décibels). Le deuxième, à interdire le bruit en fonction d'un critère subjectif (p. ex. le bruit qui interfère avec la qualité de vie). Le troisième, à interdire le bruit émanant d'une source en particulier (p. ex. le son d'un klaxon dans une zone d'hôpital). L'opinion de la majorité transforme une mesure du type 3 en une mesure du type 2, une interprétation contraire à l'intention de la Ville, à la fois telle qu'elle l'a exprimée dans le Règlement et telle qu'elle l'a présentée à la Cour dans son argumentation écrite et sa plaidoirie. Interprété tel que la Ville voulait qu'il soit interprété, le par. 9(1) est *ultra vires*. [102-103]

On a grammatical reading, art. 9(1) imposes a general ban on noise classified only by source and includes noise which is not a nuisance. In this case, the context reinforces the ordinary grammatical meaning of the words used by the legislators and shows that there is no ambiguity in art. 9(1), latent or otherwise. While the courts cannot insist on a greater level of drafting precision than the subject matter permits, such indulgence is not applicable to this By-law, which shows in its own provisions other than art. 9(1) that a sensible level of precision can be achieved. The City could have employed level, place, type and source limitations, as well as qualitative standards in art. 9(1). There is a massive amount of municipal experience in Quebec crafting anti-noise by-laws which the City of Montréal must be taken to have known about. The City obviously intended to strike out in a new direction. The legislators clearly state that the prohibitions in art. 9(1) are "[i]n addition to the noise referred to in article 8" which prohibits, with respect to inhabited places, "disruptive noise whose sound pressure level is greater than the

Suivant son sens grammatical, le par. 9(1) impose une interdiction générale qui repose exclusivement sur la source du bruit et inclut le bruit qui n'est pas une nuisance. En l'espèce, le contexte renforce le sens grammatical ordinaire des termes employés par le législateur et révèle que le par. 9(1) ne comporte aucune ambiguïté, latente ou autre. Bien que les tribunaux ne puissent exiger dans la formulation d'un texte législatif un degré de précision plus élevé que ne le permet son objet, cette indulgence ne s'applique pas au Règlement, dont les dispositions mêmes, hormis le par. 9(1), démontrent qu'il est possible d'atteindre un niveau de précision judicieux et raisonnable. La Ville aurait pu introduire dans le par. 9(1) des limites touchant l'intensité, le lieu, le type et la source du bruit, ainsi que des normes qualitatives. Il y a profusion d'antécédents en matière de formulation de règlements municipaux antibruit au Québec dont il faut présumer que la Ville de Montréal était au courant. La Ville voulait de toute évidence emprunter un chemin inédit. Le législateur indique clairement que le par. 9(1) prohibe le bruit qui y est décrit, « [o]utre

2005 SCC 62 (CanLII)

maximum standardized noise level determined by ordinance". This can only mean that in art. 9(1) the "noise produced by sound equipment" need not be disruptive, need not rise to the level fixed by ordinance and need not occur in an inhabited place. The City is entitled to have the validity of that new direction considered by the Court, rather than have its enactment essentially modified to reflect the legislative model the City evidently wished to depart from. [115] [117] [122] [124] [139] [143]

le bruit mentionné à l'article 8 » qui interdit, à l'égard des lieux habités, « [l]'émission d'un bruit perturbateur d'un niveau de pression acoustique supérieur au niveau maximal de bruit normalisé fixé par ordonnance ». Une seule interprétation est possible : le « bruit produit au moyen d'appareils sonores » visé au par. 9(1) ne doit pas nécessairement être perturbateur, ne doit pas nécessairement atteindre le niveau fixé par ordonnance, et ne doit pas nécessairement toucher un lieu habité. La Ville a le droit d'obtenir l'opinion de la Cour sur la validité de cette nouvelle façon de faire, plutôt que de voir la Cour modifier essentiellement son règlement pour le faire concorder avec le modèle dont la Ville voulait de toute évidence se démarquer. [115] [117] [122] [124] [139] [143]

To read words into art. 9(1), and then to read other words out, then to read up a phrase to require an "essential connexion with a building" and finally to read down the effect of s. 9(1), goes beyond what a court is authorized to do by way of interpretation and amounts to impermissible judicial amendment. While such radical surgery is sometimes done as a matter of constitutional remedy in a proper case, here it is being imposed at the prior stage of statutory interpretation when the Court's mandate is simply to ascertain the intention of the legislators, not to remedy wrongs. [110] [147]

Le fait d'ajouter des mots au par. 9(1), puis d'en supprimer d'autres, d'accentuer le sens de certains termes pour exiger un « lien essentiel avec un bâtiment » et, enfin, d'atténuer l'effet du par. 9(1) va au-delà de ce qu'un tribunal peut faire lorsqu'il interprète un texte législatif et constitue une modification judiciaire inadmissible. Il arrive que les tribunaux procèdent à un remodelage aussi radical d'un texte inconstitutionnel à titre de réparation lorsque la situation s'y prête, mais, en l'occurrence, ce remodelage est imposé à l'étape préliminaire de l'interprétation, alors que la mission de la Cour consiste simplement à déterminer l'intention du législateur et non à remédier à un préjudice. [110] [147]

Article 9(1) is *ultra vires* and oppressive. The legislative power to define and prohibit nuisances conferred to City Hall by the *Charter of the city of Montréal, 1960* does not extend to defining some activity or thing as a nuisance "if it has no harmful qualities, causes no injury and hurts no one". Noise is not by nature a nuisance. There must therefore be a specification of abuse. Even if art. 9(1) were *intra vires* the City's legislative power to define and prohibit nuisances, it would be a patently unreasonable exercise of it. Instead of declaring that the legislators cannot mean what they said in art. 9(1), it would be more respectful of the Court's place in the constitutional scheme to send the defective provision back to the legislators for consideration and possible re-enactment in modified form. [150] [157-158] [160-161] [165]

Le paragraphe 9(1) est *ultra vires* et abusif. Le pouvoir législatif de définir et de prohiber les « nuisances » conféré au conseil municipal par la *Charte de la Ville de Montréal, 1960* ne lui permet pas de qualifier une activité ou une chose de nuisance « lorsque cette chose n'a aucun caractère nuisible, ne fait du tort, du mal à personne ». Le bruit n'est pas par nature une nuisance. Il faut donc en préciser le caractère abusif. Même si le par. 9(1) se situait dans les limites de la compétence législative de la Ville de définir et de prohiber les nuisances, il constituerait un exercice manifestement déraisonnable de ce pouvoir. Plutôt que d'affirmer que le législateur ne peut avoir voulu dire ce qu'il a dit au par. 9(1), il serait plus respectueux du rôle dévolu à la Cour dans notre régime constitutionnel de renvoyer la disposition lacunaire au conseil municipal pour qu'il l'examine et, éventuellement, en édicte une nouvelle version. [150] [157-158] [160-161] [165]

Article 9(1) infringes freedom of expression under s. 2(*b*) of the *Canadian Charter* and this infringement is not justified. Reliance on prosecutorial discretion is not a solution to the problem of overbreadth and overinclusiveness of art. 9(1) because such discretion is not governed by criteria "prescribed by law". Article 9(1)

Le paragraphe 9(1) porte atteinte à la liberté d'expression protégée par l'al. 2*b*) de la *Charte canadienne* et cette atteinte n'est pas justifiée. S'en remettre au pouvoir discrétionnaire de la poursuite n'est pas une solution au problème de la portée excessive du par. 9(1) parce que ce pouvoir n'est régi par aucun critère prescrit « par une

2005 SCC 62 (CanLII)

is also a disproportionate response to the legitimate problem of noise pollution because it goes beyond what could be considered minimal impairment of the expressive rights of Montrealers. The status of the defence of *de minimis* from which potential offenders might hope to benefit is not clear in Canada and the permit procedure does little to relieve from the bad effects of the prohibition. Article 9(1) cannot be justified just because there are other ways in which the accused could have advertised its wares. The key issue is not the effects of the infringing law in relation to a particular accused, but whether applied to Montrealers generally the means chosen by the legislators are proportionate to the City's legislative objective. [166-174]

règle de droit ». Le paragraphe 9(1) constitue en outre une réponse disproportionnée au problème bien réel de la pollution sonore en ce qu'il va au-delà de ce qui pourrait être considéré comme une atteinte minimale à la liberté d'expression des Montréalais. Il n'est pas certain que l'exception fondée sur le principe *de minimis*, dont certains délinquants potentiels pourraient espérer bénéficier, s'applique au Canada et la procédure d'obtention de permis n'atténue guère les effets néfastes de l'interdiction. Le simple fait que l'accusée disposait d'autres moyens de promouvoir ses spectacles ne peut justifier le par. 9(1). La question déterminante n'est pas de savoir quels sont les effets de la loi attentatoire dans le cas d'un accusé en particulier, mais si les mesures choisies par le législateur, appliquées aux Montréalais en général, sont proportionnées à l'objectif législatif de la Ville. [166-174]

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Jurisprudence

Citée par la juge en chef McLachlin et la juge Deschamps

Arrêt appliqué et expliqué : *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139; **arrêts mentionnés :** *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *Cheema c. Ross* (1991), 82 D.L.R. (4th) 213; *R. c. Luciano* (1986), 34 M.P.L.R. 233; *R. c. Hadden*, [1983] 3 W.W.R. 661, conf. par [1984] 1 W.W.R. 384; *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031; *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213; *McBratney c. McBratney* (1919), 59 R.C.S. 550; *Canadian Fishing Co. c. Smith*, [1962] R.C.S. 294; *Sidmay Ltd. c. Wehttam Investments Ltd.*, [1968] R.C.S. 828; *Berardinelli c. Ontario Housing Corp.*, [1979] 1 R.C.S. 275; *Demers c. St-Laurent (Ville de)*, [1997] R.J.Q. 1892; *Kruse c. Johnson*, [1898] 2 Q.B. 91; *Hamilton (City of) c. Hamilton Distillery Co.* (1907), 38 R.C.S. 239; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231; *Montreal (City of) c. Beauvais* (1909), 42 R.C.S. 211; *Associated Provincial Picture Houses, Ltd. c. Wednesbury Corp.*, [1947] 2 All E.R. 680; *Juneau c. Québec (Ville de)*, [1991] R.J.Q. 2781; *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368; *Saint-Michel-Archange (Municipalité de) c. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875; *Laval (Ville) c. Prince*, [1996] A.Q. nº 58 (QL); *Sablières Laurentiennes Ltée c. Ste-Adèle (Ville de)*, [1989] R.L. 486; *R. c. Greenbaum*, [1993] 1 R.C.S. 674; *Morrison c. Kingston* (1937), 69 C.C.C. 251; *114957 Canada Ltée (Spraytech, Société d'arrosage) c. Hudson (Ville)*, [2001] 2 R.C.S. 241, 2001 CSC 40; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *Ramsden c. Peterborough (Ville)*, [1993] 2 R.C.S.

2005 SCC 62 (CanLII)

MacMillan Bloedel Ltd. v. Simpson (1994), 89 C.C.C. (3d) 217; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Oakes*, [1986] 1 S.C.R. 103.

Cited by Binnie J. (dissenting)

Attorney General of Quebec v. Carrières Ste-Thérèse Ltée, [1985] 1 S.C.R. 831; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Goltz*, [1991] 3 S.C.R. 485; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. L'Heureux*, [1996] Q.J. No. 2135 (QL); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Anctil v. Cour municipale de Ville de La Pocatière*, [1973] C.S. 238; *Laval (Ville) v. Prince*, [1996] Q.J. No. 58 (QL); *Métabetchouan-Lac-à-La-Croix (Ville de) v. Restaurant-Bar Chez Miville inc.*, Sup. Ct. Alma, No. 160-36-000006-995, May 8, 2000; *Baie-Comeau (Ville) v. Bar le Broadway*, 1999 CarswellQue 1472; *Beloeil (Ville) v. Pergola 2000*, [2003] Q.J. No. 12782 (QL); *Nutrichef Ltée v. Brossard (Ville)*, Sup. Ct. Longueuil, No. 505-36-000006-876, April 12, 1988; *Sévigny v. Alimentation G. F. Robin inc.*, SOQUIJ AZ-99021251; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19; *Kirkland (Ville) v. Phares* (1993), 19 M.P.L.R. (2d) 314; *Saint-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875; *Sablières Laurentiennes Ltée v. Ste-Adèle (Ville de)*, [1989] R.L. 486; *Sambault v. Mercier (Corp. mun. de Ville)*, [1983] C.S. 147; *Beach v. Perkins (Municipalité de)*, [1975] C.S. 85; *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *Kruse v. Johnson*, [1898] 2 Q.B. 91; *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Hinchey*, [1996] 3 S.C.R. 1128; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

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2005 SCC 62 (CanLII)

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Cité de Montréal, *Règlement pour pourvoir au maintien de la Paix Publique et du bon ordre* (dans *Charte et Règlements de la Cité de Montréal* (1865), ch. 23), sec. 3.
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2005 SCC 62 (CanLII)

[2000] Q.J. No. 7289 (QL), reversing a judgment of the Montréal Municipal Court, [1999] Q.J. No. 2890 (QL). Appeal allowed, Binnie J. dissenting.

Serge Barrière, for the appellant.

No one appeared for the respondent.

Daniel Paquin, as *amicus curiae*.

Shaun Nakatsuru, for the intervener.

The judgment of McLachlin C.J. and Bastarache, LeBel, Deschamps, Abella and Charron JJ. was delivered by

THE CHIEF JUSTICE AND DESCHAMPS J. —

1. Introduction

This appeal concerns the power of the city of Montréal ("City") to prohibit noise produced in the street by a loudspeaker located in the entrance of an establishment. Two arguments are raised, one based on the limits on the power to regulate and the other on the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*"). For the reasons that follow, these arguments must be rejected.

In light of its scope, art. 9(1) of the *By-law concerning noise*, R.B.C.M. 1994, c. B-3 ("By-law"), was validly adopted by the City pursuant to its regulatory powers. Although this provision limits the freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter*, the limit is reasonable and can be justified within the meaning of s. 1 of the *Canadian Charter*.

2. Origins of the Case

The respondent operates a club featuring female dancers in a commercial zone of downtown Montréal, in a building fronting Ste-Catherine Street. To attract customers and compete with a similar establishment located nearby, the respondent set up, in the main entrance to its club, a loudspeaker that amplified the music and commentary accompanying the show under way inside so that

[2000] J.Q. n° 7289 (QL), qui avait infirmé un jugement de la Cour municipale de Montréal, [1999] J.Q. n° 2890 (QL). Pourvoi accueilli, le juge Binnie est dissident.

Serge Barrière, pour l'appelante.

Personne n'a comparu pour l'intimée.

Daniel Paquin, en qualité d'*amicus curiae*.

Shaun Nakatsuru, pour l'intervenant.

Le jugement de la juge en chef McLachlin et des juges Bastarache, LeBel, Deschamps, Abella et Charron a été rendu par

LA JUGE EN CHEF ET LA JUGE DESCHAMPS —

1. Introduction

1 Le pouvoir de la Ville de Montréal (« Ville ») de prohiber le bruit produit dans la rue par un haut-parleur installé dans l'entrée d'un établissement est mis en cause. Deux arguments sont soulevés. L'un est fondé sur les limites au pouvoir de réglementation, l'autre sur la *Charte canadienne des droits et libertés* (« *Charte canadienne* »). Pour les motifs qui suivent, ces arguments sont rejetés.

2 Compte tenu de sa portée, le par. 9(1) du *Règlement sur le bruit*, R.R.V.M. 1994, ch. B-3 (« Règlement »), a été validement adopté par la Ville en vertu de ses pouvoirs réglementaires. Bien que cette disposition limite la liberté d'expression garantie à l'al. 2*b*) de la *Charte canadienne*, cette limite est raisonnable et justifiée au sens de l'article premier de la *Charte canadienne*.

2. Origines du litige

3 L'intimée exploite un bar avec spectacles de danseuses au centre-ville de Montréal, dans un édifice faisant front sur la rue Ste-Catherine, dans une zone commerciale. Afin d'attirer la clientèle et pour faire concurrence à un établissement semblable situé à proximité, elle a installé dans l'entrée principale de son local un haut-parleur qui amplifie la trame sonore du spectacle présenté à

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

passers-by would hear them. Around midnight on May 14, 1996, a police officer on patrol on Ste-Catherine Street heard the music from a nearby intersection. The respondent was charged with producing noise that could be heard outside using sound equipment, in violation of arts. 9(1) and 11 of the By-law. These provisions read as follows:

> **9.** In addition to the noise referred to in article 8, the following noises, where they can be heard from the outside, are specifically prohibited:
>
> (1) noise produced by sound equipment, whether it is inside a building or installed or used outside;
>
> . . .
>
> **11.** No noise specifically prohibited under articles 9 or 10 may be produced, whether or not it affects an inhabited place.

4 Summoned before the Municipal Court, the respondent contested the charge on the ground that arts. 9(1) and 11 of the By-law were invalid. According to the respondent, the City, in adopting these provisions, exceeded its delegated power in respect of nuisances because the provisions defined as a nuisance an activity that was not a nuisance. The respondent also alleged that the provisions infringed its freedom of expression and that the infringement could not be justified.

5 Judge Massignani of the Municipal Court ruled that the noise emitted by the respondent's establishment constituted a nuisance, that the city council had the power to define and prohibit nuisances under art. 520(72) of the *Charter of the city of Montreal, 1960*, S.Q. 1959-60, c. 102 ("Charter of the City"), and that neither the purpose nor the effect of the By-law was to restrict freedom of expression ([1999] Q.J. No. 2890 (QL)). In the Superior Court, Boilard J. quashed the conviction on the basis that the impugned provisions infringed the respondent's freedom of expression; in his view, the By-law impaired the underlying value of self-fulfilment, and this infringement could not be justified ([2000] Q.J. No. 7289 (QL)). The majority of the Court of Appeal upheld the decision to quash the conviction

l'intérieur, pour que les passants l'entendent. Le 14 mai 1996, vers minuit, un policier patrouille la rue Ste-Catherine et entend la musique depuis une intersection avoisinante. L'intimée est accusée d'avoir produit du bruit audible de l'extérieur au moyen d'appareils sonores, en violation du par. 9(1) et de l'art. 11 du Règlement. Ces articles se lisent comme suit :

> **9.** Outre le bruit mentionné à l'article 8, est spécifiquement prohibé lorsqu'il s'entend à l'extérieur :
>
> 1º le bruit produit au moyen d'appareils sonores, qu'ils soient situés à l'intérieur d'un bâtiment ou qu'ils soient installés ou utilisés à l'extérieur;
>
> . . .
>
> **11.** L'émission, touchant ou non un lieu habité, d'un bruit spécifiquement prohibé aux articles 9 ou 10, est interdite.

Assignée devant la Cour municipale, l'intimée conteste l'accusation pour le motif que le par. 9(1) et l'art. 11 du Règlement sont invalides. Selon elle, en les adoptant, la Ville a outrepassé sa compétence déléguée en matière de nuisances parce que ces dispositions définissent comme une nuisance une activité qui n'en est pas une. Elle allègue aussi qu'elles portent atteinte à sa liberté d'expression et que cette atteinte est injustifiable.

Le juge Massignani de la Cour municipale conclut que le bruit émis par l'établissement de l'intimée constitue une nuisance, que le conseil municipal détient le pouvoir de définir et de prohiber les nuisances selon le par. 520(72) de la *Charte de la Ville de Montréal, 1960*, S.Q. 1959-60, ch. 102 (« Charte de la Ville »), et que le Règlement n'a ni pour objet ni pour effet de restreindre la liberté d'expression ([1999] J.Q. nº 2890 (QL)). En Cour supérieure, le juge Boilard annule la déclaration de culpabilité au motif que les dispositions contestées briment la liberté d'expression de l'intimée; il estime que le Règlement porte atteinte à la valeur sous-jacente de l'épanouissement personnel, et que cette atteinte ne peut être justifiée ([2000] J.Q. nº 7289 (QL)). La Cour d'appel, à la majorité, confirme

2005 SCC 62 (CanLII)

([2002] R.J.Q. 2986). Writing for the majority, Fish J.A., as he then was, concluded that the City had not shown the prohibited activity to be contrary to peace and order. He was also of the view that the City could not define an activity as a nuisance if it was not a nuisance and that the prohibition constituted an unjustified violation of the right to freedom of expression. Chamberland J.A., dissenting, would have set aside the Superior Court's judgment because the City had the authority to adopt the provisions in issue pursuant to its powers to ensure peace and public order within its territory and to regulate nuisances. In his view, the infringement of the respondent's freedom of expression was justified, since there were no less-restrictive ways for the City to achieve its objective of eliminating noises that are harmful to the urban soundscape.

l'annulation de la déclaration de culpabilité ([2002] R.J.Q. 2986). Le juge Fish, siégeant alors à la Cour d'appel et exprimant l'opinion majoritaire, conclut que la Ville n'a pas démontré que l'activité prohibée est contraire à la paix et à l'ordre publics. Il est aussi d'avis que la Ville ne peut définir comme une nuisance une activité qui n'en est pas une et que la prohibition constitue une violation injustifiée du droit à la liberté d'expression. Le juge Chamberland, dissident, infirmerait le jugement de la Cour supérieure parce que la Ville est autorisée à adopter les dispositions en question en vertu de son pouvoir en matière d'ordre et de paix sur son territoire et en vertu de son pouvoir de réglementer les nuisances. Selon le juge Chamberland, l'atteinte à la liberté d'expression de l'intimée serait justifiable puisqu'il n'existe pas de moyen moins contraignant qui puisse permettre à la Ville de réaliser son objectif d'éliminer les bruits nuisibles à l'environnement sonore urbain.

6

The debate is now before this Court. We will first address the administrative law argument before turning to the constitutional argument.

Le débat est repris devant notre Cour. L'argument fondé sur le droit administratif sera étudié d'abord, puis nous traiterons de l'argument constitutionnel.

3. Analysis

3.1 *Does the City Have the Power to Adopt Article 9(1) of the By-law?*

3. Analyse

3.1 *La Ville a-t-elle compétence pour adopter le par. 9(1) du Règlement?*

7

A two-stage analysis must be carried out to establish whether the City has the power to adopt art. 9(1) of the By-law. First, the scope of the provision must be defined. Second, it must be determined whether the City's power includes the authority to adopt such a provision.

Une analyse en deux étapes s'impose afin d'établir si la Ville a compétence pour adopter le par. 9(1) du Règlement. Premièrement, nous devons définir la portée de ce paragraphe. Deuxièmement, nous devons déterminer si la compétence de la Ville inclut le pouvoir d'adopter une telle disposition.

8

We find art. 9(1) of the By-law to be valid. Our analysis will be based on our interpretation of the provision. The points on which we disagree with Binnie J., dissenting, explain how he arrives at a different result. We will begin by delimiting the scope of the impugned provision before considering the submissions based on the scope of the regulatory power.

Nous concluons que le par. 9(1) du Règlement est valide. L'interprétation de cette disposition détermine notre analyse. Nos divergences de vue avec le juge Binnie, dissident, expliquent le résultat différent auquel il parvient. Nous délimiterons d'abord la portée de la disposition contestée avant d'examiner les arguments fondés sur l'étendue du pouvoir de réglementation.

3.1.1 Scope of Article 9(1) of the By-law

3.1.1 Portée du par. 9(1) du Règlement

9

As this Court has reiterated on numerous occasions, "[t]oday there is only one principle or approach, namely, the words of an Act are to be read

Comme notre Cour l'a maintes fois répété : [TRADUCTION] « Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une

2005 SCC 62 (CanLII)

in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26). This means that, as recognized in *Rizzo & Rizzo Shoes* "statutory interpretation cannot be founded on the wording of the legislation alone" (para. 21).

loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21, citant E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87; voir aussi *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26). Cela signifie que, comme on le reconnaît dans *Rizzo & Rizzo Shoes*, « l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi » (par. 21).

10

Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation. The fact that a municipal by-law is in issue rather than a statute does not alter the approach to be followed in applying the modern principles of interpretation: P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 24.

Des mots en apparence clairs et exempts d'ambiguïté peuvent, en fait, se révéler ambigus une fois placés dans leur contexte. La possibilité que le contexte révèle une telle ambiguïté latente découle logiquement de la méthode moderne d'interprétation. Qu'il s'agisse d'un règlement municipal plutôt que d'une loi ne modifie pas l'approche imposée par les règles modernes d'interprétation : P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 31.

11

Binnie J. concludes that the provision is unlawful for being overbroad. We do not share his view regarding the scope of the By-law. Even though he discusses the recognized principles of interpretation, Binnie J. bases his analysis on the premise that art. 9(1) of the By-law is clear and unambiguous.

Le juge Binnie conclut à l'illégalité de la disposition en raison de sa portée trop large. Nous ne partageons pas son opinion sur la question de la portée du Règlement. Malgré son énoncé des principes d'interprétation reconnus, le juge Binnie fonde son analyse sur la prémisse que le par. 9(1) du Règlement est clair et exempt d'ambiguïté.

12

In our view, although it appears to be clear, the provision is in fact ambiguous. In interpreting legislation, the guiding principle is the need to determine the lawmakers' intention. To do this, it is not enough to look at the words of the legislation. Its context must also be considered.

À notre avis, malgré sa clarté apparente, le paragraphe souffre d'ambiguïté. La règle directrice qui guide l'interprétation d'une loi est la recherche de l'intention du législateur. Pour la trouver il ne suffit pas de regarder le texte de la loi. Il faut aussi considérer son contexte.

13

Although he claims to follow the modern approach to the interpretation of legislative provisions, Binnie J. actually relies on the literal interpretation advocated by counsel for the City when questioned at the hearing. In our view, the Court must not limit itself to the submissions of counsel for the appellant. There are by-laws like this one in force across Canada. Several have already been reviewed by appellate courts from angles that

Bien qu'il affirme appliquer la méthode moderne d'interprétation des dispositions législatives, le juge Binnie s'en remet en fait à l'interprétation littérale à laquelle l'avocat de la Ville a adhéré lorsqu'il a été interrogé à l'audience. À notre avis, la Cour ne doit pas se limiter à la plaidoirie de l'avocat de l'appelante. Des règlements de ce type sont en vigueur partout au Canada. Plusieurs ont déjà fait l'objet d'un examen judiciaire par des cours d'appel

mirror in many respects the arguments raised in the case at bar: *Cheema v. Ross* (1991), 82 D.L.R. (4th) 213 (B.C.C.A.); *R. v. Luciano* (1986), 34 M.P.L.R. 233 (Ont. C.A.); *R. v. Hadden*, [1983] 3 W.W.R. 661 (Sask. Q.B.), aff'd [1984] 1 W.W.R. 384 (Sask. C.A.).

sous des angles qui rejoignent à plusieurs égards les arguments soulevés en l'espèce : *Cheema c. Ross* (1991), 82 D.L.R. (4th) 213 (C.A.C.-B.); *R. c. Luciano* (1986), 34 M.P.L.R. 233 (C.A. Ont.); *R. c. Hadden*, [1983] 3 W.W.R. 661 (B.R. Sask.), conf. par [1984] 1 W.W.R. 384 (C.A. Sask.).

14

What must be done in the case at bar is not to read down art. 9(1), but to determine whether, on a proper interpretation of the provision, it is limited to prohibiting noises that interfere with the peaceful enjoyment of the urban environment. In our view, taking the wording of the provision into account together with its purpose and its context, as is required by the established principles of statutory interpretation, resolves its ambiguity and enables its scope to be determined. Soft and inoffensive sounds are not prohibited, as Binnie J. contends.

En l'espèce, il s'agit, non de faire une interprétation atténuée, mais plutôt de déterminer si, selon une interprétation juste du par. 9(1), cette disposition se limite à interdire les bruits qui interfèrent avec la jouissance paisible de l'environnement urbain. À notre avis, la prise en compte du libellé de la disposition ainsi que de son objectif et de son contexte, comme l'exigent les principes établis d'interprétation des lois, résout l'ambiguïté et permet de cerner la portée de la disposition. Les bruits doux et inoffensifs ne sont pas interdits comme le soutient le juge Binnie.

3.1.1.1 *Wording of Article 9(1) of the By-law*

3.1.1.1 *Le texte du par. 9(1) du Règlement*

15

Any act of communication presupposes two distinct but inseparable components: text and context (Côté, at p. 280). Some spheres of government activity are more conducive to precisely worded texts, while others lend themselves more to general language. The use of general language in environmental matters was approved by the Court in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, and *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213. The subject matter does not lend itself well to precise language. In the interpretation process, the more general the wording adopted by the lawmakers, the more important the context becomes. The contextual approach to interpretation has its limits. Courts perform their interpretative role only when the two components of communication converge toward the same point: the text must lend itself to interpretation, and the lawmakers' intention must be clear from the context.

Tout acte de communication suppose deux éléments distincts indissociables : le texte et le contexte (Côté, p. 355). Certains domaines de l'activité gouvernementale sont plus propices à des textes précis, d'autres à des textes généraux. L'utilisation d'expressions générales en matière environnementale a été approuvée par la Cour dans *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031, et *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213. Le sujet se prête mal à un langage précis. Dans l'exercice d'interprétation, plus le texte choisi par le législateur sera général, plus le contexte sera important. L'exercice d'interprétation contextuelle comporte ses limites. Le tribunal n'endosse son rôle d'interprète que lorsque les deux éléments de la communication convergent vers une même direction : le texte s'y prête et l'intention du législateur se dégage clairement du contexte.

16

The wording of art. 9(1) is ambiguous. The words used are very general. What exactly is a "noise"? Is it a sound that could disturb the public peace? Or is it any sound that can be imagined? What does "can be heard from the outside" mean? Is a connection with a building necessary? Or would a cellular

Le texte du par. 9(1) révèle des ambiguïtés. Les mots utilisés sont très généraux. Qu'est-ce exactement qu'un « bruit »? Est-ce un son susceptible de déranger la paix publique? Ou est-ce tout son qu'on puisse imaginer? Que veux dire « s'entend à l'extérieur »? Un lien avec un bâtiment est-il nécessaire?

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

telephone constitute sound equipment? The general language used by the lawmakers can be interpreted in many ways. This ambiguity can be resolved only by reviewing the context of art. 9(1).

3.1.1.2 *Context of Article 9(1) of the By-Law*

17 Having identified the ways in which the wording of art. 9(1) is ambiguous, we must now consider its context. The context of legislation involves a number of factors. The overall context in which a provision was adopted can be determined by reviewing its legislative history and inquiring into its purpose. The immediate context of art. 9(1) can be determined by analysing the By-law itself. This review will enable us to determine whether the City has the power to adopt the impugned provision. We will accordingly address each of these contextual indicia: history, purpose and the By-law itself.

18 We will begin our contextual analysis with the history of the By-law. Noise affects city dwellers in their everyday lives and was one of the earliest concerns of municipal governments. It has long been recognized that noise falls within the jurisdiction over nuisances: D. Langlois, "Le bruit et la fureur: les réglementations municipale et provinciale en matière de bruit", in *Développements récents en droit municipal* (1992), 163. The regulation of noise has even been characterized as a primary focus of the municipal control of nuisances: L. Giroux, "Retour sur les compétences municipales en matière de nuisance", in *Développements récents en droit de l'environnement* (1999), 299, at p. 303.

19 The City has had the authority to regulate nuisances since before Confederation. At that time, it could adopt by-laws "[f]or the good rule, peace, welfare . . . and for the prevention and suppression of all nuisances" (*Act to amend and consolidate the provisions of the Ordinance to incorporate the City and Town of Montreal*, S. Prov. C. 1851, 14 & 15 Vict., c. 128, s. LVIII). Noises were specifically regulated by reference to the preservation of public peace and good order ("No person shall

Ou est-ce qu'un téléphone cellulaire constituerait un appareil sonore? Les termes généraux utilisés par le législateur permettent des interprétations diverses. Cette ambiguïté ne peut être résolue que par une étude contextuelle du par. 9(1).

3.1.1.2 *Le contexte du par. 9(1) du Règlement*

Ayant identifié les ambiguïtés qui se dégagent du texte du par. 9(1), il nous faut donc considérer son contexte. Le contexte d'une loi comprend plusieurs éléments. L'historique d'une disposition et la recherche de l'objectif de la réglementation permettent de cerner le contexte global dans lequel la disposition est adoptée. L'analyse du Règlement lui-même permet de cerner le contexte immédiat du par. 9(1). Cet examen permet de déterminer si la Ville a le pouvoir d'adopter la disposition contestée. Nous aborderons donc chacun de ces indices contextuels : l'historique, l'objectif, et le Règlement lui-même.

Nous commençons notre analyse contextuelle avec l'historique de la réglementation. Le bruit touche les citadins dans leur quotidien et les municipalités s'y sont très tôt intéressées. L'assujettissement du bruit à la compétence sur les nuisances est depuis longtemps reconnu : D. Langlois, « Le bruit et la fureur : les réglementations municipale et provinciale en matière de bruit », dans *Développements récents en droit municipal* (1992), 163. La réglementation du bruit est même qualifiée de champ de prédilection du contrôle municipal des nuisances : L. Giroux, « Retour sur les compétences municipales en matière de nuisance », dans *Développements récents en droit de l'environnement* (1999), 299, p. 303.

La Ville a été habilitée à réglementer les nuisances dès l'époque pré-confédérative. Elle pouvait alors adopter des règlements « [p]our le bon ordre, la paix, le bien-être [. . .] et pour la prévention et la suppression de toutes nuisances » (*Acte pour amender et consolider les dispositions de l'ordonnance pour incorporer la cité et ville de Montréal*, S. Prov. C. 1851, 14 & 15 Vict., ch. 128, art. LVIII). Les bruits ont ainsi été réglementés spécifiquement en référence à la protection de la paix

wilfully . . . use . . . any bell, horn, or bugle, or other sounding instrument", *By-Law to Preserve Public Peace and Good Order* (in *Charter and By-laws of the City of Montreal* (1865), c. 23), s. 3). In 1899, in addition to its general power to maintain peace and order (*Act to revise and consolidate the charter of the city of Montreal*, S.Q. 1899, c. 58, art. 299, para. 1, and art. 299, para. 2(7)) and its power to prohibit nuisances (art. 299, para. 2(12)), the City was given the power to define what constituted a nuisance (art. 300(50)).

20 The first by-law encompassing all the provisions respecting noise was passed in 1937: *By-law concerning noise and to repeal, in whole or in part, certain by-laws* (By-law 1448, August 18, 1937). Article 5 of By-law 1448 prohibited sounds produced by sound equipment and projected outside buildings toward streets or public places. Given the time when the provision was adopted and the fact that it concerned sounds projected from a building into a public space, it is reasonable to conclude that the equipment to which the provision applied was equipment connected with the building. The purpose of the provision was apparently to prohibit sounds produced by equipment located inside a building at a volume such that a court could conclude that the person in control of the building intended the sounds to be heard by people in public spaces. The purpose of the prohibition was to preserve the peaceful nature of public spaces.

21 Article 5 of By-law 1448 was clearly the predecessor of art. 15.1.1 of the *By-law concerning noise* of 1976 (By-law 4996, June 21, 1976), which prohibited noise produced by an apparatus emitting sound outside a building. This provision, which was drafted more concisely, targeted equipment projecting sounds outside buildings. Article 15.1.1 of By-law 4996 is the predecessor of art. 9 of the By-law at issue in the instant case.

22 As can be seen from this brief overview of the By-law's historical background, the City has been regulating noise for over a hundred years. Although the wording has been modified over the years, all

publique et au bon ordre (« Personne [. . .] de propos délibéré [. . .] ne se servira lui-même d'aucune cloche, cor ou trompette ou autre instrument résonnant », *Règlement pour pourvoir au maintien de la Paix Publique et du bon ordre* (dans *Charte et Règlements de la Cité de Montréal* (1865), ch. 23), sec. 3). En 1899, en plus de son pouvoir général d'assurer la paix et l'ordre (*Loi révisant et refondant la charte de la cité de Montréal*, S.Q. 1899, ch. 58, art. 299, al. 1, et art. 299, al. 2(7)) et de celui de prohiber les nuisances (art. 299, al. 2(12)), la Ville a été dotée du pouvoir de définir ce qu'est une nuisance (art. 300(50)).

Le premier règlement englobant toutes les dispositions sur le bruit est adopté en 1937 : *Règlement concernant le bruit et abrogeant, en tout ou en partie, certains règlements* (Règlement n° 1448, 18 août 1937). L'article 5 du Règlement n° 1448 prohibe les sons produits par un appareil sonore et projetés à l'extérieur d'un édifice, vers les rues ou places publiques. En raison de l'époque à laquelle cette disposition est adoptée et du fait qu'il s'agit de sons projetés d'un édifice vers un espace public, il est permis de conclure que les appareils alors visés sont ceux qui sont rattachés à l'édifice. Le but recherché paraît de toute évidence être de prohiber les sons produits par un appareil situé à l'intérieur d'un édifice, à un volume tel qu'un tribunal puisse conclure que l'exploitant de l'édifice cherchait à les faire entendre par les occupants des espaces publics. La prohibition vise à préserver le caractère paisible des espaces publics.

L'article 5 du Règlement n° 1448 est clairement à l'origine de l'art. 15.1.1 du *Règlement sur le bruit* de 1976 (Règlement n° 4996, 21 juin 1976) qui prohibe le bruit provenant d'un appareil sonore qui diffuse à l'extérieur des bâtiments. Rédigée plus sobrement, la disposition cible les appareils qui projettent des sons à l'extérieur des édifices. L'article 15.1.1 du Règlement n° 4996 est à la source de l'art. 9 du Règlement ici contesté.

Ce rapide survol de l'historique de la réglementation permet de constater que la Ville réglemente les bruits depuis plus de cent ans. La formulation de la disposition a été modifiée au cours des ans,

2005 SCC 62 (CanLII)

the provisions adopted since 1937 have had as their purpose the elimination of sounds emitted by sound equipment inside or outside a building at a volume such that they are audible and thus interfere with citizens' peaceful enjoyment of public spaces. The underlying objective of all these by-laws has been to preserve the peaceful nature of public spaces.

mais les dispositions adoptées depuis 1937 visent l'élimination des sons qui émanent d'un appareil sonore, qui proviennent d'un édifice ou de l'extérieur d'un édifice, à un volume tel qu'ils puissent être entendus et donc interférer avec la jouissance paisible des espaces communs par les citoyens. Le but qui sous-tend tous ces règlements est de préserver le caractère paisible des espaces publics.

23 Having considered the historical context of art. 9(1) of the By-law, we will now turn to its purpose. Identifying the purpose of a regulation can be helpful in determining the meaning of a given word or expression. The Court has frequently done so to extend or restrict the apparent or literal scope of a provision: *McBratney v. McBratney* (1919), 59 S.C.R. 550; *Canadian Fishing Co. v. Smith*, [1962] S.C.R. 294; *Sidmay Ltd. v. Wehttam Investments Ltd.*, [1968] S.C.R. 828; *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275; *Rizzo & Rizzo Shoes*. Moreover, the Quebec Court of Appeal engaged in the same exercise in *Demers v. Saint-Laurent (Ville de)*, [1997] R.J.Q. 1892, when it concluded that [TRANSLATION] "the 'nuisance' referred to in s. 76 [of the *Environment Quality Act*, R.S.Q., c. Q-2] is limited to nuisances that are likely to affect the life, health, safety or welfare of the community" (p. 1895).

Ayant considéré le contexte historique du par. 9(1) du Règlement, nous nous tournons maintenant vers son objectif. L'identification de l'objectif de la réglementation est utile pour circonscrire le sens d'un mot ou d'une expression. La Cour y a eu fréquemment recours pour étendre ou restreindre la portée apparente ou littérale d'une disposition : *McBratney c. McBratney* (1919), 59 R.C.S. 550; *Canadian Fishing Co. c. Smith*, [1962] R.C.S. 294; *Sidmay Ltd. c. Wehttam Investments Ltd.*, [1968] R.C.S. 828; *Berardinelli c. Ontario Housing Corp.*, [1979] 1 R.C.S. 275; *Rizzo & Rizzo Shoes*. C'est d'ailleurs à cet exercice qu'a eu recours la Cour d'appel du Québec dans *Demers c. Saint-Laurent (Ville de)*, [1997] R.J.Q. 1892, lorsqu'elle a déterminé que « la "nuisance" à laquelle réfère l'art. 76 de la [*Loi sur la qualité de l'environnement*, L.R.Q., ch. Q-2] se limite aux nuisances qui sont de nature à porter atteinte à la vie, à la santé, la sécurité ou le bien-être de la communauté » (p. 1895).

24 This approach is consistent with the approach to be followed in analysing a word or expression containing a latent ambiguity. "Noise" is one such word. The definitions of "noise" in dictionaries are broad, although they tend to mention that the word is often, but not necessarily, used in respect of unpleasant sounds. In French, the word "*bruit*" has an even broader meaning. It is defined as a [TRANSLATION] "[c]ombination of sounds produced by vibrations that can be perceived by hearing" (*Nouveau Larousse Encyclopédique* (2001), vol. 1, at p. 233). Hence, noise in itself is not necessarily a nuisance, but there is no contesting that it can be a nuisance.

Cette approche rejoint le raisonnement sous-jacent à l'analyse des mots et expressions comportant une ambiguïté latente. Le mot « bruit » est un de ces mots. Le bruit est défini en français comme un « [e]nsemble des sons produits par des vibrations, perceptibles par l'ouïe » (*Nouveau Larousse Encyclopédique* (2001), vol. 1, p. 233). Ce mot a une portée très vaste. Les dictionnaires anglais attribuent aussi un sens large à son équivalent « *noise* », tout en mentionnant qu'il est souvent, mais pas toujours, utilisé pour désigner un son désagréable. Le bruit en lui-même n'est donc pas nécessairement une nuisance, et pourtant il est incontestable qu'il peut constituer une nuisance.

25 The general expressions used in art. 9(1), namely "noise" and "can be heard from the outside", have

Les termes généraux employés au par. 9(1), soit les termes « bruit » et « qui s'entend de

2005 SCC 62 (CanLII)

an "open texture" (Côté, at p. 279), and their meaning is affected both by the underlying legislative objective and by their legal environment. The legal environment includes "all ideas related to the wording that Parliament can reasonably consider to be sufficiently common knowledge as to obviate mention in the enactment" (Côté, at p. 281).

l'extérieur », ont une « texture ouverte » (Côté, p. 353) et sont modulés tant par l'objectif législatif qui les sous-tend que par l'environnement légal dans lequel ils se trouvent. Cet environnement légal comprend « toutes les idées liées au texte que le législateur peut présumer suffisamment connues des justiciables pour se dispenser d'avoir à les exprimer » (Côté, p. 356).

26

It is in no municipality's interest to place limits on activities engaged in by citizens that do not in any way interfere with their fellow citizens' peaceful enjoyment. The purpose pursued by the municipality can only be to protect against noise pollution. This purpose gives content to the general language of the provision and makes the implicit component of legal communication explicit. In the case at bar, it is clear from the legislative purpose that the scope of art. 9(1) of the By-law does not include sounds resulting solely from human activity that is peaceable and respectful of the municipal community. This interpretation is the same as the one that flows from our historical analysis of the provision.

Aucune municipalité n'a intérêt à limiter les citoyens dans des activités qui n'interfèrent en rien avec la jouissance paisible de leurs concitoyens. L'objectif de la municipalité ne peut être que la protection contre la pollution sonore. Cet objectif permet de donner un contenu aux termes généraux de la disposition et d'expliciter l'élément implicite de la communication légale. En l'espèce, le recours à l'objectif législatif dicte d'exclure de la portée du par. 9(1) du Règlement les sons qui ne constituent que le résultat de l'activité humaine paisible et respectueuse de la communauté municipale. Cette interprétation est aussi celle dictée par notre analyse historique de la disposition.

27

Bearing the legislative purpose in mind, we must now consider the By-law itself. The immediate context of the impugned provision, namely the other provisions of the By-law, is as important as its overall context. On this point, it should be noted that Quebec's *Interpretation Act*, R.S.Q., c. I-16, entrenches the rule of contextual interpretation and specifies how it is to be applied:

> **41.1** The provisions of an Act are construed by one another, ascribing to each provision the meaning which results from the whole Act and which gives effect to the provision.

Thus, the immediate context thus also serves to clarify the scope or meaning of a word, expression or provision.

Ayant à l'esprit l'objectif législatif, il importe maintenant d'examiner le Règlement lui-même. Le contexte immédiat de la disposition contestée, soit les autres dispositions du Règlement, est tout aussi important que le contexte global. À ce sujet, il est pertinent de noter que la *Loi d'interprétation* du Québec, L.R.Q., ch. I-16, consacre la règle de l'interprétation contextuelle et en précise la mécanique :

> **41.1** Les dispositions d'une loi s'interprètent les unes par les autres en donnant à chacune le sens qui résulte de l'ensemble et qui lui donne effet.

Le contexte immédiat permet donc aussi de préciser la portée ou le sens d'un mot, d'une expression ou d'une disposition.

28

In art. 9, the provision at issue in the instant case, the two words or expressions requiring interpretation, "noise" and "where they can be heard from the outside", are framed by their context, which enables their meaning to be determined.

Dans l'art. 9 ici contesté, les deux mots ou expressions qui portent à interprétation, « bruit » et « lorsqu'il s'entend à l'extérieur », sont encadrés par leur contexte qui permet d'en cerner le sens.

2005 SCC 62 (CanLII)

29 The noise to which art. 9 applies is already qualified as being (1) produced by sound equipment, (2) inside a building or installed or used outside it and (3) audible from the outside. These three characteristics are cumulative.

Le bruit visé à l'art. 9 est déjà qualifié comme celui qui (1) provient d'un appareil sonore, (2) situé à l'intérieur d'un bâtiment ou installé ou utilisé à l'extérieur du bâtiment, et qui (3) est audible de l'extérieur. Ces trois caractéristiques sont cumulatives.

30 Does the provision cover all noises produced by sound equipment that are heard from the outside? Obviously not, since this would not cover all three characteristics. The example given by Binnie J. of noise from a cellular phone is therefore outside the scope of art. 9(1), since it disregards the essential connection with a building, and therefore with the very text on which he claims to rely. An interpretation that did not take this connection into account would make the words "whether it is inside a building or installed or used outside" unnecessary, contrary to the principle of interpretation known as the rule of effectivity (Côté, at p. 277; s. 41.1 of the *Interpretation Act*). If the lawmakers went to the trouble of specifying the location of the sound equipment in relation to the building in art. 9(1) of the By-law, their intention was not to prohibit all noise produced by sound equipment without regard for this connection.

La disposition contestée couvre-t-elle tous les bruits provenant d'un appareil sonore qui sont entendus à l'extérieur? Non, évidemment, puisque cela ne couvre pas les trois caractéristiques. L'exemple donné par le juge Binnie du bruit d'un cellulaire est donc exclu de la portée du par. 9(1) puisqu'il fait abstraction du lien essentiel avec un bâtiment, donc du texte même sur lequel il prétend s'appuyer. Une interprétation qui ne tient pas compte de ce lien aurait pour effet de rendre les termes « qu'ils soient situés à l'intérieur d'un bâtiment ou qu'ils soient installés ou utilisés à l'extérieur » inutiles, contrairement au principe interprétatif de l'effet utile (Côté, p. 350; art. 41.1 de la *Loi d'interprétation*). Si le législateur a pris la peine de spécifier l'emplacement de l'appareil sonore par rapport au bâtiment au par. 9(1) du Règlement, c'est qu'il n'avait pas l'intention de prohiber tous les bruits produits par des appareils sonores sans égard à ce lien.

31 Other provisions of the By-law are also helpful in determining the lawmakers' intention. The By-law (reproduced in the Appendix) contains a number of definitions that permit various types of noises to be identified. For example, a "noise with audible pure sounds" is defined as a "disruptive noise whose sound energy is concentrated around certain frequencies". The expression "disruptive noise" is found in most of the definitions of types of noise. This explicit reference to the concept of disruption is consistent with the purpose identified above. The expression "disruptive noise" is itself defined as "a noise that can be detected as separate from the environmental noise and considered as a source for analysis purposes, and includes a noise defined as such in this article". "Environmental noise" is the norm against which disruptive noise can be measured. "Environmental noise" is "a combination of usual noises from various sources, including noises that are exterior in origin, more or less regular in character, that can be detected within a given

D'autres dispositions du Règlement aident aussi à cerner l'intention du législateur. Le Règlement (reproduit en annexe) comporte plusieurs définitions qui permettent d'identifier différents types de bruits. Ainsi, un « bruit comportant des sons purs audibles » est défini comme « un bruit perturbateur dont l'énergie acoustique est concentrée autour de certaines fréquences ». La notion de « bruit perturbateur » est d'ailleurs présente dans la majorité des définitions des différents bruits. Ce renvoi explicite à la notion de perturbation est cohérent avec l'objectif identifié plus tôt. L'expression « bruit perturbateur » est elle-même définie comme « un bruit repérable distinctement du bruit d'ambiance et considéré comme source aux fins d'analyse, et comprend un bruit défini comme tel au présent article ». Le « bruit d'ambiance » est la norme à laquelle le bruit perturbateur peut être mesuré. Le « bruit d'ambiance » est « un ensemble de bruits habituels de diverses provenances, y compris des bruits d'origine extérieure, à caractère plus ou moins régulier

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

period, excluding any disruptive noise". Thus, the main characteristic of disruptive noise is that it stands out from environmental noise. Disruptive noise is noise that interferes with the peaceful use of urban spaces, and is distinguished from noise in the literal sense.

et repérables dans un temps déterminé en dehors de tout bruit perturbateur ». La première caractéristique du bruit perturbateur est donc de se distinguer du bruit d'ambiance. Le bruit qui perturbe rejoint le bruit qui interfère avec l'utilisation paisible de l'espace urbain et se distingue du bruit pris dans un sens littéral.

32

This concept of disruptive noise reappears in the provisions specific to noise in inhabited places, which are found in a section that includes arts. 9 and 11. Although the expression is not explicitly mentioned in art. 9, it is nevertheless integral to the provision. It should be noted that all the noises referred to in art. 9 entail some form of auditory interference. They are disruptive noises within the meaning of the By-law and do not need to be specifically identified as such (para. (2), siren; para. (3), percussion; para. (4), cries; etc.). It would be contrary to the principles of interpretation to disregard this undeniable contextual element by interpreting art. 9(1) in the abstract.

Cette notion de bruit perturbateur est reprise dans les dispositions particulières au bruit dans les lieux habités, section qui inclut les art. 9 et 11. Bien que l'expression ne soit pas mentionnée de façon expresse à l'art. 9, elle en fait néanmoins partie intégrante. En effet, on remarque que tous les bruits ciblés à l'art. 9 comportent une interférence auditive. Ce sont des bruits perturbateurs au sens du Règlement sans qu'il soit nécessaire d'ajouter cette précision (par. 2, sirène; par. 3, percussion; par. 4, cris; etc.). Il serait contraire aux principes interprétatifs de faire abstraction de cet élément contextuel indéniable en interprétant le par. 9(1) de façon abstraite.

33

It follows that to apply art. 9(1) to all noises produced by sound equipment even if they do not interfere with the urban environment is inconsistent with the provision's immediate context. All the noises covered by the prohibition under art. 9 have a disruptive effect on the urban environment, in accordance with the definition in the By-law. All these noises can be detected as separate from the environmental noise. A noise produced by sound equipment inside or outside a building can be heard from the outside only if it stands out from the environmental noise. The only acceptable interpretation is one that takes the context into account. Although disruption is not expressly mentioned in art. 9, this is because, in view of the types of noises to which the provision applies, it was considered unnecessary to refer explicitly to disruptive noise in each paragraph.

Il s'ensuit qu'appliquer le par. 9(1) à tous les bruits provenant d'appareils sonores, même s'ils n'ont pas pour effet de causer une interférence avec l'environnement urbain, est incompatible avec le contexte immédiat de la disposition. Tous les bruits ciblés par l'interdiction de l'art. 9 ont un effet perturbateur sur l'environnement urbain selon la définition qui en est donnée au Règlement. Tous ces bruits sont repérables distinctement du bruit d'ambiance. Si le bruit produit par un appareil sonore situé à l'intérieur ou à l'extérieur d'un bâtiment peut être entendu de l'extérieur, c'est qu'il se distingue du bruit d'ambiance. Seule une interprétation qui tient compte du contexte peut être retenue. Si la notion de perturbation n'est pas expressément mentionnée à l'art. 9, c'est qu'en raison des bruits ciblés, il n'a pas été jugé utile de la reprendre explicitement à chaque paragraphe.

34

The historical and purposive analysis of the provision enabled us to determine that the lawmakers' purpose was to control noises that interfere with peaceful enjoyment of the urban environment. The immediate context of art. 9 indicates that the concept of noise that adversely affects the enjoyment

L'analyse historique et téléologique a permis de déterminer que le but recherché par le législateur est le contrôle des bruits qui constituent une interférence avec la jouissance paisible de l'environnement urbain. Le contexte immédiat de l'art. 9 permet de faire ressortir que la notion de bruit qui

2005 SCC 62 (CanLII)

of the environment is implicit in art. 9 and that the activities prohibited under it are activities that produce noises that can be detected as separate from the environmental noise. This delimitation of the By-law's scope does not, as Binnie J. claims, constitute a judicial amendment that is inconsistent with the plain meaning of the provision. Rather, it is the result of a judicious interpretation that resolves the provision's ambiguity in accordance with the modern approach to interpretation.

nuit à la jouissance de l'environnement est implicite à l'art. 9 et que les activités qui y sont prohibées sont celles qui produisent un bruit repérable distinctement du bruit d'ambiance. Cette détermination de la portée du Règlement ne constitue pas, comme le prétend le juge Binnie, une modification judiciaire contraire au sens littéral de cette disposition, mais résulte plutôt d'une interprétation juste qui permet d'en résoudre l'ambiguïté selon la méthode d'interprétation moderne.

35 Although art. 11 is mentioned in the pleadings, the parties did not address it specifically. Its scope is essentially linked to that of art. 9 and need not be discussed separately. All that remains to be determined is whether the City had the power to pass the By-law.

Même si l'art. 11 est mentionné aux actes de procédure, les parties n'en traitent pas spécifiquement. Sa portée est essentiellement liée à celle de l'art. 9 et il n'y a pas lieu d'en discuter de façon distincte. Reste à déterminer si la Ville avait le pouvoir d'adopter le Règlement.

3.1.2 Power of the City to Adopt Article 9(1) of the By-law

3.1.2 Le pouvoir de la Ville d'adopter le par. 9(1) du Règlement

36 It is not in dispute that the City has the power to define and prohibit nuisances. In adopting art. 9(1) of the By-law, the City was targeting noises that constitute a nuisance. We accordingly conclude that the City had the power to adopt art. 9(1) of the By-law.

Il n'est pas contesté que la Ville a le pouvoir de définir et de prohiber les nuisances. En adoptant le par. 9(1) du Règlement, la Ville visait des bruits qui constituent une nuisance. Ainsi, nous concluons que la Ville avait le pouvoir d'adopter le par. 9(1) du Règlement.

37 In the Court of Appeal, the respondent successfully argued, based on a literal reading of this provision, that the City did not have the power to adopt it. Fish J.A. was of the view that the City could not [TRANSLATION] "argue that all amplified noise heard from outside, regardless of its nature or volume and of the time, the place or the presence of listeners, is in itself a nuisance" (para. 41). In his opinion, since the City [TRANSLATION] "does not have the power to define and prohibit nuisances that are not in fact nuisances, it has the authority to prohibit noise only if it reasonably delimits the cases in which noise will actually constitute a nuisance" (para. 49).

L'intimée, se basant sur une interprétation littérale de cette disposition, a plaidé avec succès en Cour d'appel que la Ville n'a pas le pouvoir de l'adopter. Le juge Fish s'est dit d'avis que la Ville ne pouvait « prétendre que tout bruit amplifié entendu à l'extérieur, quelle qu'en soit la nature ou le volume, sans égard à l'heure, à l'endroit ou à la présence d'auditeurs, est en soi une nuisance » (par. 41). Selon lui, puisque la Ville « n'a pas le pouvoir de définir et de prohiber des nuisances qui n'en sont pas, dans le cas du bruit, donc, elle n'est habilitée à le prohiber que si elle circonscrit raisonnablement les cas où le bruit constituera effectivement une nuisance » (par. 49).

38 In our opinion, this approach fails to take into consideration the principles of the interpretation of legislation, according to which a contextual approach is required. It is no more than a literal analysis of the By-law. It also collapses a

À notre avis, cette façon d'aborder la question omet de prendre en considération les règles d'interprétation législative qui dictent une interprétation contextuelle. Elle est limitée à une analyse littérale du Règlement. Elle escamote aussi la distinction

2005 SCC 62 (CanLII)

distinction between the existence of the power to regulate and the exercise of that power, and does not show the City the deference it is owed with respect to the exercise of its powers.

entre l'existence du pouvoir de réglementation et son exercice et elle fait défaut d'accorder à la Ville la déférence qui lui est due dans l'exercice de ses pouvoirs.

3.1.2.1 *Distinction Between Existence and Exercise of the Power*

3.1.2.1 *Distinction entre existence et exercice du pouvoir*

39 Something is missing from the Court of Appeal's statement of principle that the City "does not have the power to define and prohibit nuisances that are not in fact nuisances" (para. 41). When a court hears an argument based on this statement, the first step of its analysis is to determine whether the municipality has the power to define a nuisance. If the municipality does have this power, the court must determine whether the power was exercised in a manner consistent with the delegated powers.

L'énoncé de principe de la Cour d'appel suivant lequel la Ville « n'a pas le pouvoir de définir et de prohiber des nuisances qui n'en sont pas » (par. 41) constitue, en réalité, une élision. La première étape de l'analyse par le tribunal saisi d'un argument fondé sur cet énoncé consiste à déterminer si la municipalité est dotée du pouvoir de définir une nuisance. Si un tel pouvoir existe, le tribunal doit vérifier s'il a été exercé conformément aux pouvoirs délégués.

40 In the instant case, since arts. 517 and 520(72) of the Charter of the City (reproduced in the Appendix) clearly confer the power to regulate and define nuisances on the City, the review to be conducted relates not to the existence of the regulatory power but to its exercise.

En l'espèce, comme l'art. 517 et le par. 520(72) de la Charte de la Ville (cités en annexe) confèrent clairement à la Ville le pouvoir de réglementer et de définir les nuisances, l'examen qui s'impose doit porter non sur l'existence du pouvoir de réglementation mais sur son exercice.

3.1.2.2 *Review of the Exercise of the Regulatory Power*

3.1.2.2 *Contrôle de l'exercice du pouvoir de réglementation*

41 The rules governing the exercise of regulatory powers are well known (*Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.); *Hamilton (City of) v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231). The intervention of courts in this sphere has been marked by great deference. Only an exercise of power in bad faith or for improper or unreasonable purposes will justify judicial review (*Kruse*; *Montréal (City of) v. Beauvais* (1909), 42 S.C.R. 211; *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (C.A.); *Juneau v. Québec (Ville de)*, [1991] R.J.Q. 2781 (C.A.); *Shell Canada Products*; *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368).

Les règles régissant l'exercice du pouvoir de réglementation sont bien connues (*Kruse c. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.); *Hamilton (City of) c. Hamilton Distillery Co.* (1907), 38 R.C.S. 239; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231). Une grande déférence marque l'intervention des tribunaux dans ce domaine. Seul un exercice de mauvaise foi, ou à des fins illégitimes ou déraisonnables, justifiera la révision judiciaire (*Kruse*; *Montreal (City of) c. Beauvais* (1909), 42 R.C.S. 211; *Associated Provincial Picture Houses, Ltd. c. Wednesbury Corp.*, [1947] 2 All E.R. 680 (C.A.); *Juneau c. Québec (Ville de)*, [1991] R.J.Q. 2781 (C.A.); *Produits Shell*; *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368).

42 Recourse to the power to define is helpful because it simplifies the task of those who must apply a by-law. Thus, when an activity is defined as

Le recours au pouvoir de définition est utile parce qu'il simplifie la tâche des intervenants qui doivent appliquer un règlement. Ainsi, lorsqu'une

2005 SCC 62 (CanLII)

a nuisance, a citizen, a municipal officer or a judge, as the case may be, knows exactly what obligations are imposed by the municipal by-law. The standard is clear. However, this does not mean that the power to define is unlimited. For example, a municipality may not use its power to define a nuisance in place of its zoning power, thereby indirectly prohibiting an activity that would otherwise be authorized (*Saint-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.), at p. 881). Nor may it, in exercising its power to regulate nuisances, set standards that are unreasonable (*Laval (Ville) v. Prince*, [1996] Q.J. No. 58 (QL) (C.A.)).

activité est définie comme une nuisance, le citoyen, l'officier municipal ou le juge, selon le cas, connaissent avec précision les obligations imposées par le règlement municipal. La norme est claire. Cela ne veut cependant pas dire que le pouvoir de définition est illimité. Une municipalité ne peut, par exemple, utiliser son pouvoir de définir une nuisance au lieu d'exercer son pouvoir de zoner et ainsi prohiber de façon détournée une activité par ailleurs autorisée (*Saint-Michel-Archange (Municipalité de) c. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.), p. 881). Elle ne peut non plus, dans l'exercice de son pouvoir de réglementer les nuisances, décréter des normes déraisonnables (*Laval (Ville) c. Prince*, [1996] A.Q. nº 58 (QL) (C.A.)).

43 The City's intention to exercise the power conferred on it by art. 520(72) of its charter to define and abate nuisances is clear from the wording of art. 2 of the By-law. The use of the expression "constitutes a nuisance" expressly bases the By-law on the provision authorizing the definition of nuisances:

2. Noise whose sound pressure level is greater than the maximum set by ordinance, or noise specifically prohibited under this by-law, constitutes a nuisance and is prohibited as being contrary to peace and order.

La volonté de la Ville de se prévaloir du pouvoir de définir, prohiber et supprimer les nuisances, que lui confère le par. 520(72) de sa charte, ressort de la formulation de l'art. 2 du Règlement. Le Règlement s'appuie explicitement sur la disposition permettant de définir les nuisances en utilisant l'expression « constitue une nuisance » :

2. Le bruit dont le niveau de pression acoustique est supérieur au maximum fixé par ordonnance ou celui qui est spécifiquement prohibé par le présent règlement constitue une nuisance et est interdit comme étant contraire à la paix et à l'ordre publics.

44 The purpose of art. 2 of the By-law is to define certain types of noise as nuisances and to prohibit them. Article 2 refers to noises that are specifically prohibited, and the type of noise referred to in the impugned provision is among them. The wording of the By-law lends itself to a contextual analysis in order to determine what types of noise might be prohibited by art. 9(1).

L'objet de l'art. 2 du Règlement est de définir certains types de bruits comme une nuisance et de les prohiber. Cet article renvoie à des bruits spécifiquement prohibés et le bruit décrit dans la disposition contestée en fait partie. Le texte utilisé dans le Règlement se prête à l'analyse contextuelle pour déterminer quels types de bruits sont susceptibles d'être prohibés par le par. 9(1).

45 To control noise, the City chose to target certain types of sounds that are more likely to stand out over other environmental noise. Targeting noises is of course consistent with the City's delegated power to regulate and define nuisances. A number of characteristics are accordingly used to identify certain noises: sound pressure level greater than the standard determined by ordinance (art. 8 of the By-law), needless use of a siren in a motor vehicle (art. 6(3) of the By-law), and so on. It is in this

Pour contrôler le bruit, la Ville a choisi de cibler certains types de sons qui sont plus susceptibles de ressortir de l'ensemble des autres bruits ambiants. Cibler les bruits s'inscrit naturellement dans le pouvoir délégué à la Ville de réglementer et de définir les nuisances. Plusieurs caractéristiques sont ainsi utilisées pour identifier certains bruits : niveau de pression acoustique supérieur à la norme fixée par ordonnance (art. 8 du Règlement); utilisation inutile d'une sirène dans un véhicule automobile (par. 6(3)

context that the City prohibited noise that can be heard from outside a building and is produced by sound equipment.

The prohibition is not absolute. Although art. 9(1) appears to be broad in scope, as we saw in the contextual analysis of the provision, it must not be interpreted literally. The provision applies only to sounds that stand out over the environmental noise. Also, art. 20 of the By-law enables the executive committee to issue ordinances authorizing the emission of the types of noise in question in certain circumstances or on special occasions. Numerous authorizations have been granted for this purpose.

As Giroux points out, at p. 316, the line between protecting the peace and the desire to ensure conformity is sometimes a fine one. In light of this tension, the courts must bear in mind that the responsibility for controlling noise rests with the municipality, and they must not supplant the municipal council to impose their views (*Sablières Laurentiennes Ltée v. Ste-Adèle (Ville de)*, [1989] R.L. 486 (Que. C.A.)). A court must show great deference in reviewing a municipal by-law adopted pursuant to the City's powers. Municipal councils are made up of elected representatives who are accountable to their constituents, and the courts have recognized that municipalities have broad discretion in exercising their regulatory powers.

Tolerance of noise varies from one individual to another. The adoption of an objective standard, be it the sound pressure level or the source of the noise, makes it easier to apply the By-law. Unless the standard or the medium in question shows that the power has been exercised unreasonably, the court must show deference. Limiting the intensity of certain specific noises and eliminating those noises are two means to the same end, that is, maintaining a level that is acceptable to municipal officials. It is up to the City to choose the means. The City's decision to prohibit, except with special permission, all noise produced by sound equipment, whether located inside a building or installed or used outside, that can be heard from the outside does not

du Règlement); etc. C'est dans cette veine que la Ville a prohibé le bruit audible de l'extérieur d'un bâtiment et produit au moyen d'un appareil sonore.

46

La prohibition n'est pas absolue. Malgré une portée en apparence large, comme nous l'avons vu à l'occasion de l'analyse contextuelle du par. 9(1), cette disposition ne doit pas être interprétée de façon littérale. Elle ne couvre que les sons qui ressortent du bruit d'ambiance. L'article 20 du Règlement permet aussi au comité exécutif d'autoriser, par ordonnance, l'émission des sons en question en certaines circonstances ou occasions spéciales. De nombreuses autorisations sont ainsi accordées.

47

Comme le souligne Giroux à la p. 316, la frontière entre la protection de la tranquillité publique et la volonté d'assurer le conformisme est parfois mince. Tenant compte de cette tension, les tribunaux doivent conserver à l'esprit que la responsabilité de contrôler le bruit demeure celle des municipalités et ne doivent pas se substituer aux conseils municipaux pour imposer leurs vues (*Sablières Laurentiennes Ltée c. Ste-Adèle (Ville de)*, [1989] R.L. 486 (C.A. Qué.)). L'examen de la réglementation municipale adoptée dans le cadre des compétences de la Ville fait appel à un degré élevé de déférence de la part du tribunal. Les conseils municipaux sont composés de représentants élus qui sont responsables devant leurs commettants et les tribunaux reconnaissent la large discrétion des municipalités dans l'exercice de leurs pouvoirs réglementaires.

48

La tolérance au bruit varie d'un individu à un autre. Le recours à une norme objective, qu'il s'agisse du niveau de pression acoustique ou de l'identification de la source du bruit, facilite l'application du Règlement. À moins que la norme ou le médium ciblé ne révèle un exercice déraisonnable, le tribunal doit faire preuve de déférence. Restreindre l'intensité de certains bruits spécifiques ou les éliminer permet d'atteindre la même fin, soit celle de maintenir un niveau acceptable aux oreilles des élus municipaux. Le choix des moyens demeure celui de la Ville. Le choix fait par la Ville de supprimer, sauf permission spéciale, les sons émanant d'un appareil sonore, qu'il soit situé à l'intérieur d'un bâtiment ou qu'il soit installé ou utilisé

2005 SCC 62 (CanLII)

exceed the City's regulatory power and in no way constitutes an unreasonable or improper exercise of that power.

à l'extérieur, et audibles à l'extérieur n'excède pas son pouvoir de réglementation et ne constitue nullement un exercice déraisonnable ou irrégulier de ce pouvoir.

49 The City also submitted that the By-law could be based on its power to ensure peace and public order. In light of our conclusion, it is unnecessary to turn to that provision to find that the By-law is valid. A few comments are in order, though.

La Ville a aussi plaidé que le Règlement pouvait prendre appui sur son pouvoir d'assurer la paix et l'ordre publics. Compte tenu de notre conclusion, il n'est pas nécessaire de recourir à cette disposition pour conclure à la validité du Règlement. Quelques remarques s'imposent cependant.

50 It is well established that a municipal by-law may have more than one aspect and more than one purpose. Consequently, a by-law may have more than one enabling provision (*Arcade Amusements*, at p. 382). It is also possible for a single enabling provision, in particular a general provision such as art. 516 of the Charter of the City, to authorize provisions with multiple purposes.

Il est acquis qu'un règlement municipal peut comporter plusieurs aspects et poursuivre plusieurs finalités. Conséquemment, un règlement peut relever de plus d'une disposition habilitante (*Arcade Amusements*, p. 382). Il est également possible qu'une même disposition habilitante, notamment une disposition générale comme celle édictée à l'art. 516 de la Charte de la Ville, puisse permettre des dispositions à finalités diverses.

51 This being said, to restate the Court's words in *R. v. Greenbaum*, [1993] 1 S.C.R. 674, at p. 693, there are many limits on a municipality's general power to adopt by-laws to ensure peace, order and the welfare of its citizens. In particular, when specific powers have been provided for, the general power should not be used to extend the clear scope of the specific provisions. In *Greenbaum* (at p. 693), the Court agreed with Middleton J.A. of the Ontario Court of Appeal in *Morrison v. Kingston* (1937), 69 C.C.C. 251. At p. 255 of that decision, Middleton J.A. had given a general description of the limits on a municipality's regulatory powers:

Cela dit, pour reprendre les propos de la Cour dans l'arrêt *R. c. Greenbaum*, [1993] 1 R.C.S. 674, p. 693, le pouvoir général de la municipalité d'adopter des règlements pour assurer la paix, l'ordre et le bien-être des citoyens est assujetti à plusieurs limites. Notamment, lorsque des pouvoirs spécifiques sont prévus, le pouvoir général ne devrait pas être utilisé pour étendre la portée précise des dispositions particulières. Dans *Greenbaum*, la Cour adopte (p. 693) les propos du juge Middleton de la Cour d'appel de l'Ontario dans *Morrison c. Kingston* (1937), 69 C.C.C. 251. Celui-ci décrit, à la p. 255, les limites aux pouvoirs de réglementation d'une municipalité qui sont exprimées en termes généraux :

> The first and most obvious limitation is found in the limitations imposed upon the power of the Province itself by the *B.N.A. Act*. The Province has not itself universal power of legislation, and its creature the municipality can have no higher power. A second and for many purposes a limitation of equally practical importance is that where the Provincial Legislature has itself undertaken to deal with a certain subject-matter in the interest of the inhabitants of the Province all legislation by the municipality must be subject to the provincial enactment. A third limitation is I think to be found in the express enactments of the *Municipal Act*. Very few

> [TRADUCTION] La première limite et la plus évidente découle des limites imposées au pouvoir de la province elle-même par l'*A.A.N.B.* La province n'a pas elle-même un pouvoir législatif universel et les municipalités, qui lui doivent leur existence, ne peuvent détenir un pouvoir plus étendu. La deuxième limite qui, à plusieurs fins, est d'importance pratique égale, réside dans le fait que, lorsque la législature provinciale a elle-même décidé de traiter une certaine question dans l'intérêt de ses habitants, tous les textes législatifs adoptés par la municipalité doivent être assujettis à la mesure législative provinciale. La troisième limite réside, à

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

subjects falling within the ambit of local government are left to the general provisions of s. 259 [now s. 130]. Almost every conceivable subject proper to be dealt with by a municipal council is specifically enumerated in the detailed provisions in the Act, and in some instances there are distinct limitations imposed on the powers of the municipal council. These express powers are, I think, taken out of any power included in the general grant of power by s. 259. [Emphasis added.]

mon avis, dans les dispositions explicites de la *Loi sur les municipalités*. Très peu de questions relevant de la compétence du gouvernement local sont assujetties aux dispositions générales de l'art. 259 [maintenant l'art. 130]. Presque toutes les questions imaginables pouvant être réglementées par le conseil municipal sont énumérées expressément dans les dispositions détaillées de la Loi et, dans certains cas, des limites précises sont imposées aux pouvoirs du conseil municipal. Ces pouvoirs explicites sont, je crois, soustraits de ceux qui sont compris dans le pouvoir général que confère l'art. 259. [Nous soulignons.]

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The Court's remarks in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, at para. 22, also support this principle. In that case, the Court upheld the validity of a provision regulating the use of pesticides on the basis of a general power. However, the majority, *per* L'Heureux-Dubé J., stated that while such general powers may apply where no specific power has been granted (para. 21), they "do not confer an unlimited power" (para. 20). The Court thus recognized that the purpose of such provisions is to "allow municipalities to respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation" (para. 19). It seems clear that there is no need to resort to a general power if a specific power exists.

Les propos tenus par la Cour dans l'arrêt *114957 Canada Ltée (Spraytech, Société d'arrosage) c. Hudson (Ville)*, [2001] 2 R.C.S. 241, 2001 CSC 40, par. 22, appuient également ce principe. Dans cette affaire, la Cour a reconnu la validité d'une disposition réglementant l'utilisation des pesticides en se fondant sur l'octroi d'un pouvoir général. La majorité, sous la plume de la juge L'Heureux-Dubé, a toutefois énoncé que, quoiqu'ils puissent suppléer à l'absence de l'octroi d'un pouvoir spécifique (par. 21), de tels pouvoirs généraux ne « confèrent pas un pouvoir illimité » (par. 20). La Cour reconnaissait ainsi que le but de telles dispositions est de « permett[re] aux municipalités de relever rapidement les nouveaux défis auxquels font face les collectivités locales sans qu'il soit nécessaire de modifier la loi provinciale habilitante » (par. 19). Il paraît évident que le recours au pouvoir général n'est pas nécessaire s'il existe un pouvoir spécifique.

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In the case at bar, the Charter of the City has two specific provisions — one relating to nuisances and the other to public order, peace and safety — in addition to the general residual power.

Or, en l'espèce, la Charte de la Ville comporte deux dispositions spécifiques, l'une portant sur les nuisances et l'autre sur l'ordre, la paix et la sécurité publics, en plus de l'habilitation générale résiduelle.

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Thus, the City may base the By-law on its power to define and regulate nuisances pursuant to arts. 517(*l*) and 520(72) of the Charter of the City. The general power under art. 516 to ensure peace, order and good government and the welfare of citizens cannot be used to justify the exercise of its regulatory power, because there is a specific provision that applies.

La Ville peut donc fonder le Règlement sur son pouvoir de définir et de réglementer les nuisances prévu aux par. 517*l*) et 520(72) de la Charte de la Ville. Le pouvoir général d'assurer la paix, l'ordre, le bon gouvernement et le bien-être des citoyens, prévu à l'art. 516, ne peut justifier l'exercice de son pouvoir réglementaire parce qu'une disposition spécifique est prévue.

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Having concluded that arts. 9(1) and 11 of the By-law are within the delegated power of the City,

Après avoir conclu que le par. 9(1) et l'art. 11 du Règlement relèvent du pouvoir délégué de la Ville,

2005 SCC 62 (CanLII)

we must consider the second issue: whether these provisions violate the *Canadian Charter*. We must first decide whether the provisions of the By-law violate s. 2(*b*) of the *Canadian Charter*. If they do, we must then consider whether this violation is justified under s. 1 of the *Canadian Charter*.

nous devons examiner la deuxième question : ces dispositions contreviennent-elles à la *Charte canadienne*? Nous devons d'abord décider si les dispositions du Règlement adopté par la Ville vont à l'encontre de l'al. 2*b*) de la *Charte canadienne*. Dans l'affirmative, nous devons ensuite nous demander si cette atteinte est justifiée au sens de l'article premier de la *Charte canadienne*.

3.2 *Does Article 9(1) of the By-law Infringe Section 2(b) of the Canadian Charter?*

3.2 *Le paragraphe 9(1) du Règlement contrevient-il à l'al. 2b) de la Charte canadienne?*

56 Does the City's prohibition on amplified noise that can be heard from the outside infringe s. 2(*b*) of the *Canadian Charter*? Following the analytic approach of previous cases, the answer to this question depends on the answers to three other questions. First, did the noise have *expressive content*, thereby bringing it within s. 2(*b*) protection? Second, if so, does the *method or location* of this expression remove that protection? Third, if the expression is protected by s. 2(*b*), does the By-law *infringe* that protection, either in purpose or effect? See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

L'interdiction par la Ville du bruit amplifié qui s'entend à l'extérieur va-t-elle à l'encontre de l'al. 2*b*) de la *Charte canadienne*? Selon l'approche analytique définie dans les arrêts antérieurs, la réponse à cette question dépend de la réponse donnée à trois autres questions. Premièrement, le bruit a-t-il le *contenu expressif* nécessaire pour entrer dans le champ d'application de la protection offerte par l'al. 2*b*)? Deuxièmement, dans l'affirmative, le *lieu ou le mode* d'expression ont-ils pour effet d'écarter cette protection? Troisièmement, si l'activité expressive est protégée par l'al. 2*b*), le Règlement, de par son objet ou son effet, *porte-il atteinte* au droit protégé? Voir *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927.

57 The first two questions relate to whether the expression at issue in this case falls within the protected sphere of s. 2(*b*). They are premised on the distinction made in *Irwin Toy* between content (which is always protected) and "form" (which may not be protected). While this distinction may sometimes be blurred (see, e.g., *Irwin Toy*, p. 968; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 748), it is useful in cases such as this, where method and location are central to determining whether the prohibited expression is protected by the guarantee of free expression.

Les deux premières questions sont rattachées à celle de savoir si l'activité expressive entre dans le champ de protection de l'al. 2*b*). Elles s'appuient sur la distinction établie dans *Irwin Toy* entre le contenu (qui est toujours protégé) et la « forme » (qui ne l'est pas nécessairement toujours). Bien que cette distinction puisse parfois être floue (voir p. ex. *Irwin Toy*, p. 968; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, p. 748), elle est utile dans des situations comme celle qui nous occupe, où le mode et le lieu sont au centre de la question de savoir si l'activité expressive interdite est protégée par la garantie de liberté d'expression.

3.2.1 Expressive Content

3.2.1 Le contenu expressif

58 The first question is whether the noise emitted by a loudspeaker from inside the club had expressive content. The answer must be yes. The loudspeaker sent a message into the street about the show going

Il s'agit en premier lieu de savoir si les sons émis par le haut-parleur, reproduisant ce qui se passait à l'intérieur du bar, avaient un contenu expressif. Une réponse affirmative s'impose. Le haut-parleur

on inside the club. The fact that the message may not, in the view of some, have been particularly valuable, or may even have been offensive, does not deprive it of s. 2(*b*) protection. Expressive activity is not excluded from the scope of the guarantee because of its particular message. Subject to objections on the ground of method or location, as discussed below, all expressive activity is presumptively protected by s. 2(*b*): see *Irwin Toy*, at p. 969; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 729.

transmettait un message dans la rue au sujet du spectacle présenté à l'intérieur du bar. Le fait que, de l'avis de certains, ce message ait été sans grande valeur ou même offensant, ne le prive pas de la protection de l'al. 2*b*). Une activité expressive n'est pas exclue du champ d'application de cette garantie en raison du message particulier transmis. Sous réserve des objections fondées sur le mode ou le lieu, dont il sera question plus loin, toute activité expressive est présumée protégée par l'al. 2*b*) : voir *Irwin Toy*, p. 969; *R. c. Keegstra*, [1990] 3 R.C.S. 697, p. 729.

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It is clear that noise emitted by loudspeakers from buildings onto the street can have expressive content, and in this case it did. Therefore, the first part of the test in *Irwin Toy* is met and a *prima facie* case for s. 2(*b*) protection is established.

Il est évident que le bruit émis dans la rue au moyen de haut-parleurs à partir d'un édifice peut avoir un contenu expressif, et c'était le cas en l'espèce. Par conséquent, la situation qui nous est soumise satisfait au premier élément du critère formulé dans *Irwin Toy* et la preuve *prima facie* de l'application de la garantie prévue par l'al. 2*b*) est établie.

3.2.2 Excluded Expression

3.2.2 Exclusion de l'activité expressive

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Expressive activity may fall outside the scope of s. 2(*b*) protection because of how or where it is delivered. While all expressive *content* is worthy of protection (see *Irwin Toy*, at p. 969), the *method or location* of the expression may not be. For instance, this Court has found that violent expression is not protected by the *Canadian Charter*: *Irwin Toy*, at pp. 969-70. Violence is not excluded because of the message it conveys (no matter how hateful) but rather because the method by which the message is conveyed is not consonant with *Charter* protection.

L'activité expressive peut néanmoins être exclue du champ d'application de la protection offerte par l'al. 2*b*) en raison de la façon dont elle s'exerce ou du lieu où elle se déroule. Bien que tout *contenu* expressif mérite d'être protégé (voir *Irwin Toy*, p. 969), ce n'est pas toujours le cas du *lieu* ou du *mode* d'expression. Ainsi, la Cour a conclu que la violence comme forme d'expression n'est pas protégée par la *Charte canadienne* : *Irwin Toy*, p. 969-970. La violence n'est pas exclue en raison du message qu'elle transmet (si haineux puisse-t-il être), mais parce que le mode de transmission de ce message est en dissonance avec la protection offerte par la *Charte canadienne*.

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This case raises the question of whether the *location* of the expression at issue causes the expression to be excluded from the scope of s. 2(*b*): see *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, *per* Lamer C.J. Property may be private or public. Public property is government-owned. In this case, although the loudspeaker was located on the respondent's private property, the sound issued onto the street, a public space owned by the government. One aspect

Dans le présent pourvoi, il faut déterminer si, en raison du *lieu* où elle se déroule, l'activité expressive en cause doit être exclue de la portée de l'al. 2*b*) : voir *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139, le juge en chef Lamer. Une propriété peut être privée ou publique. Les propriétés publiques appartiennent à une administration publique. En l'espèce, bien que le haut-parleur ait été placé sur la propriété privée de l'intimée, le son était émis dans la rue, un endroit

2005 SCC 62 (CanLII)

of free expression is the right to express oneself in certain public spaces. Thus, the public square and the speakers' corner have by tradition become places of protected expression. The question here is whether s. 2(*b*) of the *Canadian Charter* protects not only what the appellants were doing, but their right to do it *in the place where they were doing it*, namely a public street.

62 Section 2(*b*) protection does not extend to all places. Private property, for example, will fall outside the protected sphere of s. 2(*b*) absent state-imposed limits on expression, since state action is necessary to implicate the *Canadian Charter*. Public property, however, may be more problematic since, by definition, it implicates the state. Two countervailing arguments, both powerful, are pitted against each other where the issue is expression on public property.

63 The argument for s. 2(*b*) protection on all public property focuses on ownership. It says the critical distinction is between government-owned places and other places. The government as the owner of property controls it. It follows that restrictions on the use of public property for expressive purposes are "government acts". Therefore, it is argued, the government is limiting the right to free expression guaranteed by s. 2(*b*) of the *Canadian Charter* and must justify this under s. 1.

64 The argument against s. 2(*b*) protection on at least some government-owned property, by contrast, focuses on the distinction between public use of property and private use of property. Regardless of the fact that the government owns and hence controls its property, it is asserted, many government places are essentially private in use. Some areas of government-owned property have become recognized as public spaces in which the public has a right to express itself. But other areas, like private offices and diverse places of public business,

public appartenant à une administration publique. L'un des aspects de la liberté d'expression est le droit de s'exprimer dans certains endroits publics. Ainsi, la place et la tribune publiques sont devenues, par tradition, des lieux où l'expression est protégée. Il s'agit en l'espèce de savoir si l'al. 2*b*) de la *Charte canadienne* protège non seulement l'activité à laquelle se sont livrés les appelants, mais également leur droit de s'y livrer *là où ils s'y sont livrés*, c'est-à-dire sur une voie publique.

La protection de l'al. 2*b*) ne s'étend pas à tous les lieux. Une propriété privée, par exemple, n'entre pas dans le champ d'application de l'al. 2*b*), à moins que l'État n'y impose une limite à l'expression, car seul un acte de l'État peut enclencher l'application de la *Charte canadienne*. Une propriété publique peut, cependant, être plus problématique puisque, par définition, elle est liée à l'État. Deux arguments contradictoires, l'un et l'autre puissants, s'opposent lorsque l'expression sur une propriété publique est en cause.

L'argument favorable à l'application de la protection de l'al. 2*b*) à l'intérieur de toute propriété publique est axé sur l'identité du propriétaire. Cet argument accorde une importance fondamentale à la distinction entre les endroits appartenant à l'État et les autres endroits. À titre de propriétaire, l'État exerce un contrôle sur ses propriétés. Il s'ensuit que les limites à l'utilisation d'une propriété publique à des fins d'expression sont des « actes de l'État ». Par conséquent, soutient-on, l'État restreint la liberté d'expression garantie par l'al. 2*b*) de la *Charte canadienne* et doit justifier cette atteinte au sens de l'article premier.

L'argument défavorable à l'application de la protection de l'al. 2*b*) à l'intérieur d'au moins certaines propriétés appartenant à l'État est, à l'opposé, axé sur la distinction entre l'usage public et l'usage privé de la propriété. Indépendamment du fait que l'État soit propriétaire d'un endroit et, de ce fait, le contrôle, de nombreuses propriétés de l'État sont essentiellement privées quant à leur usage. Certains espaces situés dans des propriétés appartenant à l'État sont maintenant reconnus comme des endroits publics où la population a le droit de

2005 SCC 62 (CanLII)

have never been viewed as available spaces for public expression. It cannot have been the intention of the drafters of the *Canadian Charter*, the argument continues, to confer a *prima facie* right of free expression in these essentially private spaces and to cast the onus on the government to justify the exclusion of public expression from places that have always and unquestionably been off-limits to public expression and could not effectively function if they were open to the public.

s'exprimer. Mais d'autres endroits, comme des bureaux privés et différents endroits affectés aux affaires de l'État, n'ont jamais été considérés comme des lieux ouverts à l'expression publique. Toujours selon cet argument, il est impossible que les rédacteurs de la *Charte canadienne* aient eu l'intention de conférer un droit *prima facie* à la liberté d'expression dans ces endroits essentiellement privés et d'imposer à l'État le fardeau de justifier l'exclusion de l'expression publique dans des endroits d'où celle-ci est depuis toujours et incontestablement exclue et qui ne pourraient remplir efficacement leur fonction s'ils étaient ouverts au public.

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In *Committee for the Commonwealth of Canada*, six of seven judges endorsed the second general approach, although they adopted different tests for determining whether the government-owned property at issue was public or private in nature. Lamer C.J., supported by Sopinka and Cory JJ., advocated a test based on whether the primary function of the space was compatible with free expression. McLachlin J., supported by La Forest and Gonthier JJ., proposed a test based on whether expression in the place at issue served the values underlying the s. 2(*b*) free speech guarantee. L'Heureux-Dubé J. opted for the first approach and went directly to s. 1.

Dans *Comité pour la République du Canada*, six des sept juges ont adopté cette deuxième façon d'aborder la question, bien qu'ils aient retenu des critères différents pour déterminer si la propriété publique en cause était de nature publique ou privée. Le juge en chef Lamer, avec l'appui des juges Sopinka et Cory, a préconisé l'application d'un critère fondé sur la question de savoir si la fonction principale du lieu était compatible avec la liberté d'expression. La juge McLachlin, avec l'appui des juges La Forest et Gonthier, a proposé un critère fondé sur la question de savoir si l'expression dans le lieu en cause favorisait les valeurs sous-jacentes à la liberté d'expression que garantit l'al. 2*b*). La juge L'Heureux-Dubé a quant à elle opté pour la première solution et est passée directement à l'application de l'article premier.

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In this case, as in *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, we are satisfied that on any of the tests proposed in *Committee for the Commonwealth of Canada*, the emission of noise onto a public street is protected by s. 2(*b*). The activity is expressive. The evidence does not establish that the method and location at issue here — a building-mounted amplifier emitting noise onto a public street — impede the function of city streets or fail to promote the values that underlie the free expression guarantee.

Dans le présent pourvoi, nous sommes convaincues que, comme dans l'affaire *Ramsden c. Peterborough (Ville)*, [1993] 2 R.C.S. 1084, quel que soit le critère choisi parmi ceux proposés dans *Comité pour la République du Canada*, l'émission de bruit sur une voie publique est protégée par l'al. 2*b*). Cette activité est expressive. La preuve n'établit pas que le mode d'expression et le lieu en cause — l'émission sur une voie publique de bruits amplifiés par un haut-parleur installé sur un édifice — font obstacle à la fonction des rues de la municipalité ou ne favorisent pas les valeurs sous-jacentes à la liberté d'expression.

67

This method of expression is not repugnant to the primary function of a public street, on the test

Ce mode d'expression n'est pas inconciliable avec la fonction principale d'une voie publique,

2005 SCC 62 (CanLII)

of Lamer C.J. Streets provide means of passing and accessing adjoining buildings. They also serve as venues of public communication. However one defines their function, emitting noise produced by sound equipment onto public streets seems not in itself to interfere with it. If sound equipment were being used in a way that prevented people from using the street for passage or communication, the answer might be different: see, e.g., *MacMillan Bloedel Ltd. v. Simpson* (1994), 89 C.C.C. (3d) 217 (B.C.C.A.). However, the evidence here does not establish this.

selon le critère établi par le juge en chef Lamer. Les rues permettent de circuler et d'accéder aux édifices qui les bordent. Elles servent aussi de lieux de communication pour le public. Peu importe comment on définit la fonction des rues, la simple émission de bruit produit au moyen d'appareils sonores ne semble pas l'entraver. Si le matériel sonore était utilisé de façon à empêcher les gens d'utiliser la rue pour circuler ou pour communiquer, la réponse pourrait être différente : voir p. ex. *MacMillan Bloedel Ltd. c. Simpson* (1994), 89 C.C.C. (3d) 217 (C.A.C.-B.). Or, ce n'est pas ce que la preuve démontre en l'espèce.

68 The method and location of the expression also arguably serve the values that underlie the guarantee of free expression, on the approach advocated by McLachlin J. Amplified emissions of noise from buildings onto a public street could further democratic discourse, truth finding and self-fulfillment. Again, if the evidence showed that the amplification inhibited passage and communication on the street, the situation might be different. The argument that the emissions of noise onto a public street in this case did not serve the values underlying the freedom of expression rests on its content, and cannot be considered in addressing the issue of whether the method or location of the expression itself is inimical to s. 2(*b*).

On peut également soutenir que le lieu et le mode d'expression favorisent les valeurs sous-jacentes à la garantie de liberté d'expression, suivant l'approche préconisée par la juge McLachlin. Le bruit amplifié émis sur une voie publique au moyen d'appareils sonores à partir d'un édifice pourrait favoriser le débat démocratique, la recherche de la vérité et l'épanouissement personnel. Répétons que, si la preuve avait démontré que l'amplification de ces bruits gênait la circulation et la communication dans la rue, la situation pourrait être différente. L'argument selon lequel l'émission de bruit sur une voie publique ne favorisait pas, en l'espèce, les valeurs sous-jacentes à la liberté d'expression repose sur le contenu des sons diffusés et ne peut être pris en compte pour ce qui est de déterminer si ce lieu et ce mode d'expression sont contraires à l'al. 2*b*).

69 Finally, on the analysis of L'Heureux-Dubé J. in *Committee for the Commonwealth of Canada*, the expressive content of the noise mandates the conclusion that it is protected by s. 2(*b*) and propels the analysis directly into s. 1, where justification is the issue.

Enfin, selon l'analyse effectuée par la juge L'Heureux-Dubé dans *Comité pour la République du Canada*, le contenu expressif du bruit nous oblige à conclure qu'il bénéficie de la protection de l'al. 2*b*) et nous amène directement à l'analyse fondée sur l'article premier qui porte sur la justification.

70 It follows that here, as in *Ramsden*, it is unnecessary to revisit the question of which of the divergent approaches to the issue of expression on public property should be adopted. However, since we are requested to clarify the test, we offer the following views.

En conséquence, dans le présent pourvoi, comme dans l'arrêt *Ramsden*, il n'est pas nécessaire de déterminer laquelle des différentes façons d'aborder la question de l'expression sur une propriété publique devrait être retenue. Cependant, puisqu'on nous demande de préciser le critère à appliquer, nous formulons les remarques suivantes.

71 We agree with the view of the majority in *Committee for the Commonwealth of Canada* that

Nous acceptons l'opinion majoritaire exprimée dans *Comité pour la République du Canada*

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

the application of s. 2(*b*) is not attracted by the mere fact of government ownership of the place in question. There must be a further enquiry to determine if this is the *type* of public property which attracts s. 2(*b*) protection.

selon laquelle le fait que l'endroit visé appartienne à l'État, sans plus, n'emporte pas automatiquement l'application de la protection offerte par l'al. 2*b*). Il faut donc pousser l'examen plus loin afin de déterminer s'il s'agit du *type* de propriété de l'État auquel s'applique cette protection.

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Expressive activity should be excluded from the protective scope of s. 2(*b*) only if its method or location clearly undermines the values that underlie the guarantee. Violent expression, which falls outside the scope of s. 2(*b*) by reason of its method, provides a useful analogy. Violent expression may be a means of political expression and may serve to enhance the self-fulfillment of the perpetrator. However, it is not protected by s. 2(*b*) because violent means and methods undermine the values that s. 2(*b*) seeks to protect. Violence prevents dialogue rather than fostering it. Violence prevents the self-fulfillment of the victim rather than enhancing it. And violence stands in the way of finding the truth rather than furthering it. Similarly, in determining what public spaces fall outside s. 2(*b*) protection, we must ask whether free expression in a given place undermines the values underlying s. 2(*b*).

L'activité expressive ne devrait être exclue du champ de protection de l'al. 2*b*) que si le lieu ou le mode d'expression en cause minent les valeurs sous-jacentes à cette garantie. L'expression violente, exclue du champ de protection de l'al. 2*b*) à cause du mode d'expression choisi, offre une analogie utile. L'expression violente peut constituer un moyen d'expression politique et servir à favoriser l'épanouissement personnel de son auteur. Toutefois, elle n'est pas protégée par l'al. 2*b*) parce que la violence mine les valeurs que l'al. 2*b*) vise à protéger. La violence nuit au dialogue plutôt que de l'encourager. La violence nuit à l'épanouissement personnel de la victime plutôt que de le favoriser. Et la violence fait obstacle à la recherche de la vérité plutôt que de la faciliter. De même, pour déterminer quels sont les endroits publics qui échappent à la protection de l'al. 2*b*), nous devons nous demander si la liberté d'expression dans l'endroit visé mine les valeurs sous-jacentes à l'al. 2*b*).

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We therefore propose the following test for the application of s. 2(*b*) to public property; it adopts a principled basis for method or location-based exclusion from s. 2(*b*) and combines elements of the tests of Lamer C.J. and McLachlin J. in *Committee for the Commonwealth of Canada*. The onus of satisfying this test rests on the claimant.

Nous proposons donc, pour l'application de l'al. 2*b*) aux propriétés publiques, le critère suivant, qui fournit un fondement rationnel à l'exclusion de la protection de l'al. 2*b*) en fonction du lieu et du mode d'expression et combine des éléments des critères formulés par le juge en chef Lamer et la juge McLachlin dans *Comité pour la République du Canada*. C'est au demandeur qu'il incombe de satisfaire à ce critère.

74

The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:

La question fondamentale quant à l'expression sur une propriété appartenant à l'État consiste à déterminer s'il s'agit d'un endroit public où l'on s'attendrait à ce que la liberté d'expression bénéficie d'une protection constitutionnelle parce que l'expression, dans ce lieu, ne va pas à l'encontre des objectifs que l'al. 2*b*) est censé favoriser, soit : (1) le débat démocratique; (2) la recherche de la vérité; et (3) l'épanouissement personnel. Pour trancher cette question, il faut examiner les facteurs suivants :

(a) the historical or actual function of the place; and

(b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

75 The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(*b*). In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.

76 Actual function is also important. Is the space in fact essentially private, despite being government-owned, or is it public? Is the function of the space — the activity going on there — compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity? Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance.

77 Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote. Most cases will be resolved on the basis of historical or actual function. However, we cannot discount the possibility that other factors may be relevant. Changes in society and technology may affect the spaces where expression should be protected having regard to the

a) la fonction historique ou réelle de l'endroit;

b) les autres caractéristiques du lieu qui laissent croire que le fait de s'y exprimer minerait les valeurs sous-jacentes à la liberté d'expression.

La fonction historique d'un endroit destiné et servant au débat public est un indicateur de la conformité de l'expression à cet endroit avec les objectifs de l'al. 2*b*). Dans les endroits où il est de tradition que la liberté d'expression s'exerce, il est peu probable que protéger l'exercice de cette liberté mine les valeurs qui la sous-tendent. Partant, lorsque l'utilisation historique d'un endroit pour l'exercice de la liberté d'expression est établie, le lieu de l'activité expressive — en ce qui a trait au fait qu'elle se déroule sur une propriété publique — sera protégée.

La fonction réelle de l'endroit est elle aussi importante. S'agit-il en fait d'un endroit essentiellement privé, même s'il appartient à l'État, ou d'un endroit public? Sa fonction — l'activité qui s'y déroule — est-elle compatible avec la libre expression publique? Ou s'agit-il d'une activité qui commande un certain isolement et un accès limité? Le droit d'entrer librement dans ce lieu et d'y présenter son message, par des paroles ou par des actes, serait-il compatible avec ce qui s'y fait? Ou les activités qui s'y déroulent s'en trouveraient-elles entravées? De nombreuses fonctions de l'administration publique, des réunions du Cabinet au simple travail de bureau, nécessitent un certain isolement. Élargir le droit à la liberté d'expression à de tels lieux pourrait bien compromettre la démocratie et l'efficacité de la gouvernance.

Les fonctions historique et réelle servent aussi d'indicateurs des endroits où l'exercice de la liberté d'expression aurait pour effet de miner les valeurs sous-jacentes à cette liberté. L'ultime question, cependant, sera toujours de savoir si la liberté d'expression à l'endroit en cause minerait les valeurs que cette garantie est censée promouvoir. La plupart des affaires seront tranchées sur le fondement de la fonction historique ou réelle. Cependant, nous ne pouvons écarter la possibilité que d'autres facteurs soient pertinents. Les changements sociaux et technologiques peuvent avoir une incidence sur les

2005 SCC 62 (CanLII)

values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant.

endroits où l'expression mérite d'être protégée eu égard aux valeurs qui sous-tendent cette garantie. Le critère proposé tient compte de cette éventualité en permettant que d'autres facteurs que celui de la fonction historique ou réelle soient pris en considération au besoin.

78

The markers of historical and actual functions will provide ready answers in most cases. However, we must accept that, on the difficult issue of whether free expression is protected in a given location, some imprecision is inevitable. As some scholars point out, the public-private divide cannot be precisely defined in a way that will provide an advance answer for all possible situations: see, e.g., R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 148 *et seq*. This said, the historical and actual functions of a place is something that can be established by evidence. As courts rule on what types of spaces are inherently public, a central core of certainty may be expected to evolve with respect to when expression in a public place will undermine the values underlying the freedom of expression.

Les indicateurs des fonctions historique et réelle permettront de solutionner aisément la plupart des cas. Toutefois, nous devons accepter qu'une certaine imprécision demeure inévitable quant à l'épineuse question de savoir si la liberté d'expression est protégée dans un lieu donné. Comme le signalent certains juristes, il est impossible de tracer avec précision une ligne de démarcation entre le public et le privé qui permettrait de solutionner à l'avance toutes les situations possibles : voir p. ex. R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), p. 148 et suiv. Cela dit, les fonctions historique et réelle d'un endroit sont des éléments qu'il est possible d'établir par la preuve. Au fur et à mesure que les tribunaux détermineront quels genres d'endroits ont un caractère intrinsèquement public, on peut s'attendre à pouvoir cerner avec certitude un certain nombre de circonstances dans lesquelles l'expression dans un lieu public minera les valeurs sous-jacentes à la liberté d'expression.

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Another concern is whether the proposed test screens out expression which merits protection, on the one hand, or admits too much clearly unprotected expression on the other. Our jurisprudence requires broad protection at the s. 2(*b*) stage, on the understanding that governments can limit that protection if they can justify the limits under s. 1 of the *Canadian Charter*. The proposed test reflects this. However, it also reflects the reality that some places must remain outside the protected sphere of s. 2(*b*). People must know where they can and cannot express themselves and governments should not be required to justify every exclusion or regulation of expression under s. 1. As six of seven judges of this Court agreed in *Committee for the Commonwealth of Canada*, the test must provide a preliminary screening process. Otherwise, uncertainty will prevail and governments will be continually forced to justify restrictions which, viewed from the perspective of history and common sense,

On peut également se demander si le critère proposé écarte des activités expressives qui méritent d'être protégées ou s'il en retient au contraire certaines qui ne méritent manifestement pas de l'être. Notre jurisprudence exige une protection étendue à l'étape de l'al. 2*b*), étant entendu que l'État peut restreindre cette protection à condition que les limites imposées puissent se justifier au sens de l'article premier de la *Charte canadienne*. Le critère proposé incarne ce principe. Cependant, il prend aussi en considération le fait que certains endroits doivent demeurer hors du champ de protection de l'al. 2*b*). Les gens doivent savoir où ils peuvent ou non s'exprimer et les gouvernements ne doivent pas être tenus de justifier, conformément à l'article premier, chaque exclusion ou réglementation de l'expression. Comme en ont convenu six des sept juges de notre Cour dans *Comité pour la République du Canada*, ce critère doit comporter un mécanisme qui permette d'écarter d'emblée certains endroits.

2005 SCC 62 (CanLII)

are entirely appropriate. Restricted access to many government-owned venues is part of our history and our constitutional tradition. The *Canadian Charter* was not intended to turn this state of affairs on its head.

Autrement, l'incertitude l'emportera et les gouvernements seront constamment forcés de justifier des restrictions qui sont tout à fait appropriées d'un point de vue historique et logique. L'accès restreint à de nombreux lieux appartenant à l'État fait partie de notre histoire et de notre tradition constitutionnelle. La *Charte canadienne* n'était pas censée changer la situation du tout au tout.

80 A final concern is whether the proposed test is flexible enough to accommodate future developments. Changes in society will inevitably alter the specifics of the debate about the venues in which the guarantee of free expression will apply. Some say, for example, that the increasing privatization of government space will shift the debate to the private sector. Others say that the new spaces for communication created by electronic communication through the Internet will raise new questions on the issue of where the right to free speech applies. We do not suggest how the problems of the future will be answered. But it seems to us that a test that focuses on historical and actual functions as markers for public and private domains, adapted as necessary to accord with new situations and the values underlying the s. 2(*b*) guarantees, will be sufficiently flexible to meet the problems of the future.

On peut enfin se demander si le critère proposé est assez souple pour s'adapter aux changements à venir. L'évolution de la société modifiera inévitablement les tenants et aboutissants du débat concernant les endroits où s'applique la garantie de liberté d'expression. Certains affirment, par exemple, que la privatisation croissante des lieux utilisés à des fins publiques déplacera le débat vers le secteur privé. D'autres avancent que les nouveaux lieux d'échange du cyberespace feront surgir de nouvelles questions quant aux endroits où s'applique le droit à la liberté d'expression. Nous ne prétendons pas répondre aux problèmes à venir. Mais il nous semble qu'un critère axé sur les fonctions historique et réelle d'un lieu comme indicateurs de son appartenance au domaine public ou privé, adapté le cas échéant aux nouvelles situations et aux valeurs qui sous-tendent les garanties prévues à l'al. 2*b*), offrira la souplesse nécessaire pour régler les difficultés futures.

81 Applying the approach we propose to the case at bar confirms the conclusion reached earlier under the three *Committee for the Commonwealth of Canada* tests that the expression at issue in this case falls within the protected sphere of s. 2(*b*) of the *Canadian Charter*. The content, as already noted, is expressive. Viewed from the perspective of locus, the expression falls within the public domain. Streets are clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted. There is nothing to suggest that to permit this medium of expression would subvert the values of s. 2(*b*).

L'application de la méthode proposée à la présente espèce confirme la conclusion à laquelle nous sommes précédemment arrivés au moyen des trois critères établis dans *Comité pour la République du Canada*, soit que l'expression en cause entre dans le champ de protection de l'al. 2*b*) de la *Charte canadienne*. Son contenu, ainsi que nous l'avons déjà signalé, est expressif. Considérée sous l'angle du lieu, elle se situe dans le domaine public. Les rues sont manifestement des lieux de rencontre publics et non privés, où diverses formes d'expression sont acceptées depuis longtemps. Rien n'indique que, s'il était autorisé, ce mode d'expression menacerait les valeurs qui sous-tendent l'al. 2*b*).

3.2.3 The Infringement

3.2.3 L'atteinte

82 This brings us to the third step of the *Irwin Toy* test. Having concluded that the expression falls

Cela nous amène à la troisième étape du critère formulé dans *Irwin Toy*. Ayant conclu que

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

within the protected scope of s. 2(*b*), we must ask whether the By-law impinges on protected expression, in purpose or effect.

l'expression entre dans le champ de protection de l'al. 2*b*), nous devons nous demander si le Règlement, de par son objet ou son effet, porte atteinte à l'expression protégée.

83 Here, the purpose of the By-law is benign. However, its effect is to restrict expression. Where the effect of a provision is to limit expression, a breach of s. 2(*b*) will be made out, provided the claimant shows that the expression at issue promotes one of the values underlying the freedom of expression: *Irwin Toy*, at p. 976.

En l'espèce, l'objet du Règlement est légitime. Il a toutefois pour effet de limiter l'expression. Lorsque l'effet d'une disposition est de limiter l'expression, la violation de l'al. 2*b*) sera établie, à la condition que le demandeur démontre que l'expression en cause favorise l'une des valeurs sous-jacentes à la liberté d'expression : *Irwin Toy*, p. 976.

84 The electronically amplified noise at issue here encouraged passers-by to engage in the leisure activity of attending one of the performances held at the club. Generally speaking, engaging in lawful leisure activities promotes such values as individual self-fulfillment and human flourishing. The disputed value of particular expressions of self-fulfillment, like exotic dancing, does not negate this general proposition: *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 489. It follows that the By-law has the effect of restricting expression which promotes one of the values underlying s. 2(*b*) of the *Canadian Charter*.

Les bruits amplifiés électroniquement en l'espèce incitaient les passants à participer à une activité de loisir, soit à assister à l'un des spectacles présentés au bar. De façon générale, la participation à des activités de loisir légales favorise des valeurs comme l'enrichissement et l'épanouissement personnels. La valeur controversée de certaines formes d'expression de l'épanouissement personnel, telle la danse exotique, ne dément pas cette affirmation générale : *R. c. Butler*, [1992] 1 R.C.S. 452, p. 489. Il s'ensuit que le Règlement a pour effet de limiter une expression qui favorise l'une des valeurs sous-jacentes à l'al. 2*b*) de la *Charte canadienne*.

85 We conclude that the City's ban on emitting amplified noise constitutes a limit on free expression under s. 2(*b*) of the *Canadian Charter*.

Nous concluons que l'interdiction par la Ville d'émettre un bruit amplifié restreint la liberté d'expression garantie par l'al. 2*b*) de la *Charte canadienne*.

3.3 *Is the Limit Justified Under Section 1 of the Canadian Charter*?

3.3. *Cette atteinte est-elle justifiée au sens de l'article premier de la Charte canadienne?*

86 We have concluded that the By-law amounts to a limitation on expression protected by s. 2(*b*). The remaining question is whether that limit is justified under s. 1 of the *Canadian Charter*.

Nous avons conclu que le Règlement restreint la liberté d'expression protégée par l'al. 2*b*). Reste à savoir si cette atteinte est justifiée au sens de l'article premier de la *Charte canadienne*.

87 Section 1 of the *Canadian Charter* provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

L'article premier de la *Charte canadienne* dispose :

> La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

2005 SCC 62 (CanLII)

88

Under s. 1, the onus is on the City to show that the limit is directed at a pressing and substantial objective, and that the limit is proportionate in the sense of being rationally connected to the objective, impairing the right to freedom of expression in a reasonably minimal way, and having an effect in terms of curtailment of the right that is proportionate to the benefit sought: *R. v. Oakes*, [1986] 1 S.C.R. 103.

En vertu de l'article premier, il incombe à la Ville de démontrer que la restriction vise un but urgent et réel et qu'elle est proportionnée, en ce sens qu'elle a un lien rationnel avec l'objectif poursuivi, qu'elle porte une atteinte raisonnablement minimale au droit à la liberté d'expression et que son effet attentatoire est proportionnel à l'avantage recherché : *R. c. Oakes*, [1986] 1 R.C.S. 103.

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We conclude that the objective of the limitation is pressing and substantial. The Superior Court judge, Boilard J., defined that objective as combatting noise pollution (paras. 15 and 17). Noise pollution is a serious problem in urban centers, and cities like Montréal are entitled to act reasonably and responsibly in seeking to curb it.

Nous concluons que l'objectif de la restriction est urgent et réel. Le juge Boilard de la Cour supérieure a précisé que cet objectif était la répression de la pollution par le bruit (par. 15 et 17). La pollution par le bruit est un grave problème dans les centres urbains, et les villes comme Montréal peuvent prendre des mesures raisonnables et responsables pour tenter de l'enrayer.

90

This brings us to proportionality. Proportionality is concerned with the *means* chosen to meet the objective. Here the City chose a two-pronged attack on noise pollution. First, it prohibited noises exceeding a stipulated degree of loudness: art. 8. Second, it prohibited particular noises — namely noise that can be heard from the outside and is produced by sound equipment, whether it is inside a building or installed or used outside: art. 9. Noise targeted by art. 9 is prohibited regardless of whether it affects an inhabited place: art. 11. It is important, however, to note that art. 9 does not represent an absolute ban. Unlike *Ramsden*, where no relief from the restrictive by-law was possible, the scheme of the By-law in this case anticipates routine granting of licences as exceptions to the prohibition. Article 20 of the By-law provides that the City may authorize the use of sound equipment prohibited by arts. 9 and 11 in particular circumstances, as for special events, celebrations and demonstrations. The City has exercised this authority and granted permits to use sound equipment on hundreds of occasions: at para. 115, *per* Chamberland J.A. There is no evidence that it has exercised this authority arbitrarily or to curb democratic discourse. Moreover, as discussed above, in para. 34, a contextual reading of the impugned provision leads to the conclusion that art. 9(1) only captures noise that interferes with the peaceful use and enjoyment of the urban

Cela nous amène à la proportionnalité. La proportionnalité est liée au *moyen* choisi pour atteindre l'objectif poursuivi. En l'espèce, la Ville a choisi de s'attaquer à la pollution par le bruit de deux façons. Premièrement, elle a interdit le bruit dont l'intensité est supérieure au niveau prescrit : art. 8. Deuxièmement, elle a interdit certains bruits particuliers — à savoir le bruit audible à l'extérieur produit au moyen d'appareils sonores, que ceux-ci soient situés à l'intérieur d'un bâtiment ou qu'ils soient installés ou utilisés à l'extérieur : art. 9. Le bruit que cible l'art. 9 est interdit, peu importe qu'il touche ou non un lieu habité : art. 11. Il importe toutefois de souligner que l'art. 9 ne crée pas d'interdiction absolue. Contrairement au règlement en cause dans l'affaire *Ramsden*, auquel il n'était pas possible d'échapper, le Règlement qui nous occupe prévoit la possibilité d'obtenir un permis de façon routinière pour déroger à l'interdiction. L'article 20 du Règlement permet en effet à la Ville d'autoriser l'usage d'appareils sonores autrement interdit par les art. 9 et 11, dans des circonstances particulières, notamment à l'occasion d'événements spéciaux, de fêtes et de manifestations. La Ville a exercé ce pouvoir et accordé des permis relatifs à l'usage d'appareils sonores des centaines de fois : par. 115, le juge Chamberland. Aucune preuve n'établit qu'elle aurait exercé ce pouvoir arbitrairement ou dans le but de restreindre le débat démocratique. De plus,

environment. This is the essence of the regulatory scheme the City put in place to deal with noise pollution on its streets.

comme nous l'avons déjà expliqué au par. 34, une interprétation contextuelle de la disposition contestée mène à la conclusion que le par. 9(1) ne vise que le bruit qui interfère avec l'utilisation et la jouissance paisibles de l'environnement urbain. Telle est l'essence du régime réglementaire mis en place par la Ville pour lutter contre la pollution par le bruit dans ses rues.

91

The first question is whether the limit on noise produced by sound equipment is rationally connected to the City's objective of limiting noise in the streets. Clearly it is. Amplified noise emitted into the street may interfere with the activities of people using the street and the buildings around it. People in urban neighbourhoods cannot expect to be free from the sounds of the many activities that go on around them. However, they can and do expect the level of this intrusion to be limited, so that they can enjoy a measure of peace and quiet. This was the City's objective. Presumptively prohibiting the emission of amplified noise was one of the means by which it sought to accomplish that objective.

La première question consiste à se demander si la restriction concernant le bruit produit au moyen d'appareils sonores a un lien rationnel avec l'objectif de la Ville de réprimer le bruit dans ses rues. Manifestement, elle en a un. Le bruit amplifié émis dans la rue peut gêner les activités des gens qui y circulent et qui utilisent les édifices avoisinants. Les gens qui fréquentent les quartiers urbains ne peuvent espérer échapper aux sons que produisent les nombreuses activités qui se déroulent autour d'eux. Cependant, ils peuvent s'attendre et s'attendent en fait à n'être incommodés que modérément et à pouvoir jouir d'une certaine tranquillité. C'est ce que la Ville avait comme objectif. On peut présumer que prohiber l'émission de bruits amplifiés est l'un des moyens qu'elle a choisis pour atteindre cet objectif.

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The second question, and the most difficult, is whether the measure impairs the right in a reasonably minimal way. Boilard J. held that the prohibition on noise that is produced by sound equipment and can be heard from the outside, the second prong of the City's regulatory scheme, was not minimally intrusive because it [TRANSLATION] "completely precluded [the club owner] from communicating its commercial message at a time when and place where the harmful effects of doing so were minimal if not non-existent" (para. 33). This conclusion rests on a literal reading of art. 9(1) which, in our view, must be rejected. He went on to say that arts. 8, 10 and 11 sufficed to permit the City to prevent an escalation of the publicity war between the competing club owners on the street. In his view, the City could maintain reasonable and tolerable limits on noise in the streets by regulating the volume of noise measurable by sound level meters, as it had done for Christmas music played over loudspeakers. Boilard J. therefore concluded that the City

La deuxième question, et la plus difficile, consiste à déterminer si cette mesure constitue une atteinte raisonnablement minimale au droit garanti. Le juge Boilard a statué que l'interdiction du bruit audible à l'extérieur produit au moyen d'appareils sonores, qui constitue le deuxième volet du régime réglementaire mis en place par la Ville, ne représente pas une atteinte minimale parce qu'elle « empêche complètement [le propriétaire du bar] d'exprimer son message commercial à un moment et dans un endroit où les effets dommageables d'une telle activité sont minimes s'ils ne sont pas inexistants » (par. 33). Cette conclusion repose sur une interprétation littérale du par. 9(1) qui, à notre avis, doit être rejetée. Il a ajouté que les art. 8, 10 et 11 suffisaient pour permettre à la Ville d'empêcher l'escalade de la réclame entre les établissements concurrents de la rue. Il estimait que la Ville pouvait maintenir le bruit produit dans la rue dans les limites du raisonnable et du tolérable en réglementant l'intensité du bruit mesurable à l'aide de sonomètres, comme elle

2005 SCC 62 (CanLII)

could have achieved its objective by less intrusive means than a blanket ban on noise produced by sound equipment.

l'avait fait pour la musique de Noël émise par des haut-parleurs. Le juge Boilard a donc conclu que la Ville aurait pu atteindre son objectif en utilisant des moyens moins attentatoires qu'une interdiction générale du bruit produit au moyen d'appareils sonores.

93 On appeal, only Chamberland J.A. found it necessary to consider minimal impairment. We generally endorse his comments and conclusions on this issue.

En appel, seul le juge Chamberland a jugé nécessaire d'examiner la question de l'atteinte minimale. Nous faisons nôtres, dans l'ensemble, ses remarques et ses conclusions sur ce point.

94 First, in dealing with social issues like this one, where interests and rights conflict, elected officials must be accorded a measure of latitude. The Court will not interfere simply because it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way. This is particularly so on environmental issues, where views and interests conflict and precision is elusive: *Canadian Pacific*.

Premièrement, lorsqu'ils s'attaquent à un problème social comme celui-ci, en présence d'intérêts et de droits conflictuels, les représentants élus doivent bénéficier d'une certaine latitude. La Cour n'interviendra pas du seul fait qu'elle peut imaginer un moyen plus adéquat, moins attentatoire, de remédier au problème. Il suffit que la Ville démontre qu'elle a conçu une mesure restrictive raisonnablement adaptée à la situation. Cela vaut particulièrement dans le domaine de la protection de l'environnement, où les avis divergent, les intérêts s'opposent et la précision est inatteignable : *Canadien Pacifique*.

95 Second, it is far from clear that regulation by degree of loudness would effectively deal with the problem of noise pollution and the conflict between commercial concerns seeking to maximize commercial expression and citizens seeking a relatively peaceful and calm environment. Boilard J. erred in suggesting that the City could adequately deal with the problem of noise pollution by regulating the volume of noise measurable by sound level meter. Noise can be emitted randomly in unexpected places. Detecting and prosecuting violations could be difficult. Moreover, the regulation of sound levels alone would not prevent the possibility that multiple, simultaneous noises, each within the legal limit, could cumulatively exceed an acceptable sound level.

Deuxièmement, il est loin d'être évident que le fait de réglementer l'intensité sonore résoudrait efficacement le problème de la pollution par le bruit et le conflit entre les commerçants, qui souhaitent maximiser l'expression commerciale, et les citoyens, qui aspirent à un environnement relativement calme et paisible. Le juge Boilard a estimé, incorrectement, que la Ville pourrait régler adéquatement le problème de la pollution par le bruit en réglementant l'intensité du bruit mesurable à l'aide de sonomètres. Les bruits peuvent être émis de façon aléatoire dans des lieux inattendus. Déceler les infractions et poursuivre les contrevenants pourrait s'avérer difficile. En outre, la réglementation de l'intensité sonore ne pourrait écarter à elle seule la possibilité que plusieurs bruits émis simultanément, dont chacun respecte la limite prescrite, excèdent ensemble un niveau sonore acceptable.

96 Regulation by degree of loudness would not achieve the City's goal of eliminating, subject to exceptions, a certain *type* of sound — that

Réglementer l'intensité sonore ne permettrait pas à la Ville de réaliser son objectif d'éliminer, sauf exception, un certain *type* de son — le bruit

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

produced by sound equipment. Moreover, regulation by sound level meters has definite limits. While some noises may be capable of being monitored in this way, some, like intermittent noises or random noises, cannot. Moreover, the suggestion was unrealistic. As Chamberland J.A. put it: [TRANSLATION] "[I]t would take a forest of sound level meters and an army of qualified technicians lying in waiting to monitor the noise produced by sound equipment at different times of day and night, everywhere in greater Montréal" (para. 119).

produit au moyen d'appareils sonores. En outre, une réglementation fondée sur l'utilisation de sonomètres a des limites certaines. Même s'il est possible de contrôler certains bruits de cette façon, d'autres, comme les bruits intermittents ou aléatoires, ne peuvent l'être. Par ailleurs, cette proposition n'est pas réaliste. Comme l'a dit le juge Chamberland, « [i]l faudrait une forêt de sonomètres et une armée de techniciens qualifiés à l'affût pour contrôler les bruits produits au moyen d'appareils sonores, à différents moments du jour et de la nuit, partout dans le grand Montréal » (par. 119).

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Rights should never be sacrificed to mere administrative convenience. Here, however, the City contends that for a variety of reasons there was really no other practical way to deal with the complex problem it was facing. Accordingly, the City's measures do not go beyond what was reasonably necessary in the circumstances and, as a result, its regulatory plan is entitled to deference.

On ne peut permettre qu'un droit soit assujetti à la simple commodité administrative. Toutefois, en l'espèce, la Ville prétend que, pour une foule de raisons, aucun autre moyen pratique ne lui permettait vraiment de régler le problème complexe auquel elle faisait face. Par conséquent, les mesures prises par la Ville n'outrepassaient donc pas les limites de ce qui était raisonnablement nécessaire dans les circonstances et, de ce fait, la retenue s'impose à l'égard de son régime réglementaire.

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It remains to consider whether the prejudicial effects on free expression flowing from the regulation of sound at issue are proportionate to the beneficial effects of the regulation. In our view, the test supports the conclusion that the By-law is valid.

Il reste à examiner si les effets préjudiciables du Règlement sur la liberté d'expression sont proportionnés à ses effets bénéfiques. À notre avis, le test favorise la validité du Règlement.

99

The expression limited by the By-law consists of noise produced by sound equipment that interferes with the peaceful use and enjoyment of the urban environment. This limitation therefore goes to the permitted forms of expression on city streets, regardless of content. Against this stand the benefits of reducing noise pollution on the street and in the neighbourhood. We acknowledge that in balancing the deleterious and positive effects of the By-law, account must be taken of the fact that the activity was taking place on a street with an active commercial nightlife in a large and sophisticated city. This does not, however, mean that its residents must necessarily be subjected to abuses of the enjoyment of their environment. As Chamberland J.A. put it, [TRANSLATION] "the citizens of a city, even a city the size of Montréal, are entitled to a healthy environment. Noise control is

L'expression restreinte par le Règlement est celle qui consiste à produire, au moyen d'appareils sonores, du bruit qui gêne l'utilisation et la jouissance paisibles de l'environnement urbain. Cette restriction touche donc les modes d'expression permis dans les rues de la Ville, sans égard au contenu. Le Règlement a par ailleurs l'effet bénéfique de réduire la pollution par le bruit dans la rue et les environs. Nous reconnaissons que, dans la pondération des effets préjudiciables et bénéfiques du Règlement, il faut tenir compte du fait que l'activité expressive se déroulait dans une rue commerciale très animée le soir, dans une grande ville moderne. Cela ne signifie pas pour autant que ses résidents doivent nécessairement subir des abus dans la jouissance de leur environnement. Ainsi que l'a écrit le juge Chamberland, « [l]es citoyens d'une ville, même s'il s'agit d'une ville de la taille de Montréal, ont

2005 SCC 62 (CanLII)

unquestionably part of what must be done to improve the quality of this environment" (para. 129). We conclude that the beneficial effects of the By-law outweigh its prejudicial effects.

3.4 *Conclusion on the Constitutional Issue*

100 We conclude that the expression at issue falls within the protected sphere of s. 2(*b*) of the *Canadian Charter* and that the prohibition on noise produced by sound equipment in arts. 9 and 11 of the By-law limits that right. However, that limitation is justified under s. 1 of the *Canadian Charter* as a reasonable limit in a free and democratic society. We therefore conclude that the By-law is constitutional.

4. Disposition

101 In the result, we would allow the appeal, with costs in all appellate courts.

The following are the reasons delivered by

102 BINNIE J. (dissenting) — I have read with interest the reasons of my colleagues the Chief Justice and Deschamps J. upholding the validity of art. 9(1) of the Montréal *By-law concerning noise*, R.B.C.M. 1994, c. B-3, as both within the powers of the City to deal with "nuisances" and as a justified limit on Montrealers' freedom of expression. With respect, I reach a different conclusion on both counts. Although the circumstances of the present dispute do not call for much moral indignation (a noise war between competing strip joints), it remains true that operators of the strip joints cannot lawfully be convicted under an invalid law any more than anyone else. Article 9(1) of the by-law imposes a general ban on "noise produced by sound equipment" which includes, on the face of it, everything from loudspeakers blasting outside a strip club to the quiet outdoor use of a radio in an Outremont garden, to the ringing of a cell phone in front of the Palais de Justice to the squawk of a baby alarm. I say "on the face of it" because the significant legal issue in this appeal is the extent to

droit à un environnement sain. Le contrôle du bruit fait indubitablement partie des gestes à poser pour améliorer la qualité de cet environnement » (par. 129). Nous concluons que les effets bénéfiques du Règlement dépassent ses effets préjudiciables.

3.4 *Conclusion sur la question constitutionnelle*

Nous concluons que l'expression en cause entre dans le champ d'application de la protection offerte par l'al. 2*b*) de la *Charte canadienne* et que la prohibition du bruit produit au moyen d'appareils sonores édictée aux art. 9 et 11 du Règlement a restreint ce droit. Cependant, cette atteinte est justifiée au sens de l'article premier de la *Charte canadienne*, parce qu'elle constitue une limite raisonnable dans une société libre et démocratique. Nous concluons donc que le Règlement est constitutionnel.

4. Dispositif

En conséquence, nous sommes d'avis d'accueillir le pourvoi, avec dépens à tous les niveaux d'appel.

Version française des motifs rendus par

LE JUGE BINNIE (dissident) — J'ai lu avec intérêt les motifs de mes collègues, la Juge en chef et la juge Deschamps, confirmant la validité du par. 9(1) du *Règlement sur le bruit* de la Ville de Montréal, R.R.V.M. 1994, ch. B-3, au motif qu'il relève des pouvoirs de la Ville de remédier aux « nuisances » et constitue une limite justifiée à la liberté d'expression des Montréalais. En toute déférence, j'arrive à une conclusion différente sur ces deux points. Bien que les circonstances du présent litige soulèvent peu d'indignation morale (une guerre du bruit entre deux clubs de danseuses érotiques concurrents), il demeure que les exploitants de clubs de danseuses érotiques ne peuvent pas plus que quiconque être légalement reconnus coupables en application d'une loi invalide. Le paragraphe 9(1) du règlement impose une interdiction générale du « bruit produit au moyen d'appareils sonores » ce qui, de prime abord, inclut tout bruit, de celui que crachent des haut-parleurs à l'extérieur d'un club de danseuses érotiques à celui que produit l'écoute paisible de la radio dans un jardin d'Outremont, en passant par la

which the Court can write limitations into a by-law to implement the Court's view of what *would be* a reasonable measure against noise pollution.

sonnerie d'un téléphone cellulaire devant le palais de justice et les cris qui s'échappent d'un moniteur pour bébé. Je dis « de prime abord », parce que la question de droit importante que soulève le présent pourvoi est celle de savoir dans quelle mesure la Cour peut introduire des limites dans un règlement pour imposer sa conception de ce que *serait* une mesure raisonnable contre la pollution sonore.

Generally speaking, it is the job of the legislative body to craft its own limits. Anti-noise by-law measures are of three types. The first prohibits noise that exceeds objective measurable limits (e.g., a set level of decibels). The second prohibits noise by subjective criteria (e.g., noise that interferes with the quality of life). The third prohibits noise by source (e.g., sounding car horns in a hospital zone). My colleagues' interpretation converts a type 3 provision into a type 2 provision. This shift was not sought by the appellant City of Montréal or suggested by the courts below. Indeed it contradicts the City's intent both as expressed in the by-law and as submitted to this Court in written and oral argument. I believe the City is entitled to the Court's pronouncement on the validity of art. 9(1) as written and as the City intended it to be interpreted. Taken on that basis, I would say that art. 9(1) is *ultra vires* the City's legislative authority.

103 De façon générale, c'est à l'organisme législatif qu'il appartient d'établir ses propres limites. Les mesures réglementaires antibruit sont de trois types. Le premier consiste à interdire le bruit qui excède une limite objective mesurable (p. ex. un niveau prescrit de décibels). Le deuxième, à interdire le bruit en fonction d'un critère subjectif (p. ex. le bruit qui interfère avec la qualité de vie). Le troisième, à interdire le bruit émanant d'une source en particulier (p. ex. le son d'un klaxon dans une zone d'hôpital). L'interprétation proposée par mes collègues transforme une mesure du type 3 en une mesure du type 2. Pareille transformation n'a été ni demandée par l'appelante, la Ville de Montréal, ni suggérée par les tribunaux d'instance inférieure. En fait, elle est contraire à l'intention de la Ville, à la fois telle qu'elle l'a exprimée dans le règlement et telle qu'elle l'a présentée à la Cour dans son argumentation écrite et sa plaidoirie. J'estime que la Ville a droit à une décision de la Cour sur la validité du par. 9(1) tel qu'il est libellé et tel que la Ville voulait qu'il soit interprété. Sur ces bases, je suis d'avis que le par. 9(1) excède la compétence législative de la Ville.

Further, while I agree with my colleagues that art. 9(1) of the by-law interferes with the free expression of Montrealers, I disagree that such interference can be justified under either the Quebec *Charter of human rights and freedoms*, R.S.Q., c. C-12, or the *Canadian Charter of Rights and Freedoms*. In my view, art. 9(1) is a clear case of legislative overkill. This was the view taken by Fish J.A. (as he then was) and Letarte J. (*ad hoc*) in the Quebec Court of Appeal ([2002] R.J.Q. 2986) and I agree with them. It follows that the respondent was convicted under an invalid law. I would therefore dismiss the appeal.

104 De plus, bien que je convienne avec mes collègues que le par. 9(1) du règlement porte atteinte à la liberté d'expression des Montréalais, je ne suis pas d'accord pour dire que cette atteinte peut se justifier au sens de la *Charte des droits et libertés de la personne*, L.R.Q., ch. C-12, ou de la *Charte canadienne des droits et libertés*. À mon avis, le par. 9(1) est un cas manifeste d'excès législatif. C'est l'opinion qu'ont exprimée les juges Fish (maintenant juge de notre Cour) et Letarte (*ad hoc*) de la Cour d'appel du Québec ([2002] R.J.Q. 2986) et je la partage. Il s'ensuit que l'intimée a été reconnue coupable en application d'une loi invalide. Je serais donc d'avis de rejeter le pourvoi.

2005 SCC 62 (CanLII)

A. The City's Position on the Scope of Article 9(1)

105 The City's lawyer, Maître Serge Barrière, was in the course of explaining that [TRANSLATION] "the City of Montréal has the power not only to prohibit nuisances, but also to define them", when he was interrogated by my colleague LeBel J.:

> [TRANSLATION] **MR. JUSTICE LeBEL:** But, let's say you had . . . if, for example, we take the case of the loudspeakers we are concerned with today, if the only noise the loudspeaker emitted into the street was a relatively quiet sort of whispering, could you define that as a nuisance?
>
> **MR. BARRIÈRE:** Well, I would argue that you could. If I didn't think so, I wouldn't be here.

106 This interpretation of the absolute nature of the ban was also considered correct by counsel appointed by the Court as *amicus curiae*:

> [TRANSLATION] **MR. JUSTICE BINNIE:** May I ask a question about the scope of art. 9? In the case of a person with throat cancer [who] can only speak using a microphone or an amplifier to make himself heard, is that prohibited by . . .?
>
> **MR. [PAQUIN]:** If he was heard outside, absolutely.
>
> **MR. JUSTICE BINNIE:** Yes, if he's walking outside, he's in violation.
>
> **MR. [PAQUIN]:** He's in violation of art. 9, or if he was talking with . . . or if he was talking to his wife on his balcony, and their conversation was heard from the sidewalk by passers-by . . . .

107 Counsel for the City was moved to comment on this exchange in his reply argument:

> [TRANSLATION] . . . the question asked by Justice Binnie gave me pause. It seems to me . . . I can suggest a partial answer, perhaps . . . it seems to me that it's unlikely a police officer would issue a statement of offence for a sound device of this kind, and if one did, I would think that any judge hearing the complaint could, by applying the methods of interpretation approved by the Court, conclude that this was not sound equipment . . . .

A. La position de la Ville sur la portée du par. 9(1)

Alors que l'avocat de la Ville, maître Serge Barrière, était en train d'expliquer que « la Ville de Montréal a le pouvoir non seulement de prohiber les nuisances mais de les définir », mon collègue, le juge LeBel, l'a questionné :

> **MONSIEUR LE JUGE LeBEL :** Mais, disons, si vous aviez . . . si, par exemple, prenons le cas des haut-parleurs qui nous occupe aujourd'hui, si le seul bruit que diffusait le haut-parleur dans la rue était un espèce de chuchotement assez bas, est-ce que vous pourriez définir ça comme une nuisance?
>
> **MAÎTRE BARRIÈRE :** Bien, je prétends que oui, si je prétendais que non, je ne serais pas devant vous.

L'avocat désigné par la Cour comme *amicus curiae* a aussi souscrit à cette interprétation quant au caractère absolu de l'interdiction :

> **MONSIEUR LE JUGE BINNIE :** Est-ce que je peux poser une question sur la portée de l'article 9? Dans le cas d'une personne qui a un cancer de gorge, [. . . qui] ne peut parler qu'avec un micro ou un amplificateur pour se faire entendre, est-ce que c'est prohibé par . . .?
>
> **MAÎTRE [PAQUIN] :** S'il s'entendait à l'extérieur, absolument.
>
> **MONSIEUR LE JUGE BINNIE :** Oui, s'il se promène à l'extérieur, il est en contravention.
>
> **MAÎTRE [PAQUIN] :** Il est en contravention à l'article 9 ou s'il parlait avec . . . ou s'il parlait sur son balcon à sa conjointe et que sa conversation était entendue aux abords du trottoir par des passants . . .

L'avocat de la Ville a jugé bon de commenter cette conversation dans l'argumentation qu'il a présentée en réponse :

> . . . la question posée par monsieur le juge Binnie m'a interpell[é] quelque peu. Il me semble . . . je peux suggérer un élément de réponse peut-être, il me semble que ce serait peu probable qu'un policier dresse un constat d'infraction pour un appareil sonore de ce genre-là et si c'était le cas, il me semble qu'un juge saisi de la plainte pourrait avec les méthodes d'interprétation que la Cour préconise arriver à la conclusion que ce n'est pas un appareil sonore . . .

2005 SCC 62 (CanLII)

108

In its factum the City argues that [TRANSLATION] "pollution results not only from the intensity of the sounds, but also from the addition of all the different types of sounds from different sources that make up the environmental noise" (para. 71), and that "environmental noise cannot be combatted effectively unless unnecessary noises are eliminated" (para. 75). Taken together, City Hall's submissions amount to the contention that all "noise produced by sound equipment" is legitimately banned by art. 9(1), but that prosecutorial discretion will pick and choose amongst noises which may not rise to the level of nuisances in themselves to suppress what, in the City's view, are "unnecessary" contributors to the general ambiant noise level. The exercise of this prosecutorial discretion is not governed by any criteria expressed in art. 9(1). The City apparently rests its noise strategy on the idea that the sweeping discretion given to by-law enforcement officials will, everybody hopes, be exercised against bringing absurd prosecutions.

Dans son mémoire, la Ville soutient que « la pollution résulte non seulement de l'intensité des sons mais de l'addition des sons de toutes sortes et origines qui forment le bruit ambiant » (par. 71) et qu'« on ne s'attaque efficacement au bruit ambiant que si on parvient à retirer les bruits non nécessaires » (par. 75). Les observations de la Ville équivalent en somme à la prétention que le par. 9(1) interdit légitimement tout « bruit produit au moyen d'appareils sonores », mais que la poursuite choisira à sa discrétion de supprimer, parmi les bruits qui ne s'élèvent peut-être pas en eux-mêmes au rang de nuisance, ceux qui, de l'avis de la Ville, contribuent « inutilement » au niveau général du bruit ambiant. L'exercice du pouvoir discrétionnaire de la poursuite n'est régi par aucun critère formulé au par. 9(1). La stratégie de la Ville en matière de bruit repose apparemment sur l'espoir que les agents responsables de l'application du règlement exerceront, comme chacun le souhaite, leur immense pouvoir discrétionnaire de façon à empêcher les poursuites absurdes.

109

My conclusion on the merits is that, while the City is entirely within its authority to combat noise pollution, it goes too far when the fight includes treating as a "nuisance" any audible signal from "sound equipment" without regard to the potential, if any, for disturbance or annoyance. The *Charter of the city of Montreal, 1960*, S.Q. 1959-60, c. 102, authorizes City Hall to define and prohibit "nuisances", but as my colleagues agree, "this does not mean that the power to define is unlimited" (para. 42). In my view, art. 9(1) is oppressive and should, as the Quebec Court of Appeal determined, be sent back to City Hall for further consideration and modification.

Je conclus, sur le fond, que la Ville a pleinement compétence pour combattre la pollution sonore, mais qu'elle va trop loin lorsque, pour ce faire, elle traite comme une « nuisance » tout signal audible produit au moyen d'« appareils sonores », sans égard à la possibilité qu'il soit ou non désagréable ou incommodant. La *Charte de la Ville de Montréal, 1960*, S.Q. 1959-60, ch. 102, autorise le conseil municipal à définir et à prohiber les « nuisances », mais, comme en conviennent mes collègues, « [c]ela ne veut cependant pas dire que le pouvoir de définition est illimité » (par. 42). À mon avis, le par. 9(1) est abusif et devrait, comme la Cour d'appel du Québec l'a statué, être renvoyé devant le conseil municipal pour réexamen et modification.

B. General Principles of Interpretation

B. Principes généraux d'interprétation

110

I accept, of course, the principles of "contextual" interpretation of statutes and by-laws laid down in our cases and in part referred to by my colleagues. Our disagreement is about the *application* of those interpretive principles. In my view, with respect, my colleagues resort to a combination of reading expressions "up", reading expressions

Je reconnais évidemment les principes d'interprétation « contextuelle » des lois et des règlements établis par notre jurisprudence et auxquels mes collègues se reportent en partie. Notre désaccord porte sur l'*application* de ces principes d'interprétation. Avec déférence, j'estime que la démarche de mes collègues, qui combinent plusieurs techniques

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

"down", reading words "out" and reading words "in" that goes beyond what a court is authorized to do by way of interpretation and amounts to impermissible judicial amendment. Such radical surgery is sometimes done as a matter of constitutional *remedy* in a proper case, but here it is not being done as a remedy after finding a *Charter* breach. It is being imposed at the prior stage of interpretation, when the Court's mandate is simply to ascertain the intention of the legislators, not to remedy wrongs.

pour tantôt accentuer, tantôt atténuer le sens du règlement, ainsi qu'y ajouter et en supprimer des mots, va au-delà de ce qu'un tribunal peut faire lorsqu'il interprète un texte législatif et constitue une modification judiciaire inadmissible. Il arrive que les tribunaux procèdent à un remodelage aussi radical d'un texte inconstitutionnel à titre de *réparation* lorsque la situation s'y prête, mais, en l'occurrence, il ne s'agit pas d'une mesure réparatrice accordée à la suite d'une atteinte préalablement établie à un droit garanti par la *Charte canadienne*. En l'espèce, ce remodelage est imposé à l'étape préliminaire de l'interprétation, alors que la mission de la Cour consiste simplement à déterminer l'intention du législateur et non à remédier à un préjudice.

111 The Court was quite right in recent years to have adopted a contextual approach (as opposed to a purely literal approach) to statutory interpretation, but that does not mean that after proper application of a contextual approach the Court cannot conclude that in fact the legislators meant what they said. As noted in *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, it is sometimes stated, when a court considers the grammatical and ordinary sense of a provision, that "[t]he legislator does not speak in vain" (p. 838). See also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 37.

C'est à juste titre que la Cour a adopté, au cours des dernières années, une méthode d'interprétation contextuelle (par opposition à une méthode d'interprétation purement littérale) des lois. Cela ne signifie toutefois pas qu'après avoir appliqué correctement une méthode d'interprétation contextuelle, la Cour ne peut conclure que le législateur a effectivement voulu dire ce qu'il a dit. Comme l'a souligné la Cour dans *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, on affirme parfois, lorsqu'un tribunal se penche sur le sens ordinaire et grammatical d'une disposition, que « [l]e législateur ne parle pas pour ne rien dire » (p. 838). Voir aussi *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 37.

112 The provision in question is found in art. 9(1) of the by-law and reads as follows:

> **9.** In addition to the noise referred to in article 8, the following noises, where they can be heard from the outside, are specifically prohibited:
>
> (1) noise produced by sound equipment, whether it is inside a building or installed or used outside;

La disposition en cause est formulée ainsi au par. 9(1) du règlement :

> **9.** Outre le bruit mentionné à l'article 8, est spécifiquement prohibé lorsqu'il s'entend à l'extérieur :
>
> 1° le bruit produit au moyen d'appareils sonores, qu'ils soient situés à l'intérieur d'un bâtiment ou qu'ils soient installés ou utilisés à l'extérieur;

113 As my colleagues interpret art. 9(1) in paras. 29-33 of their judgment it *should* read:

> **9.** The following noises, where they can be heard from the outside, are specifically prohibited

Suivant l'interprétation qu'en donnent mes collègues, aux par. 29 à 33 de leurs motifs, le par. 9(1) *devrait* être ainsi rédigé :

> **9.** Est spécifiquement prohibé lorsqu'il s'entend à l'extérieur :

(1) disruptive noise emitted by sound equipment located inside a building or installed or used outside the building that stands out over other environmental noise and that interferes with citizens' peaceful enjoyment of public spaces;

The position of the City of Montréal in its written argument and in oral argument (as already referred to) is that art. 9(1) means what it says.

We all take as our starting point Driedger's statement of the proper contextual approach to interpretation:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [Emphasis added.]

(E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

This "modern approach" was affirmed in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, and subsequently elaborated upon in *Bell ExpressVu*. I propose to proceed as the Court did in *Bell ExpressVu*, namely to look first at the "grammatical and ordinary sense" of the words used by the legislators in art. 9(1), then to the "broader context", and finally to some considerations specific to the scheme of the Montréal charter and the Montréal noise by-law, their object, and the intention of the respective legislators. My conclusion, as will be seen, is that there is no ambiguity in art. 9(1), latent or otherwise. As in *Bell ExpressVu* itself, a full contextual analysis demonstrates that the legislators intended what they said.

1. *Grammatical and Ordinary Sense*

As my colleagues note, *Larousse* defines the word "*bruit*" as a [TRANSLATION] "[c]ombination of sounds produced by vibrations that can be perceived by hearing" (*Nouveau Larousse Encyclopédique*

1º le bruit perturbateur qui émane d'un appareil sonore situé à l'intérieur d'un bâtiment ou installé ou utilisé à l'extérieur du bâtiment, qui ressort des autres bruits ambiants et qui interfère avec la jouissance paisible des espaces publics par les citoyens;

Rappelons que la Ville de Montréal a soutenu, dans son argumentation écrite et dans sa plaidoirie, que le sens du par. 9(1) est exactement celui qui est exprimé par son libellé.

114 Nous prenons tous comme point de départ l'énoncé de Driedger sur la méthode d'interprétation contextuelle :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. [Je souligne.]

(E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), p. 87)

115 Cette « méthode moderne » d'interprétation a été reconnue dans *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, puis étoffée dans *Bell ExpressVu*. Je propose de procéder comme la Cour l'a fait dans *Bell ExpressVu*, c'est-à-dire de commencer par l'analyse du « sens ordinaire et grammatical » des termes employés par le législateur au par. 9(1), d'examiner ensuite le « contexte élargi » et de terminer par l'examen de certaines considérations propres à l'esprit de la *Charte de la Ville de Montréal* et du *Règlement sur le bruit* de la Ville de Montréal, à leur objet et à l'intention de leur législateur respectif. Ainsi que nous le verrons, j'arrive à la conclusion que le par. 9(1) ne comporte aucune ambiguïté, latente ou autre. Comme dans *Bell ExpressVu,* un examen exhaustif du contexte démontre que le législateur voulait effectivement dire ce qu'il a dit.

1. *Le sens ordinaire et grammatical*

116 Comme le font observer mes collègues, le *Nouveau Larousse Encyclopédique* (2001), vol. 1, p. 233, définit un « bruit » comme un « [e]nsemble des sons produits par des vibrations, perceptibles

2005 SCC 62 (CanLII)

(2001), vol. 1, at p. 233). It therefore follows, as they acknowledge at para. 24, that this word "has an even broader meaning [than 'noise']. Hence, noise in itself is not necessarily a nuisance, but there is no contesting that it can be a nuisance" (emphasis added).

par l'ouïe ». Il s'ensuit donc, ainsi qu'elles le reconnaissent au par. 24, que « [c]e mot a une portée très vaste. [. . .] Le bruit en lui-même n'est donc pas nécessairement une nuisance, et pourtant il est incontestable qu'il peut constituer une nuisance » (je souligne).

117 We agree therefore that on a grammatical reading, art. 9(1) includes noise produced by sound equipment which is *not* a nuisance. To acknowledge that "noise" comes in different types and volumes is not to say that the word itself is ambiguous. Supporters of art. 9(1) conjure up visions of competing strip clubs, ghetto blasters ruining Sunday afternoons in Murray Park, or thousands of angry protestors marching along boulevard René-Lévesque hyperventilating through megaphones. However, as stated, the City's lawyer in this Court did not shrink from acknowledging that the actual force and scope of art. 9(1) is a good deal more sweeping than those examples would suggest, and that this sweeping result was intended by his clients at City Hall, who believe that all will be cured by the sensible exercise of prosecutorial discretion.

Nous convenons donc que, suivant son sens grammatical, le par. 9(1) inclut le bruit produit au moyen d'appareils sonores qui *n*'est *pas* une nuisance. Reconnaître que le « bruit » se présente sous différentes formes et varie en intensité ne signifie pas que ce terme est en soi ambigu. Les défenseurs du par. 9(1) font planer le spectre de la concurrence entre clubs de danseuses, de dimanches après-midi au parc Murray gâchés par des radiocassettes tonitruantes ou de milliers de manifestants enragés s'époumonant dans des mégaphones le long du boulevard René-Lévesque. Or, comme je l'ai dit, l'avocat de la Ville n'a pas reculé et a reconnu devant la Cour que l'effet et la portée réels du par. 9(1) sont beaucoup plus vastes que ces exemples le laisseraient croire, et que le conseil municipal, qu'il représente, souhaitait qu'ils soient aussi vastes, croyant que l'exercice judicieux du pouvoir discrétionnaire de la poursuite résoudrait la question.

118 Read in its grammatical and ordinary sense, art. 9(1) would preclude a Montrealer sitting in his garden listening to Mozart playing softly through an open window from a kitchen radio. It would catch people who can only make themselves heard using "sound equipment", such as Dr. Stephen Hawking, one of the world's foremost theoretical physicists, who suffers from amyotrophic lateral sclerosis (ALS or Lou Gehrig's disease) and can only communicate through a voice box. Were we to be fortunate enough to sit on a roof garden in Montréal with one of these individuals, talking at normal conversational levels, their communications ("noise produced by sound equipment") would potentially be considered a nuisance but ours would not. The City prosecutors would be unlikely to lay a charge, of course, but in the City's view enforcement would be a matter of discretion, depending apparently on whether City Hall regards their noise as "unnecessary".

Interprété suivant son sens grammatical et ordinaire, le par. 9(1) empêcherait un Montréalais assis dans son jardin, d'écouter par une fenêtre ouverte la radio de la cuisine qui joue doucement du Mozart. Il s'appliquerait aux personnes qui ne peuvent se faire entendre qu'au moyen d'un « appareil sonore », comme Stephen Hawking, l'un des plus éminents physiciens théoriciens au monde, qui souffre de sclérose latérale amyotrophique (SLA ou maladie de Lou Gehrig) et qui communique à l'aide d'un synthétiseur vocal. Aurions-nous la chance de converser à voix normale avec l'une ou l'autre de ces personnes sur une terrasse-jardin à Montréal, que leurs paroles (un « bruit produit au moyen d'appareils sonores ») pourraient être considérées comme une nuisance, mais pas les nôtres. Bien sûr, les procureurs de la Ville ne porteraient vraisemblablement aucune accusation, mais selon la Ville, ils auraient le pouvoir discrétionnaire d'appliquer le règlement en fonction, semble-t-il, de ce que la Ville considère comme un bruit « inutile ».

2005 SCC 62 (CanLII)

119

Strolling north from St. Catherine Street, we would reach the student ghetto east of the main McGill University Campus. An undergraduate studying to the music of an Ella Fitzgerald CD would stay within the law if she kept her windows closed, but opening the sash to let in some air and a spring breeze would allow the music to escape and precipitate an exercise of the "prosecutor's discretion" under art. 9(1) of the by-law. She, like Professor Hawking or the young mother sitting on her front porch listening to the mewling of her baby over a baby alarm (whether or not attached to the building) would be contributing noise to the Montréal environment by means of a prohibited source, and would thereby run afoul of art. 9(1) of the by-law.

En bifurquant vers le nord à partir de la rue Ste-Catherine, nous arriverions dans le quartier étudiant situé à l'est du campus principal de l'Université McGill. La candidate au baccalauréat qui étudierait au son d'un CD d'Ella Fitzgerald respecterait la loi en gardant ses fenêtres fermées, mais les ouvrirait-elle pour faire entrer l'air et la brise printanière qu'elle permettrait à la musique de s'échapper et déclencherait l'exercice du « pouvoir discrétionnaire de la poursuite » conféré par le par. 9(1) du règlement. À l'instar du Professeur Hawking ou de la jeune mère de famille assise sous le porche de sa maison qui écoute les gazouillis de son nourrisson à l'aide d'un moniteur pour bébé (fixé ou non à l'immeuble), elle ajouterait un bruit émanant d'une source interdite à l'environnement sonore de Montréal et désobéirait ainsi au par. 9(1) du règlement.

120

The above-mentioned encounters with "sound equipment" are all "imaginable circumstances which could commonly arise in day-to-day life" (*R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 516), and may therefore be used legitimately to test the validity of the City's enactment.

Les utilisations d'« appareils sonores » décrites dans les paragraphes qui précèdent sont toutes des « circonstances imaginables qui pourraient se présenter couramment dans la vie quotidienne » (*R. c. Goltz*, [1991] 3 R.C.S. 485, p. 516) et, de ce fait, servir légitimement à jauger la validité du texte édicté par la Ville.

121

To this point I have been dealing with what art. 9(1) says. However, my colleagues hold that what it says is not what it means. They say context shows that there is an "latent ambiguity" (para. 24). Accordingly, I turn to consider the context.

Jusqu'à maintenant, je m'en suis tenu au libellé du par. 9(1). Or, mes collègues estiment que cette disposition n'a pas exactement le sens exprimé par son libellé. Elles affirment que le contexte révèle une « ambiguïté latente » (par. 24). J'aborderai donc maintenant la question du contexte.

2. *The Broader Context*

2. *Le contexte élargi*

122

It is true, as my colleagues state, that "[w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context" (para. 10). Ambiguity is a conclusion that may be arrived at *after* looking at the broader context (*Bell ExpressVu*, at para. 29; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26, at para. 43). However, in this case, the context reinforces rather than detracts from the ordinary grammatical meaning of the words used by the legislators. There is no ambiguity, in my opinion, and thus no gateway at this interpretative

Il est vrai, comme mes collègues l'affirment, que « [d]es mots en apparence clairs et exempts d'ambiguïté peuvent, en fait, se révéler ambigus une fois placés dans leur contexte » (par. 10). On ne devrait conclure à l'existence d'une ambiguïté qu'*après* avoir examiné le contexte élargi (*Bell ExpressVu*, par. 29; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26, par. 43). Or, en l'espèce, le contexte renforce le sens grammatical ordinaire des termes employés par le législateur plutôt que d'en diverger. Il n'existe, à mon avis, aucune ambiguïté et l'étape

2005 SCC 62 (CanLII)

stage through which the Court can usher in "creative" remedies.

de l'interprétation ne débouche pas sur une conclusion qui permettrait à la Cour d'exercer sa créativité pour accorder réparation.

a. The Environmental Law Context

a. Le contexte du droit de l'environnement

123 I agree with my colleagues that the by-law is directed to "protect against noise pollution" (para. 26). The City is therefore dealing with a subject matter a good deal more specific than was the case in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, in which our Court rejected a claim that environmental protection legislation was unconstitutionally "vague". Gonthier J., for the majority, wrote that:

Je conviens avec mes collègues que le règlement a pour objet « la protection contre la pollution sonore » (par. 26). L'intervention de la Ville porte donc sur une question beaucoup plus précise que dans l'arrêt *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031, où notre Cour a rejeté la prétention d'« imprécision » inconstitutionnelle d'une loi sur la protection de l'environnement. S'exprimant au nom de la majorité, le juge Gonthier a écrit :

> In the context of environmental protection legislation, a strict requirement of drafting precision might well undermine the ability of the legislature to provide for a comprehensive and flexible regime.
>
> . . .
>
> Legislators must have considerable room to manoeuvre in the field of environmental regulation, and s. 7 [of the *Charter*] must not be employed to hinder flexible and ambitious legislative approaches to environmental protection. [paras. 52 and 59]

> Dans le contexte des lois sur la protection de l'environnement, toute exigence stricte de précision dans la formulation pourrait avoir pour effet de limiter la capacité du législateur à établir un régime complet et souple.
>
> . . .
>
> Les législateurs doivent disposer d'une grande marge de manœuvre en matière de réglementation environnementale, et l'art. 7 [de la *Charte*] ne doit pas nuire aux démarches législatives souples et d'envergure en matière de protection de l'environnement. [par. 52 et 59]

124 In my view, with respect, *Canadian Pacific* has no application to the present appeal. In the first place, the enactment in that case not only required the prosecution to establish the release of a "contaminant" into the natural environment, but added the requirement that such release must cause harm (i.e., in contrast to art. 9(1) where there is no requirement to show a harmful effect). Secondly, here we are not dealing with a general environmental law that applies to all manner of pollution and is therefore necessarily couched in general terms. The Montréal by-law is directed solely and exclusively at *noise* pollution. The regulatory parameters of "noise" are well established, and may include level, place, type and source limitations, as my colleagues point out, as well as qualitative standards. While I agree that the courts cannot insist on a greater level of drafting precision than the subject matter permits, such indulgence is not applicable to this by-law, which

En toute déférence, j'estime que l'arrêt *Canadien Pacifique* ne s'applique pas au présent pourvoi. Premièrement, la loi dans cette affaire obligeait la poursuite à prouver non seulement qu'un « contaminant » avait été déposé dans l'environnement naturel, mais aussi que ce rejet avait causé un dommage (contrairement au par. 9(1), qui n'exige pas la preuve d'un effet dommageable). Deuxièmement, nous ne sommes pas en présence ici d'une loi générale sur l'environnement qui s'applique à toutes les formes de pollution et qui est donc nécessairement formulée en termes généraux. Le règlement de la Ville de Montréal vise uniquement et exclusivement la pollution par le *bruit*. Les paramètres de réglementation du « bruit » sont bien établis et peuvent comporter, outre des normes qualitatives, des limites touchant l'intensité, le lieu, le type et la source du bruit, comme l'ont souligné mes collègues. Bien que je convienne que les tribunaux

2005 SCC 62 (CanLII)

shows in its own provisions other than art. 9(1) that a sensible level of precision *can* be achieved. The City's problem is that after setting out specific provisions dealing with noise classified by quality and impact, it added a general ban on noise classified only by source and, as we all agree, source as such has no necessary connection with *either* noise quality *or* harmful impact and, therefore, source as such has no necessary connection with "nuisance". Of course, the City could have employed *qualitative* limitations in art. 9(1), for example to prohibit a level of noise [TRANSLATION] "that disturbs the peace and tranquillity of persons . . . in the vicinity", as in the noise by-law upheld by the Quebec Court of Appeal in *R. c. L'Heureux*, [1996] Q.J. No. 2135 (QL). My colleagues (impermissibly in my view) seek to read art. 9(1) in the same way as if its language tracked the Quebec City by-law, but this approach fails to respect the very different language used by the Montréal legislators. There are different approaches to noise standards. The problem with art. 9(1) is that it employs none of them to qualify the general ban on "noise produced by sound equipment".

ne peuvent exiger dans la formulation d'un texte législatif un degré de précision plus élevé que ne le permet son objet, cette indulgence ne s'applique pas au règlement, dont les dispositions mêmes, hormis le par. 9(1), démontrent qu'il est *possible* d'atteindre un niveau de précision judicieux et raisonnable. Le problème de la Ville tient à ce qu'après avoir formulé certaines dispositions précises régissant le bruit en fonction de sa qualité et de ses effets, elle a ajouté une interdiction générale qui repose exclusivement sur la source du bruit. Or, et nous sommes unanimes sur ce point, la source du bruit n'est pas en soi nécessairement liée *ni* à la qualité *ni* aux effets préjudiciables du bruit et n'est donc pas nécessairement liée à la notion de « nuisance ». La Ville aurait évidemment pu inclure d'autres limites *qualitatives* dans le par. 9(1) en interdisant, par exemple, le bruit dont l'intensité « trouble la paix ou la tranquillité des personnes [. . .] dans le voisinage », comme l'interdit le règlement sur le bruit dont la validité a été confirmée par la Cour d'appel du Québec dans *R. c. L'Heureux*, [1996] J.Q. n° 2135 (QL). Mes collègues cherchent (selon moi, à tort) à interpréter le par. 9(1) comme si son libellé reproduisait celui du règlement de la Ville de Québec, mais cette façon de faire ne respecte pas la formulation très différente retenue par le législateur montréalais. Il existe différentes façons de fixer des normes sur le bruit. Si l'article 9 pose problème, c'est parce qu'il n'en utilise aucune pour restreindre la portée de l'interdiction générale du « bruit produit au moyen d'appareils sonores ».

b. The Civil Liberties Context

b. Le contexte des libertés civiles

125 The more important general contextual factor is freedom of expression. As my colleagues acknowledge at para. 85, art. 9(1) *even as they interpret it* limits the guarantee of freedom of expression under the *Canadian Charter*. Verbal communications are apparently to be restricted to the hearing range of an unaided human voice, which puts open-air politics in Montréal back to the era before Georges-Étienne Cartier addressed the crowd from the balcony at City Hall.

Le facteur contextuel général le plus important est celui de la liberté d'expression. Comme mes collègues le reconnaissent au par. 85, le par. 9(1) porte atteinte à la liberté d'expression que garantit la *Charte canadienne*, *même selon l'interprétation qu'elles attribuent à cette disposition*. Les communications verbales doivent apparemment être limitées aux fréquences audibles produites par la seule voix humaine, ce qui ramène les activités politiques à ciel ouvert à Montréal à une époque antérieure à celle où Georges-Étienne Cartier s'est adressé à la foule du haut du balcon de l'hôtel de ville.

2005 SCC 62 (CanLII)

126 Of course municipal enactments are to be read purposefully. Nevertheless, where enactments infringe rights under the Quebec *Charter* or the *Canadian Charter*, the Court has long taken the view that it should not remedy the deficiencies by rewriting the legislative text. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the government argued that if the law fell below the constitutional standard for search and seizure, the Court should read an "appropriate standard" into the provisions. The Court declined to do so, explaining

> it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. [p. 169]

127 As stated, the City did not request the Court to read the limitations proposed by my colleagues into its noise by-law. To do so, particularly in a case dealing with freedom of expression, is to co-opt the Court to transform the *minimum* standard required by the *Charter* of Quebec or Canada into the *maximum* freedom allowed under the by-law. That, with respect, is not the proper role of the Court.

c. The Legislative Context

128 My colleagues write that "[t]he overall context in which a provision was adopted can be determined by reviewing its legislative history and inquiring into its purpose" (para. 17). I agree that noise pollution is a form of public nuisance and that a purpose of the Montréal charter is to allow the City legislators to identify and prohibit those parts of the universe of noise that can be expected to [TRANSLATION] "cause serious inconvenience or adversely affect either public health or the welfare of the community, or of a significant part of the community" (*per* Gendreau J. in *Anctil v. Cour municipale de Ville de La Pocatière*, [1973] C.S. 238, at p. 244).

Les règlements municipaux doivent évidemment être interprétés en fonction de leur objet. Néanmoins, lorsqu'un texte législatif porte atteinte aux droits garantis par la *Charte canadienne* ou par la *Charte* québécoise, la Cour a décidé depuis longtemps qu'elle ne devait pas récrire le texte pour remédier à ses lacunes. Dans *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, le gouvernement a soutenu que si la loi ne respectait pas la norme constitutionnelle en matière de perquisitions et de saisies, la Cour devait en interpréter les dispositions en y introduisant un « critère approprié ». La Cour a refusé de le faire, en donnant l'explication suivante :

> . . . il incombe à la législature d'adopter des lois qui contiennent les garanties appropriées permettant de satisfaire aux exigences de la Constitution. Il n'appartient pas aux tribunaux d'ajouter les détails qui rendent constitutionnelles les lacunes législatives. [p. 169]

Ainsi que je l'ai mentionné, la Ville n'a pas demandé à la Cour d'introduire dans son règlement sur le bruit les limites proposées par mes collègues. En le lui demandant, en particulier dans une affaire touchant la liberté d'expression, elle se trouverait à coopter la Cour afin qu'elle fasse de la norme *minimale* exigée par la *Charte canadienne* ou québécoise la liberté *maximale* autorisée par le règlement. J'estime, en toute déférence, que ce n'est pas là le rôle de la Cour.

c. Le contexte législatif

Mes collègues estiment que « [l]'historique d'une disposition et la recherche de l'objectif de la réglementation permettent de cerner le contexte global dans lequel la disposition est adoptée » (par. 17). Je reconnais que la pollution par le bruit est une forme de nuisance publique et que l'un des objets de la *Charte de la Ville de Montréal* est de permettre au législateur municipal de définir et de prohiber, parmi tous les bruits, ceux qui risquent de « produire des inconvénients sérieux ou de porter atteinte, soit à la santé publique, ou soit au bien-être de la communauté, ou d'une partie importante de la communauté » (le juge Gendreau dans *Anctil c. Cour municipale de Ville de La Pocatière*, [1973] C.S. 238, p. 244).

2005 SCC 62 (CanLII)

129

I agree with my colleagues that this was the City's mandate. However, recognition of the limited nature of the mandate does not provide an answer to the excessive scope of art. 9(1) of the Montréal noise by-law. It just demonstrates the scope of the problem.

À l'instar de mes collègues, j'estime que c'est ce que la Ville avait comme mandat. Toutefois, le fait de reconnaître que son mandat était limité ne règle pas la question de la portée excessive du par. 9(1) du *Règlement sur le bruit* de la Ville de Montréal. Il ne fait que démontrer l'ampleur du problème.

130

My colleagues also contend that the relevant history shows that art. 9(1) requires an "essential connection with a building" (para. 30). In fact, however, while earlier versions of the noise by-law *did* link the equivalent of art. 9(1) to a building (e.g., in 1976 the by-law prohibited "noise produced by an apparatus emitting sound outside a building"), City Hall subsequently dropped the limitation my colleagues now seek to restore by "interpretation".

Selon mes collègues, il ressort aussi de l'historique du par. 9(1) que cette disposition requiert l'existence d'un « lien essentiel avec un bâtiment » (par. 30). Cependant, dans les faits, bien que les versions antérieures du *Règlement sur le bruit* aient *effectivement* relié la disposition correspondant au par. 9(1) à un bâtiment (p. ex., le règlement de 1976 interdisait « le bruit provenant d'un appareil sonore qui diffuse à l'extérieur des bâtiments »), le conseil municipal a subséquemment laissé tomber la limite que mes collègues cherchent maintenant à rétablir par voie d'« interprétation ».

131

Moreover, the addition of an "essential connection with a building" again contradicts the intention of City Hall. Counsel for the City cites in his factum a number of instances where relief has been granted by City permit from the prohibition in art. 9(1) with respect to parks and other public places where no building is involved (see appellant's factum, at paras. 84-87).

En outre, l'ajout de l'exigence d'un « lien essentiel avec un bâtiment » contredit de nouveau l'intention du conseil municipal. Dans son mémoire, l'avocat de la Ville cite en exemple plusieurs cas où la Ville a levé l'interdiction prévue au par. 9(1) en accordant des permis concernant des parcs ou d'autres endroits publics où aucun immeuble n'était en cause (voir mémoire de l'appelante, par. 84-87).

d. The Context of the Legal Environment

d. Le contexte de l'environnement légal

132

I further agree with my colleagues that the "legal environment" may provide proper context (para. 25). My colleagues trace the legislative authority conferred on municipalities to deal with nuisances back to 1851 (para. 19). The City of Montréal has thus had more than 150 years of experience in these matters, and must be taken to have been aware that the Quebec courts have consistently required a clear definition of what is prohibited and what is permitted in order that the inhabitants can govern their everyday conduct accordingly. In *Laval (Ville) v. Prince*, [1996] Q.J. No. 58 (QL), for example, the Quebec Court of Appeal struck down a provision in a City of Laval noise by-law which prohibited

Je conviens également avec mes collègues que l'« environnement légal » peut fournir des éléments contextuels (par. 25). Mes collègues font remonter à 1851 l'attribution aux municipalités du pouvoir législatif de réglementer les nuisances (par. 19). La Ville de Montréal possède donc plus de 150 années d'expérience en la matière, et il faut présumer qu'elle savait que les tribunaux du Québec exigent de façon constante que ce qui est prohibé et ce qui ne l'est pas soit clairement défini afin que les personnes qui résident dans la municipalité puissent régler leur conduite quotidienne en conséquence. Dans *Laval (Ville) c. Prince*, [1996] A.Q. n° 58 (QL), par exemple, la Cour d'appel du Québec a radié la disposition d'un règlement sur le bruit de la Ville de Laval qui interdisait l'émission

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

[TRANSLATION] a noise heard outdoors between 7:00 a.m. and 10:00 p.m. the intensity of which exceeds an equivalent noise level of 55 dB(A), measured over a period of 15 minutes . . ., at the boundary of any property used in whole or in part as a place of residence;

133 Even though the Laval noise by-law (unlike the Montréal by-law here) specified measurable limits to permitted noise, the court considered those limits to be unreasonably restrictive:

[TRANSLATION] The municipality may not rely on the first subsection of s. 463 of the *Cities and Towns Act* to declare that something (in this case, a noise) constitutes a nuisance if it has no harmful qualities, causes no injury and hurts no one. Thus, the municipality exceeds the authority granted to it by this provision in declaring that noise of a certain intensity is prohibited because it constitutes a nuisance when it is not in fact harmful in any way, given that it is less intense than the environmental noise. To sum up, the municipality's power to *define* a nuisance and abate it does not include the power to create a nuisance. [Emphasis added; para. 35.]

134 The prohibition in the Montréal by-law may also be compared with the Métabetchouan noise by-law upheld as valid by the Quebec Superior Court in *Métabetchouan-Lac-à-la-Croix (Ville de) v. Restaurant-Bar Chez Miville inc.*, Sup. Ct. Alma, No. 160-36-000006-995, May 8, 2000:

[TRANSLATION] ***Art. 4*** No one may, between the hours of 10 p.m. and 7 a.m., adversely affect the well-being of people in the vicinity by using a radio, television, phonograph, loudspeaker, or other sound-producing instrument or device, or use a musical instrument in such a way as to cause excessive or undue noise.

135 The unsatisfactory approach of art. 9(1) is further illustrated by reference to the provisions of other by-laws which have come before the Quebec courts for consideration. In *Baie-Comeau (Ville) v. Bar le Broadway*, 1999 CarswellQue 1472 (Sup. Ct.), for example, the by-law set out what the legislators meant by a "nuisance":

[d]'un bruit perçu à l'extérieur entre 7h00 et 22h00 heures [. . .] dont l'intensité est supérieure au niveau équivalent de bruit de 55 dB(A), mesuré sur une période de 15 minutes [. . .], à la limite de tout terrain servant, en tout ou en partie, à l'habitation;

Même si le règlement sur le bruit pris par la Ville de Laval (contrairement à celui pris par la Ville de Montréal en l'espèce) prévoyait des limites mesurables quant à l'intensité des bruits autorisés, la cour a jugé que ces limites étaient déraisonnablement restrictives :

La municipalité, s'appuyant sur le premier paragraphe de l'article 463 de la *Loi sur les cités et villes*, ne peut pas décréter que quelque chose (en l'espèce, un bruit) constitue une nuisance lorsque cette chose n'a aucun caractère nuisible, ne fait du tort, du mal à personne. La municipalité outrepasse donc le pouvoir que lui confère cet article lorsqu'elle décrète qu'un bruit d'une certaine intensité est prohibé parce que constituant une nuisance quand, en fait, ce bruit n'a rien de nuisible, étant d'une intensité inférieure à l'intensité du bruit ambiant. En somme, le pouvoir de la municipalité de *définir* une nuisance et la supprimer ne comporte pas celui d'en créer une. [Soulignement et italique ajoutés; par. 35.]

Il peut être utile de comparer aussi l'interdiction générale que prévoit le règlement de la Ville de Montréal à l'interdiction prévue par le règlement sur le bruit de Métabetchouan dont la validité a été confirmée par la Cour supérieure dans *Métabetchouan-Lac-à-la-Croix (Ville de) c. Restaurant-Bar Chez Miville inc.*, C.S. Alma, n° 160-36-000006-995, 8 mai 2000 :

Art. 4 Il est défendu à toute personne, entre vingt-deux (22) heures et sept (7) heures du matin, de nuire au bien-être des personnes du voisinage en faisant usage d'un appareil radio, d'un téléviseur, d'un phonographe, d'un haut-parleur ou d'un autre instrument ou appareil producteur de son, ou de se servir d'un instrument de musique de façon à causer un bruit excessif ou inusité.

Un coup d'œil aux dispositions d'autres règlements soumis à l'attention des tribunaux québécois permet aussi de constater que la solution retenue dans le par. 9(1) est inadéquate. Dans *Baie-Comeau (Ville) c. Bar le Broadway*, 1999 CarswellQue 1472 (C.S.), par exemple, le règlement énonçait ce que le législateur entendait par une « nuisance » :

[TRANSLATION] Nuisance: any situation or act that is likely to produce serious inconvenience or adversely affect the life, safety, health, property or comfort of persons, or that deprives them of the exercise of a common right.

A nuisance may originate from a situation, an illegal act, or the abuse of a thing or a right; it is continuous in nature and is intimately linked to the situation or act.

Yet again, in *Beloeil (Ville) v. Pergola 2000*, [2003] Q.J. No. 12782 (QL), the Municipal Court upheld art. 1 of an anti-noise by-law which clearly stated:

[TRANSLATION] The emission of any noise that disturbs the peace and tranquillity of people in the vicinity constitutes a nuisance and is prohibited.

Examples of similar norms adopted by Quebec municipalities are gathered together by Professor L. Giroux in "Retour sur les compétences municipales en matière de nuisance", in *Développements récents en droit de l'environnement* (1999), 299, at pp. 328-30. These include *Nutrichef Ltée v. Brossard (Ville)*, Sup. Ct. Longueuil, No. 505-36-000006-876, April 12, 1988:

[TRANSLATION] Any noise that is caused by any person by any means whatsoever and that is likely to impede the peaceable use of property in the vicinity constitutes a nuisance.

Laval v. Prince:

[TRANSLATION] The emission of any noise that disturbs the peace and tranquillity of the people in the vicinity constitutes a nuisance and is prohibited.

Sévigny v. Alimentation G. F. Robin inc., SOQUIJ AZ-99021251 (Sup. Ct.):

[TRANSLATION] . . . to use any noise-producing thing in a manner that disturbs the rest, comfort or well-being of some of or all the people in the vicinity;

. . .

. . . to produce or *allow to be produced*, while engaging in the operation or conduct of an industry or business or the exercise of a trade or occupation of any kind, *an excessive or unusual noise* that disturbs the rest, comfort or well-being of some of or all the people in the vicinity. [Emphasis in original.]

Nuisance : tout état de chose ou de fait qui est susceptible de produire des inconvénients sérieux ou de porter atteinte soit à la vie, la sécurité, la santé, la propriété et le confort des personnes ou qui les prive de l'exercice d'un droit commun.

L'élément nuisible peut provenir d'un état de chose, d'un acte illégal ou de l'usage abusif d'un objet ou d'un droit, il revêt un certain caractère de continuité et est intimement lié à la chose ou à l'acte.

136

En outre, dans *Beloeil (Ville) c. Pergola 2000*, [2003] J.Q. n° 12782 (QL), la Cour municipale a confirmé la validité de l'art. 1 d'un règlement antibruit qui prévoyait clairement :

Constitue une nuisance et est prohibée l'émission de tout bruit qui trouble la paix ou la tranquillité du voisinage.

137

Le professeur L. Giroux a colligé des exemples de normes semblables établies par des municipalités du Québec dans « Retour sur les compétences municipales en matière de nuisance », dans *Développements récents en droit de l'environnement* (1999), 299, p. 328-330. Il cite notamment *Nutrichef Ltée c. Brossard (Ville)*, C.S. Longueuil, n° 505-36-000006-876, 12 avril 1988 :

Le fait, par toute personne, d'occasionner tout bruit causé de quelque façon que ce soit, de nature à empêcher l'usage paisible de la propriété dans le voisinage, constitue une nuisance.

Laval c. Prince :

Constitue une nuisance et est prohibée l'émission de tout bruit qui trouble la paix ou la tranquillité du voisinage.

Sévigny c. Alimentation G. F. Robin inc., SOQUIJ AZ-99021251 (C.S.) :

. . . faire usage de toute chose faisant du bruit d'une façon à incommoder le repos, le confort ou le bien-être du voisinage ou d'une partie de celui-ci;

. . .

. . . lors de l'exploitation, de la conduite ou de l'exercice d'une industrie, un commerce, un métier ou une occupation quelconque, faire ou *laisser faire un bruit excessif ou insolite* d'une façon à incommoder le repos, le confort ou le bien-être du voisinage ou d'une partie de celui-ci. [Souligné dans l'original.]

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

138 In the same vein, the Quebec Court of Appeal in *L'Heureux*, previously mentioned, upheld as valid the following prohibition:

> [TRANSLATION] Disruptive noise produced by a musical instrument or equipment the purpose of which is to reproduce or amplify sound constitutes a nuisance if:
>
> it disturbs the peace or tranquillity of persons who reside, work or are present in the vicinity,
>
> or
>
> its level exceeds, in an inhabited place, the maximum level prescribed by Chapter III . . . .

139 What is evident from this overview of the legal environment is that there is a massive amount of municipal experience in Quebec crafting anti-noise by-laws which the City of Montréal must be taken to have known about. The City obviously intended, as its counsel more or less stated at the hearing of the appeal, to strike out in a new direction. In my view, the City is entitled to have the validity of that new direction considered by the Court, rather than have its enactment essentially modified to reflect the legislative model the City evidently wished to depart from.

140 The approach advocated by my colleagues is at odds with the legal environment because it suggests that a municipality is now better off to specify no qualitative noise limits (as in art. 9(1)) because to do so will risk judicial disapproval (as in *Prince*). It would be better, from the municipality's point of view, to leave it up to a court to read in the limit the court would have enacted had it been the legislators because the court is likely to uphold the validity of its own handiwork. As my colleagues admit at para. 32, the limit they wish to read into art. 9(1) "is not explicitly mentioned". Such a wait-till-we-see-what-the-judge-says approach does not benefit the inhabitants however, because they will have no idea until the court makes its pronouncement which activity is permitted and which activity is prohibited.

Dans la même veine, dans l'affaire *L'Heureux*, la Cour d'appel du Québec a confirmé la validité de l'interdiction suivante :

> Le bruit perturbateur produit par un instrument de musique ou un appareil destiné à reproduire ou à amplifier le son :
>
> qui trouble la paix ou la tranquillité des personnes qui résident, travaillent ou se trouvent dans le voisinage
>
> ou
>
> dont le niveau dépasse, dans un lieu habité, le niveau maximal prescrit par le chapitre III
>
> constitue une nuisance . . .

Cet aperçu de l'environnement légal fait ressortir la profusion des antécédents en matière de formulation de règlements municipaux antibruit au Québec dont il faut présumer que la Ville de Montréal était au courant. La Ville voulait de toute évidence emprunter un chemin inédit, comme l'a plus ou moins révélé son avocat lors de l'audition de l'appel. J'estime que la Ville a le droit d'obtenir l'opinion de la Cour sur la validité de cette nouvelle façon de faire, plutôt que de voir la Cour modifier essentiellement son règlement pour le faire concorder avec le modèle dont la Ville voulait de toute évidence se démarquer.

La démarche préconisée par mes collègues est en contradiction avec l'environnement légal parce qu'elle laisse croire qu'il est dorénavant préférable pour une municipalité de ne prévoir aucune limite sonore qualitative (comme c'est le cas au par. 9(1)), pour ne pas s'exposer à la désapprobation du pouvoir judiciaire (comme dans *Prince*). Selon la Ville, il vaudrait mieux laisser au tribunal le soin d'interpréter la disposition comme si elle contenait la limite que le tribunal y aurait incluse s'il avait été le législateur, parce que le tribunal confirmera vraisemblablement la validité d'une mesure qu'il a lui-même concoctée. Comme mes collègues le reconnaissent au par. 32, la limite qu'elles souhaitent inclure dans le par. 9(1) « [n'est] pas mentionnée de façon expresse ». Cette solution « attendons-de-voir-ce-qu'en-dira-le-juge » ne sert toutefois pas les intérêts des habitants, parce qu'ils ne sauront pas quelle activité est permise et quelle autre est prohibée avant que le tribunal ne se prononce à cet égard.

e. The Immediate Context of the Noise By-Law

I agree with my colleagues that "[t]he immediate context of the impugned provision, namely the other provisions of the By-law, is as important as its overall context" (para. 27). We must thus put art. 9(1) in the context of the entire noise by-law, whose relevant articles read as follows:

By-law concerning noise, R.B.C.M. 1994, c. B-3

1. In this by-law, the following words mean:

"disruptive noise": a noise that can be detected as separate from the environmental noise and considered as a source for analysis purposes, and includes a noise defined as such in this article;

"environmental noise": a combination of usual noises from various sources, including noises that are exterior in origin, more or less regular in character, that can be detected within a given period, excluding any disruptive noise;

"noise with audible pure sounds": a disruptive noise whose sound energy is concentrated around certain frequencies;

2. Noise whose sound pressure level is greater than the maximum set by ordinance, or noise specifically prohibited under this by-law, constitutes a nuisance and is prohibited as being contrary to peace and order.

8. No disruptive noise [« *bruit perturbateur* »] whose sound pressure level is greater than the maximum standardized noise level determined by ordinance, with respect to the inhabited place subjected to that emission, may be emitted.

9. In addition to the noise referred to in article 8, the following noises, where they can be heard from the outside, are specifically prohibited:

(1) noise produced by sound equipment, whether it is inside a building or installed or used outside;

. . .

11. No noise specifically prohibited under articles 9 or 10 may be produced, whether or not it affects an inhabited place.

e. Le contexte immédiat du *Règlement sur le bruit*

141 Je conviens avec mes collègues que « [l]e contexte immédiat de la disposition contestée, soit les autres dispositions du Règlement, est tout aussi important que le contexte global » (par. 27). Il nous faut donc situer le par. 9(1) dans le contexte de l'ensemble du *Règlement sur le bruit*, dont les dispositions pertinentes sont les suivantes :

Règlement sur le bruit, R.R.V.M. 1994, ch. B-3

1. Aux fins du présent règlement, les mots suivants signifient :

« bruit comportant des sons purs audibles » : un bruit perturbateur dont l'énergie acoustique est concentrée autour de certaines fréquences;

« bruit d'ambiance » : un ensemble de bruits habituels de diverses provenances, y compris des bruits d'origine extérieure, à caractère plus ou moins régulier et repérables dans un temps déterminé en dehors de tout bruit perturbateur;

« bruit perturbateur » : un bruit repérable distinctement du bruit d'ambiance et considéré comme source aux fins d'analyse, et comprend un bruit défini comme tel au présent article;

2. Le bruit dont le niveau de pression acoustique est supérieur au maximum fixé par ordonnance ou celui qui est spécifiquement prohibé par le présent règlement constitue une nuisance et est interdit comme étant contraire à la paix et à l'ordre publics.

8. L'émission d'un bruit perturbateur d'un niveau de pression acoustique supérieur au niveau maximal de bruit normalisé fixé par ordonnance à l'égard du lieu habité touché par cette émission est interdite.

9. Outre le bruit mentionné à l'article 8, est spécifiquement prohibé lorsqu'il s'entend à l'extérieur :

1° le bruit produit au moyen d'appareils sonores, qu'ils soient situés à l'intérieur d'un bâtiment ou qu'ils soient installés ou utilisés à l'extérieur;

. . .

11. L'émission, touchant ou non un lieu habité, d'un bruit spécifiquement prohibé aux articles 9 ou 10, est interdite.

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

13. The analysis referred to in article 12 must be made with the devices and in accordance with the measuring methods prescribed by ordinance, and those procedures must be noted in the analysis report.

Subject to the first paragraph, the analysis may, in the cases provided for by ordinance, consist in simply identifying the type, origin and level of noise, without using the devices and methods specified in the first paragraph, and in such cases, it must be so noted in the analysis report.

Despite the first paragraph, an analysis by simple identification is sufficient in the case of noises specifically prohibited under article 9.

20. . . .

For the purpose of section III, the executive committee may, by ordinance:

. . .

(3) determine the terms of exception to articles 9, 10 or 11 under circumstances or on the occasion of events, celebrations or demonstrations it specifies or authorizes.

13. L'analyse prévue à l'article 12 doit se faire à l'aide des appareils et suivant les méthodes de mesure prescrits par ordonnance et le procès-verbal d'analyse doit faire état de ces procédés.

Sous réserve du premier alinéa, l'analyse peut, dans les cas prévus par ordonnance, consister en une simple identification par la personne chargée d'effectuer l'analyse du type, de la provenance et du niveau de bruit, sans l'usage des appareils et méthodes mentionnés au premier alinéa et, dans ce cas, le procès-verbal d'analyse doit en faire mention.

Malgré le premier alinéa, l'analyse par simple identification suffit dans le cas des bruits spécifiquement prohibés à l'article 9.

20. . . .

Aux fins de l'application de la section III, le comité exécutif peut, par ordonnance :

. . .

3º déterminer, dans les circonstances ou à l'occasion d'événements, de fêtes ou de manifestations qu'il précise ou autorise, les modalités d'exception aux articles 9, 10 et 11.

142 It is necessary to consider the legislative context in some detail. A specific prohibition is found in art. 8 with respect to *inhabited* places, which prohibits "disruptive noise whose sound pressure level is greater than the maximum standardized noise level determined by ordinance". The legislators were careful in art. 8 to specify *both* a noise level (to be fixed by ordinance) *and* the location (inhabited areas) limitations. But art. 11 expressly states that "[n]o noise specifically prohibited under articles 9 or 10 may be produced, whether or not it affects an inhabited place".

Un examen détaillé du contexte législatif s'impose. L'article 8 crée une prohibition expresse à l'égard des lieux *habités*, interdisant « [l]'émission d'un bruit perturbateur d'un niveau de pression acoustique supérieur au niveau maximal de bruit normalisé fixé par ordonnance ». Les législateurs ont pris soin de prescrire à l'art. 8 des limites qui touchent *à la fois* l'intensité du bruit (fixé par ordonnance) *et* le lieu (lieux habités). Cependant, l'article 11 prévoit expressément que « [l]'émission, touchant ou non un lieu habité, d'un bruit spécifiquement prohibé aux articles 9 ou 10, est interdite ».

143 Not only are noise level and location limitations absent from art. 9(1), but the legislators clearly state that the prohibitions in art. 9(1) are "[i]n addition to the noise referred to in article 8". This can only mean that in art. 9(1) the "noise produced by sound equipment" (i) need not be disruptive, (ii) need not rise to the level fixed by ordinance, and (iii) need not occur in an inhabited place. The simple and complete ban of noise by reference to *source* and to no other criteria is confirmed by art. 13 which

Non seulement aucune limite relative à l'intensité du bruit ou au lieu n'est mentionnée au par. 9(1), mais le législateur indique clairement que le par. 9(1) prohibe le bruit qui y est décrit, « [o]utre le bruit mentionné à l'article 8 ». Une seule interprétation est possible : le « bruit produit au moyen d'appareils sonores » visé au par. 9(1) (i) ne doit pas nécessairement être perturbateur, (ii) ne doit pas nécessairement atteindre le niveau fixé par ordonnance, et (iii) ne doit pas nécessairement toucher un

2005 SCC 62 (CanLII)

provides that "an analysis by simple identification is sufficient in the case of noises specifically prohibited under article 9".

lieu habité. L'interdiction simple et totale du bruit en fonction de sa *source*, et d'aucun autre critère, est confirmée par l'art. 13, selon lequel « l'analyse par simple identification suffit dans le cas des bruits spécifiquement prohibés à l'article 9 ».

144

The by-law defines the expression "disruptive noise" and the City could therefore be expected to use the expression where that is what was intended. The City not only knew *how* to do so, but it *did* do so in art. 8. There is no such "disruptive noise" limitation in art. 9(1). Equally, where the City wished to control the intensity or level of noise (as in art. 2) or to differentiate among areas of the city where the noise may be considered a nuisance (art. 8) and therefore likely to interfere with what my colleagues call "peaceful enjoyment of the urban environment" (para. 34) it clearly said so. The legislators placed no such limitations in art. 9(1) which simply imposes a ban by *source* and makes no mention of the *quality* or the *impact* of "noise" which emanates from the source. The City imposed the ban "whether or not [the noise] affects an inhabited place" (art. 11). Thus, art. 9(1) means what it says, as counsel for the City submitted in oral argument, and further he said [TRANSLATION] "[i]f I didn't think so, I wouldn't be here."

Le règlement définit l'expression « bruit perturbateur ». On pouvait donc s'attendre à ce que la Ville emploie cette expression si telle était son intention. Non seulement la Ville savait *comment* procéder, mais c'est ainsi qu'elle a *effectivement* procédé à l'art. 8. Or, aucune limite n'est établie par l'emploi de l'expression « bruit perturbateur » au par. 9(1). De même, lorsque la Ville a voulu contrôler l'intensité ou le niveau du bruit (p. ex., à l'art. 2) ou établir les différents secteurs de la ville où le bruit peut être considéré comme une nuisance (art. 8) et où il risque par conséquent d'interférer avec ce que mes collègues appellent « la jouissance paisible de l'environnement urbain » (par. 34), elle l'a exprimé clairement. Le législateur n'a prévu aucune limite de ce genre au par. 9(1), qui impose simplement une interdiction en fonction de la *source* du bruit, sans mentionner la *qualité* ou l'*effet* du « bruit » qui en émane. La Ville a prévu que l'interdiction s'appliquait aux bruits « touchant ou non un lieu habité » (art. 11). Ainsi, le sens du par. 9(1) correspond à son libellé, comme l'avocat de la Ville l'a fait valoir dans sa plaidoirie, ajoutant « si je prétendais que non, je ne serais pas devant vous. »

C. In My View, With Respect, the Interpretation of Article 9(1) Adopted by the Majority Amounts to Judicial Amendment

C. Avec déférence, j'estime que l'interprétation attribuée au par. 9(1) par les juges de la majorité constitue une modification judiciaire

145

As my colleagues state "[o]ur analysis will be based on our interpretation of the provision" (para. 8). Their interpretation, to recapitulate, requires a number of steps which, in the context of a law limiting freedom of expression, would more traditionally be considered under the heading of remedy rather than interpretation.

Comme l'affirment mes collègues, « [l]'interprétation de cette disposition détermine notre analyse » (par. 8). En résumé, leur interprétation requiert un certain nombre d'étapes qui, dans le contexte d'une loi restreignant la liberté d'expression, relèveraient traditionnellement de la réparation plutôt que de l'interprétation.

146

First, as noted, my colleagues' interpretation requires the Court to *read into* art. 9(1) the expression "disruptive noise" (para. 31) from art. 8 even though, as they acknowledge at para. 32, "the

Premièrement, comme je l'ai signalé, l'interprétation de mes collègues oblige le tribunal à *ajouter* au par. 9(1) l'expression « bruit perturbateur » (para. 31) empruntée à l'art. 8 bien que, comme

expression is not explicitly mentioned in art. 9". The full sentence in their decision reads:

> Although disruption is not expressly mentioned in art. 9, this is because, in view of the types of noises to which the provision applies, it was considered unnecessary to refer explicitly to disruptive noise in each paragraph. [para. 33]

147 The problem with this view, again, is that it is clear that the legislators did not intend art. 9(1) to repeat the same limitation ("perturbation") as art. 8 because art. 9(1) is introduced and governed by the words "[i]n addition to the noise referred to in article 8". This is because the legislators dealt with the *quality* of the noise in art. 8 and in art. 9(1) turned to prohibit a particular *source* of noise, i.e., sound equipment. My colleagues must therefore *read out* of art. 9(1) the words "[i]n addition to the noise referred to in article 8". My colleagues then *read up* the words in art. 9(1) "whether it [the sound equipment] is inside a building or installed or used outside" to require an "essential connection with a building" (para. 30). There is, of course, no such requirement of a "connection" expressed anywhere in art. 9(1), and the legislative history is against such an interpretation, as already mentioned. My colleagues must then *read down* the effect of art. 9(1) so that "[a]lthough art. 9(1) appears to be broad in scope, it . . . applies only to sounds that stand out over the environmental noise" (para. 46). We are no longer in the realm of interpretation. We are in the presence of judicial amendments.

148 Finally, my colleagues argue that the word "noise" in art. 9(1) suffers from "a latent ambiguity" (para. 24). However, as I have endeavoured to demonstrate, there is no ambiguity in the word "noise" either on a preliminary reading of art. 9(1) itself or, more importantly, having looked at all of the relevant contexts in which art. 9(1) operates or falls for consideration. The fact is, as counsel for the City contends, that art. 9(1) is directed to the elimination of a broad and general *source* of noise.

elles le reconnaissent au par. 32, « l'expression ne soit pas mentionnée de façon expresse à l'art. 9 ». Voici la phrase complète qui se trouve dans leurs motifs :

> Si la notion de perturbation n'est pas expressément mentionnée à l'art. 9, c'est qu'en raison des bruits ciblés, il n'a pas été jugé utile de la reprendre explicitement à chaque paragraphe. [par. 33]

Encore une fois, le problème avec ce raisonnement, c'est qu'il est évident que le législateur ne voulait pas répéter au par. 9(1) la qualification du bruit (« perturbateur ») exprimée à l'art. 8, puisque le par. 9(1) commence et est régi par les mots « [o]utre le bruit mentionné à l'article 8 ». Il en est ainsi parce que le législateur traite de la *qualité* du bruit à l'art. 8 et qu'il interdit ensuite, au par. 9(1), une *source* particulière de bruit, c.-à-d. les appareils sonores. Mes collègues doivent donc *supprimer* du par. 9(1) les mots « [o]utre le bruit mentionné à l'article 8 ». Elles *accentuent* ensuite le sens des termes « qu'ils [les appareils sonores] soient situés à l'intérieur d'un bâtiment ou qu'ils soient installés ou utilisés à l'extérieur », employés au par. 9(1), pour exiger un « lien essentiel avec un bâtiment » (par. 30). Les termes du par. 9(1) n'exigent évidemment pas expressément un tel lien et l'historique législatif va à l'encontre de cette interprétation, comme je l'ai déjà mentionné. Mes collègues doivent ensuite *atténuer* les effets de l'interdiction prévue au par. 9(1) de sorte que « [m]algré une portée en apparence large [. . .] cette disposition [. . .] ne couvre que les sons qui ressortent du bruit d'ambiance » (par. 46). Nous ne sommes plus dans le domaine de l'interprétation. Nous sommes en présence de modifications judiciaires.

Enfin, mes collègues affirment que le mot « bruit » au par. 9(1) comporte « une ambiguïté latente » (par. 24). Toutefois, comme j'ai tenté de le démontrer, le mot « bruit » n'est pas ambigu, ni à la simple lecture du par. 9(1) ni — ce qui est encore plus important — après examen de l'ensemble des contextes pertinents dans lesquels le par. 9(1) s'applique ou est envisagé. Force est de constater que, comme le soutient l'avocat de la Ville, le par. 9(1) vise l'élimination d'une *source* globale et générale

2005 SCC 62 (CanLII)

Such a legislative overreach should be quashed because it not only ignores the characteristics of a "nuisance" but constitutes (as my colleagues concede) an infringement of Montrealers' freedom of expression, as will shortly be discussed.

D. Article 9(1) of the Noise By-law Is an Invalid Exercise of the City's Power to Define and Prohibit "Nuisances"

It is well established that the Court adopts a "broad and purposive" approach to the construction of the powers of a municipality: *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 18; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 44; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19, at paras. 6 and 8. Nevertheless, there *are* limits.

1. *Article 9(1) Is Ultra Vires*

The Quebec Court of Appeal has long taken the position (as it did in this case) that the legislative power conferred on Quebec municipalities to define and prohibit "nuisances" does not extend to defining some activity or thing as a nuisance [TRANSLATION] "if it has no harmful qualities, causes no injury and hurts no one. . . . [T]he municipality's power to define a nuisance and abate it does not include the power to create a nuisance" (*Prince*, at para. 35, *per* Chamberland J.A.).

This essential nature of a "nuisance" is confirmed by Quebec text writers on the subject; see Professor J. L'Heureux, *Droit municipal québécois* (1984), t. II, at p. 723:

> [TRANSLATION] It is important to note that a nuisance must necessarily be harmful in nature, that is, it must cause serious inconvenience or adversely affect either public health or the welfare of the community. [Emphasis added.]

de bruit. Un tel excès législatif devrait être invalidé parce que non seulement il fait abstraction des caractéristiques propres d'une « nuisance », mais il constitue (comme le concèdent mes collègues) une atteinte à la liberté d'expression des Montréalais, comme il en sera bientôt question.

D. Le paragraphe 9(1) du *Règlement sur le bruit* constitue un exercice invalide du pouvoir de la Ville de définir et de prohiber les « nuisances »

149 Il est bien établi que la Cour adopte, à l'égard des pouvoirs municipaux, une méthode d'interprétation « large, fondée sur l'objet visé » : *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, p. 244-245; *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13, par. 18; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64, par. 44; *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19, par. 6 et 8. Il y *existe* cependant des limites.

1. *Le paragraphe 9(1) est ultra vires*

150 La Cour d'appel du Québec estime depuis longtemps (comme en l'espèce) que le pouvoir législatif des municipalités du Québec de définir et de prohiber les « nuisances » ne leur permet pas de qualifier une activité ou une chose de nuisance « lorsque cette chose n'a aucun caractère nuisible, ne fait du tort, du mal à personne. [. . .] [L]e pouvoir de la municipalité de définir une nuisance et la supprimer ne comporte pas celui d'en créer une » (*Prince*, par. 35, le juge Chamberland).

151 Cette caractéristique essentielle d'une « nuisance » est confirmée par les auteurs québécois en la matière; voir le professeur J. L'Heureux, *Droit municipal québécois* (1984), t. II, p. 723 :

> Il est important de remarquer qu'une nuisance doit obligatoirement avoir un caractère nuisible, c'est-à-dire produire des inconvénients sérieux ou porter atteinte soit à la santé publique, soit au bien-être de la communauté. [Je souligne.]

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

152 I agree with this view. It is built on 30 years of consistent Quebec jurisprudence, of which both the National Assembly and Montréal City Hall must be taken to be aware: *Prince*; *Kirkland (Ville) v. Phares* (1993), 19 M.P.L.R. (2d) 314 (Que. Sup. Ct.); *Saint-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.); *Sablières Laurentiennes Ltée v. Ste-Adèle (Ville de)*, [1989] R.L. 486 (Que. C.A.); *Sambault v. Mercier (Corp. mun. de Ville)*, [1983] C.S. 147; *Beach v. Perkins (Municipalité de)*, [1975] C.S. 85; *Anctil*.

Je partage cette opinion. Elle repose sur 30 ans de jurisprudence constante au Québec, dont il faut présumer que l'Assemblée nationale et le conseil municipal de Montréal avaient connaissance : *Prince*; *Kirkland (Ville) c. Phares* (1993), 19 M.P.L.R. (2d) 314 (C.S. Qué.); *Saint-Michel-Archange (Municipalité de) c. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.); *Sablières Laurentiennes Ltée c. Ste-Adèle (Ville de)*, [1989] R.L. 486 (C.A. Qué.); *Sambault c. Mercier (Corp. mun. de Ville)*, [1983] C.S. 147; *Beach c. Perkins (Municipalité de)*, [1975] C.S. 85; *Anctil*.

153 The recognition that not all noise made by a sound equipment should be considered a nuisance is consistent with art. 976 of the *Civil Code of Québec*, S.Q. 1991, c. 64, which provides:

> **976.** Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.

Le fait de reconnaître que tous les bruits produits au moyen d'appareils sonores ne devraient pas être considérés comme des nuisances est compatible avec l'art. 976 du *Code civil du Québec*, L.Q. 1991, ch. 64, lequel dispose :

> **976.** Les voisins doivent accepter les inconvénients normaux du voisinage qui n'excèdent pas les limites de la tolérance qu'ils se doivent, suivant la nature ou la situation de leurs fonds, ou suivant les usages locaux.

154 While the power of the municipality to "define" nuisances may not be limited to activities that would in any event exceed "the limit of tolerance" that neighbours owe each other under art. 976 of the *Civil Code of Québec*, I agree with my colleagues that the power to define nuisances "is [not] unlimited. For example, a municipality may not . . . in exercising its power to regulate nuisances, set standards that are unreasonable" (para. 42). Nor, I would add, can it lawfully define as a nuisance an activity like making "noise" without specifying any proper or relevant "norms" at all.

Certes, il se peut que le pouvoir de la municipalité de « définir » ce qui constitue une nuisance ne se limite pas aux activités qui dépasseraient de toute façon « les limites de la tolérance » que les voisins se doivent en vertu de l'art. 976 du *Code civil du Québec*, mais je conviens avec mes collègues que le pouvoir de définir les nuisances « ne veut cependant pas dire que le pouvoir de définition est illimité. Une municipalité ne peut, par exemple, [. . .] dans l'exercice de son pouvoir de réglementer les nuisances, décréter des normes déraisonnables » (par. 42). J'ajouterais qu'elle ne peut pas non plus légalement qualifier une activité, comme faire du « bruit », de nuisance sans préciser quelque « norme » appropriée ou pertinente que ce soit.

155 The Quebec Court of Appeal stated in *Saint-Michel-Archange*, at p. 880:

> [TRANSLATION] A nuisance may be the very existence of something, such as a substandard landfill site, or garbage on a piece of land. A nuisance may also arise out of the improper use of something. It must then be determined to what extent the use of this thing adversely affects third persons, or whether the nuisance created by the by-law is truly a nuisance. [Emphasis and citations omitted.]

La Cour d'appel du Québec a dit ce qui suit dans *Saint-Michel-Archange*, p. 880 :

> Une nuisance peut être l'existence même d'un objet, par exemple, un dépotoir non réglementaire ou des déchets sur un terrain. Une nuisance peut provenir aussi de l'usage abusif d'un objet. Il faut alors déterminer dans quelle mesure l'utilisation de cet objet est nuisible pour les tiers ou encore se demander si la nuisance créée par le règlement en est une véritable. [Italiques et citations omises.]

2005 SCC 62 (CanLII)

156

Professor Giroux summarizes the relevant Quebec jurisprudence, at pp. 304-5:

> [TRANSLATION] It is now well established in the case law that there are two classes of nuisances. The first class of nuisances are those that can be characterized as such by virtue of their very existence (*in se*). They are things that are nuisances by nature, such as evil-smelling waste, an open-air dump or garbage on a lot. The other type of nuisance is a nuisance not by the very nature of a thing, but rather because of the improper or incorrect use of the thing (*per se*). Noise is perhaps the most obvious example of this . . . .

Le professeur Giroux résume la jurisprudence québécoise pertinente, aux p. 304-305 :

> Il est maintenant bien acquis dans la jurisprudence qu'il y a deux catégories de nuisance. Les nuisances de la première catégorie sont celles qui se qualifient par leur seule existence (*in se*). Il s'agit d'objets ou de choses qui sont des nuisances par nature comme le seraient des détritus nauséabonds, un dépotoir à ciel ouvert ou des déchets sur un terrain. L'autre type de nuisance ne provient pas de la nature même d'un objet mais plutôt de son emploi abusif ou de sa mauvaise utilisation (*per se*). L'exemple le plus évident peut-être est celui du bruit . . .

157

Noise accordingly is not "by nature" a nuisance. There must therefore be a specification of abuse. There is none in art. 9(1).

Le bruit n'est donc pas « par nature » une nuisance. Il faut par conséquent en préciser le caractère abusif. Le paragraphe 9(1) ne le précise pas.

158

Invalidation of the by-law as *ultra vires* would therefore accord with the *dictum* of Beetz J. in *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368. In that case, in declaring invalid a part of the Montréal by-law governing amusements, the Court adopted in part, at pp. 404-5, the classic statement of Lord Russell in *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.), at p. 99-100, that if a municipal by-law involves "<u>such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men</u>, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires'" (emphasis added).

L'invalidation du règlement parce qu'il est *ultra vires* serait donc conforme à la remarque incidente formulée par le juge Beetz dans *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368. Dans ce pourvoi, en déclarant *ultra vires* une partie du règlement de la Ville de Montréal régissant les appareils et les salles d'amusement, la Cour a fait sienne, en partie, à la p. 405, la déclaration classique de lord Russell dans *Kruse c. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.), p. 99-100, qui a affirmé que si un règlement municipal entraîne [TRADUCTION] « <u>une immixtion abusive ou gratuite dans les droits des personnes qui y sont assujetties, au point d'être injustifiabl[e] aux yeux d'un homme raisonnable</u>[,] la Cour pourrait alors dire "le Parlement n'a jamais eu l'intention de donner le pouvoir d'établir ces règles; elles sont déraisonnables et *ultra vires*" » (je souligne).

159

In *R. v. Greenbaum*, [1993] 1 S.C.R. 674, the Court ruled that a City of Toronto by-law that banned unlicenced street vendors could not be upheld under a power "for prohibiting and abating public nuisances" because "the effect of the by-law is to prohibit conduct which may not amount to a public nuisance" (p. 692). It is true that the Toronto law-making authority at issue in that case did not include a power to *define* nuisances, but if the Court in *Greenbaum* had adopted the approach of my colleagues in this case it could simply have read into the Toronto by-law a requirement that the

Dans *R. c. Greenbaum*, [1993] 1 R.C.S. 674, la Cour a statué qu'elle ne pouvait confirmer la validité d'un règlement interdisant les vendeurs ambulants qui ne détenaient pas de permis, pris par la Ville de Toronto en vertu de son pouvoir d'« interdire et [de] supprimer les nuisances publiques », parce que « le règlement a pour effet d'interdire un comportement qui peut ne pas constituer une nuisance publique ». (p. 692). Il est vrai que le pouvoir législatif en cause dans cette affaire ne comprenait pas le pouvoir de *définir* les nuisances, mais si la Cour avait retenu la méthode adoptée par mes collègues en l'espèce, elle

2005 SCC 62 (CanLII)

prohibition extend only to those vendors of t-shirts whose activities were disruptive or amounted to a nuisance. The Court refused to do so on that occasion (pp. 691-92), and, on that basis, reversed the Ontario Court of Appeal.

aurait pu simplement introduire dans le règlement de la Ville de Toronto une exigence portant que l'interdiction ne s'applique qu'aux vendeurs de tee-shirts dont les activités sont perturbatrices ou équivalent à une nuisance. La Cour a refusé de le faire dans cette affaire (p. 691-692) et, pour cette raison, a infirmé la décision de la Cour d'appel de l'Ontario.

2. *The Role of Deference*

160 I agree with my colleagues that in combatting the nuisance of noise pollution "[i]t is up to the City to choose the means" (para. 48). The problem is that art. 9(1) of the by-law is much broader than noise pollution because, as my colleagues point out "noise in itself is not necessarily a nuisance" (para. 24). I agree that the courts should leave City Hall with a broad latitude in such matters, but the fact remains, as my colleagues state, that the City's power is not "unlimited" (para. 42). In my view, it is more respectful of City Hall to declare what it has done to be *ultra vires*, as I do, rather than saying as my colleagues do, that the legislators cannot mean what they said in art. 9(1). It would be more respectful of our place in the constitutional scheme to send the defective provision back to the legislators for consideration and possible re-enactment. There are, as earlier noted, other approaches to the problem of limits identified in art. 9(1) than the solution adopted by my colleagues. The legislators, not the courts, should make their choice amongst these different options.

2. *Le rôle de la déférence*

Je suis d'accord avec mes collègues pour dire que, dans la lutte contre la nuisance que constitue la pollution sonore, « [l]e choix des moyens demeure celui de la Ville » (par. 48). La difficulté réside dans le fait que la portée du par. 9(1) du *Règlement sur le bruit* va au-delà de la pollution sonore parce que, comme mes collègues l'ont fait remarquer, « [l]e bruit en lui-même n'est donc pas nécessairement une nuisance » (par. 24). Je reconnais que, sur ces questions, les tribunaux devraient laisser une grande latitude au conseil municipal, mais il reste que, comme l'ont dit mes collègues, le pouvoir de la ville n'est pas « illimité » (par. 42). À mon avis, déclarer *ultra vires* la disposition prise par le conseil municipal, comme je le fais, témoigne d'un plus grand respect à son égard que d'affirmer, à l'instar de mes collègues, que les législateurs ne peuvent avoir voulu dire ce qu'ils ont dit au par. 9(1). Renvoyer la disposition lacunaire au conseil municipal pour qu'il l'examine et, éventuellement, en édicte une nouvelle version, respecte mieux le rôle dévolu à la Cour dans notre régime constitutionnel. Il existe, rappelons-le, d'autres solutions au problème de la portée du par. 9(1) que celle adoptée par mes collègues. C'est au législateur et non à la Cour qu'il appartient de choisir parmi ces différentes possibilités.

161 Article 9(1) is *ultra vires* and the analysis need proceed no further.

Le paragraphe 9(1) est *ultra vires* et il n'est pas nécessaire de poursuivre l'analyse.

3. *Article 9(1) Is a Patently Unreasonable Exercise of the Delegated Legislative Power to Define and Prohibit Nuisances*

3. *Le paragraphe 9(1) constitue un exercice manifestement déraisonnable du pouvoir législatif délégué de définir et de prohiber les nuisances*

162 The argument is made that where, as here, the City is given an explicit power to define nuisances, the enactment of a definition cannot as such be

On fait valoir que lorsque, comme en l'espèce, la Ville se voit attribuer le pouvoir explicite de définir les nuisances, l'adoption d'une définition ne peut

ultra vires. The by-law can only be quashed if the power of definition is *exercised* unreasonably (or patently unreasonably).

en soi être *ultra vires*. Le règlement ne peut être annulé que si la Ville *exerce* son pouvoir de définition de façon déraisonnable (ou manifestement déraisonnable).

2005 SCC 62 (CanLII)

163

The Court has not recently pronounced upon the standard of review of the *intra vires* exercise of *legislative* power by a municipality. In *Rascal Trucking*, which dealt with a municipality's *adjudicative* function in relation to an alleged nuisance, Major J. summarized the recent jurisprudence, and stated at para. 37:

> The conclusion is apparent. The standard upon which courts may entertain a review of *intra vires* municipal actions should be one of patent unreasonableness.

Thus, as Professor D. J. Mullan noted in his text *Administrative Law* (2001), "municipalities have been brought within the mainstream of judicial review theory" (p. 113).

La Cour ne s'est pas prononcée récemment sur la norme de contrôle applicable à l'exercice du pouvoir *législatif* d'une municipalité *dans les limites* de sa compétence. Dans l'arrêt *Rascal Trucking*, portant sur une fonction *juridictionnelle* d'une municipalité concernant une nuisance alléguée, le juge Major a résumé la jurisprudence récente et déclaré, au par. 37 :

> La conclusion est évidente. La norme suivant laquelle les tribunaux peuvent examiner les actions d'une municipalité accomplies dans les limites de sa compétence est celle du caractère manifestement déraisonnable.

Ainsi, le professeur D. J. Mullan a fait remarquer dans son ouvrage, *Administrative Law* (2001), que [TRADUCTION] « les municipalités ont été assujetties à la théorie générale du contrôle judiciaire » (p. 113).

164

Generally speaking, more deference is shown to a municipality's exercise of a legislative function than an adjudicative function. The standard of review in assessing a by-law, assuming the exercise of the legislative power is otherwise *intra vires*, would be patent unreasonableness.

En général, l'exercice d'une fonction législative par une municipalité appelle une plus grande retenue que l'exercice d'une fonction juridictionnelle. La norme de contrôle applicable à l'examen d'un règlement, à supposer que l'exercice du pouvoir législatif soit par ailleurs *intra vires*, serait celle du caractère manifestement déraisonnable.

165

In my view, even if this case should be analysed in terms of the *exercise* of the City's legislative power to define and prohibit "nuisances", as opposed to an *ultra vires* analysis, art. 9(1) is nevertheless a patently unreasonable exercise of it. I will not repeat the analysis. That finding, too, is sufficient to dispose of this case. But there is more.

À mon avis, même si la présente affaire devait être analysée sous l'angle de *l'exercice* du pouvoir législatif de la Ville de définir et de prohiber les « nuisances » plutôt que sous celui du caractère *ultra vires* du par. 9(1), cette disposition constituerait néanmoins un exercice manifestement déraisonnable de ce pouvoir. Je ne reprendrai pas l'analyse. Cette conclusion est elle aussi suffisante pour statuer sur le pourvoi. Mais il y a plus.

E. Article 9(1) Infringes Freedom of Expression Under Section 2(*b*) of the *Canadian Charter*

E. Le paragraphe 9(1) porte atteinte à la liberté d'expression protégée par l'al. 2*b*) de la *Charte canadienne*

166

I agree with the conclusion of my colleagues at paras. 82-85 that the prohibition in art. 9(1) infringes freedom of expression.

Je souscris à l'analyse effectuée par mes collègues, aux par. 82 à 85, selon laquelle la prohibition prévue au par. 9(1) porte atteinte à la liberté d'expression.

F. Article 9(1) Is Not Saved as a Reasonable Limit Prescribed by Law Under Section 1 of the *Canadian Charter*

167 I am unable to agree with my colleagues that the infringement of free expression is justified. Firstly, in my view there are no limits properly "prescribed by law". Secondly, art. 9(1) is a disproportionate response to the legitimate problem of noise pollution because it goes beyond what could be considered minimal impairment of the expressive rights of Montrealers.

1. *Prescribed by Law*

168 The limitations relied on by my colleagues to justify art. 9(1) would be useful if endorsed by the legislators. However, it would appear that *without* those "read in", "read out", "read up" and "read down" limitations my colleagues themselves would agree that art. 9(1) would fail the s. 1 test. (My colleagues write: "Our analysis will be based on our interpretation of the provision" (para. 8).) I have already explained why I believe their interpretation is precluded by both the text and concentric circles of context around art. 9(1), as well as by the Court's traditional reluctance to engage in judicial surgery on otherwise invalid laws which involve infringement of *Charter* rights: see *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 728, *per* La Forest J.:

> . . . when one is dealing with laws that impinge on the liberty of the subject, the judicial stance should be one that does not encourage the legislature to overreach, and the courts should be slow indeed to provide a corrective. [Emphasis added.]

169 The City's solution to this problem of overbreadth and overinclusiveness is its reliance on prosecutorial discretion. But, with respect, that is not a solution. Prosecutorial discretion under

F. Le paragraphe 9(1) n'est pas sauvegardé à titre de restriction raisonnable prescrite par une règle de droit au sens de l'article premier de la *Charte canadienne*

Je ne puis souscrire à l'opinion de mes collègues selon laquelle l'atteinte à la liberté d'expression est justifiée. Premièrement, nous ne sommes en présence d'aucune limite dûment prescrite « par une règle de droit ». Deuxièmement, le par. 9(1) constitue une réponse disproportionnée au problème bien réel de la pollution sonore en ce qu'il va au-delà de ce qui pourrait être considéré comme une atteinte minimale à la liberté d'expression des Montréalais.

1. *Prescrite par une règle de droit*

Les limites invoquées par mes collègues pour justifier le par. 9(1) seraient utiles si le législateur les avait approuvées. Cependant, il semblerait que *sans* ces « ajouts » et « suppressions » de mots, et ces « accentuations » et « atténuations » de sens, mes collègues conviendraient elles-mêmes que le par. 9(1) ne satisfait pas au critère de l'article premier. (Elles écrivent : « L'interprétation de cette disposition détermine notre analyse » (par. 8).) J'ai déjà expliqué pourquoi j'estime que leur interprétation est exclue à la fois par le libellé du par. 9(1) et par les différents contextes, du plus immédiat au plus général, au centre desquels se situe cette disposition, sans parler de la réticence habituelle de la Cour à s'engager dans le remodelage de textes législatifs par ailleurs invalides, qui portent atteinte aux droits garantis par la *Charte canadienne* : voir *Schachter c. Canada*, [1992] 2 R.C.S. 679, p. 728, le juge La Forest :

> . . . lorsqu'il s'agit de lois qui empiètent sur la liberté de la personne, les tribunaux devraient adopter une position dissuadant les législateurs d'adopter des dispositions ayant une portée trop large et devraient se montrer peu empressés à apporter une mesure corrective. [Je souligne.]

La solution retenue par la Ville pour régler ce problème de portée excessive consiste à s'en remettre au pouvoir discrétionnaire de la poursuite. J'estime, en toute déférence, que cette solution n'en

2005 SCC 62 (CanLII)

art. 9(1) is not governed by criteria prescribed by law. As the Court pointed out in *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1078:

In its factum, the Crown alleged that such eventual violations could be, and are in fact, avoided through the proper use of prosecutorial discretion to charge for a lesser offence.

In my view the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the *Charter*. To do so would be to disregard totally s. 52 of the *Constitution Act, 1982* which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter. . . . [Emphasis added.]

2. *Minimal Impairment*

In addition to prosecutorial discretion, it is suggested that some potential offenders might hope to benefit from a *de minimis* exemption, but the status of this defence in Canada is not clear (see *R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 21, and *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 69) and in any event "[t]he defence of *de minimis* does not mean that the act is justified; it remains unlawful, but on account of its triviality it goes unpunished" (*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, at para. 203, *per* Arbour J.).

The permit procedure under art. 20 does little to relieve against the prohibition. Permits are issued as a matter of municipal discretion and are available only for particular occasions ("events, celebrations or demonstrations"). Permits are not otherwise available. The use of sound equipment to communicate an otherwise unobjectionable message should not be subject to the discretion of the City's Executive Committee, especially where, as

est pas une. Le pouvoir discrétionnaire de la poursuite conféré par le par. 9(1) n'est régi par aucun critère prescrit par une règle de droit. Comme l'a souligné notre Cour dans *R. c. Smith*, [1987] 1 R.C.S. 1045, p. 1078 :

Dans son mémoire, le ministère public soutient que de telles violations éventuelles peuvent être évitées, et le sont vraiment, par l'utilisation appropriée du pouvoir discrétionnaire du ministère public d'inculper pour une infraction moindre.

À mon avis, l'article ne peut pas être sauvegardé en invoquant ce pouvoir discrétionnaire qu'a le ministère public de ne pas appliquer la loi dans les cas où il estime que son application entraînerait une violation de la *Charte*. Ce serait là ignorer totalement l'art. 52 de la *Loi constitutionnelle de 1982* qui porte que la Constitution rend inopérantes les dispositions incompatibles de toute autre règle de droit et les tribunaux ont le devoir de déclarer qu'il en est ainsi; ils ne peuvent laisser ni au ministère public ni à personne d'autre le soin d'éviter une violation. . . [Je souligne.]

2. *Atteinte minimale*

170 Outre le pouvoir discrétionnaire de la poursuite, on laisse entendre que certains délinquants potentiels pourraient espérer bénéficier de l'exception fondée sur le principe *de minimis*, mais il n'est pas certain que ce moyen de défense s'applique au Canada (voir *R. c. Cuerrier*, [1998] 2 R.C.S. 371, par. 21, et *R. c. Hinchey*, [1996] 3 R.C.S. 1128, par. 69) et, quoi qu'il en soit, « [l]e moyen de défense fondé sur le principe *de minimis* ne signifie pas que l'acte en cause est justifié, cet acte reste illégal, mais en raison de son caractère anodin, il ne sera pas puni » (*Canadian Foundation for Children, Youth and the Law c. Canada (Procureur général)*, [2004] 1 R.C.S. 76, 2004 CSC 4, par. 203, la juge Arbour).

171 La procédure d'obtention de permis prévue à l'art. 20 n'atténue guère la portée de l'interdiction. Les permis sont délivrés à la discrétion de la municipalité et uniquement pour certaines occasions (« événements, fêtes ou manifestations »). Autrement, ils ne sont pas disponibles. L'utilisation d'appareils sonores pour communiquer un message par ailleurs acceptable ne devrait pas dépendre du pouvoir discrétionnaire du comité exécutif

2005 SCC 62 (CanLII)

here, the criteria for the exercise of its discretion are not specified by the legislators.

de la Ville surtout lorsque, comme en l'espèce, le législateur n'a pas précisé les conditions de son exercice.

172 Nor can I agree with my colleagues that art. 9(1) passes constitutional muster in this case because the strip club had other ways of communicating its message to the public. I do not believe that a justification that limits itself to the particular circumstances of a particular accused is an adequate answer to a general challenge to the validity of a by-law. The *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103) requires the Court to determine whether the means chosen are proportionate to the legislative objective, not what the effects of the infringing law are in the case of a particular accused. If it were otherwise, a law could be valid in some situations and not others, creating an unpredictable patchwork. In *Smith*, for example, the minimum sentence of seven years for importation of drugs was quashed even though on the facts a seven-year sentence might have been considered perfectly fit for that particular offender. In *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, a case dealing with a federal by-law prohibiting the distribution of pamphlets at an airport without the Minister's authorization, L'Heureux-Dubé J. observed, at p. 217:

> . . . the problem is not only that the Regulation applies to the activity at issue, but that it applies to virtually all conceivable activity involving freedom of expression at airports.

See also *R. v. Zundel*, [1992] 2 S.C.R. 731, at pp. 771-72, *per* McLachlin J.

Je ne peux pas non plus souscrire à l'opinion de mes collègues que le par. 9(1) résiste à l'examen constitutionnel en l'espèce, parce que le club de danseuses dispose d'autres moyens de communiquer son message au public. Je ne crois pas qu'une justification qui se limite au cas individuel d'un accusé en particulier réponde adéquatement à une contestation générale de la validité d'un règlement. Le critère établi dans *R. c. Oakes*, [1986] 1 R.C.S. 103, impose à la Cour de déterminer si les moyens choisis sont proportionnés à l'objectif législatif, et non pas quels sont les effets de la loi attentatoire dans le cas d'un accusé en particulier. S'il en était autrement, une loi pourrait être valide dans certains cas et non dans d'autres, ce qui créerait un salmigondis de décisions imprévisibles. Dans *Smith*, par exemple, la peine minimale de sept ans d'emprisonnement pour importation de drogues a été annulée même si, à la lumière des faits, on aurait pu juger qu'elle convenait parfaitement à ce contrevenant en particulier. Dans l'arrêt *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139, portant sur un règlement fédéral interdisant la distribution de brochures dans un aéroport sans l'autorisation du ministre, voici ce que la juge L'Heureux-Dubé a fait remarquer, à la p. 217 :

> . . . le problème ne résulte pas uniquement du fait que le Règlement s'applique à l'activité en question mais qu'il s'applique à pratiquement toute activité imaginable liée à la liberté d'expression dans les aéroports.

Voir aussi *R. c. Zundel*, [1992] 2 R.C.S. 731, p. 771-772, la juge McLachlin.

173 In my view, art. 9(1) is not justified just because these particular respondents may have access to other forms of business communication, any more than in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, a law that infringed freedom of religion could be saved because the challenger was a corporation and did not itself suffer violation of a religious belief, of which it had none. In that case, it was held that even a drugstore lacking an immortal soul or any religious belief

À mon avis, le simple fait que les intimés en l'espèce puissent avoir accès à d'autres modes de communication commerciale ne justifie pas le par. 9(1), tout comme, dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, une loi contrevenant à la liberté de religion ne pouvait être sauvegardée parce que la partie qui la contestait était une personne morale et qu'elle n'avait pas elle-même subi une atteinte à une croyance religieuse, puisqu'elle n'en avait aucune. Dans ce

2005 SCC 62 (CanLII)

whatsoever could attack a law that was flawed by religious discrimination.

pourvoi, la Cour a statué que même une pharmacie dépourvue d'âme immortelle ou de quelque croyance religieuse que ce soit pouvait contester une loi viciée pour cause de discrimination religieuse.

174 In summary, the reduction of noise pollution is a legitimate objective but art. 9(1) is open-ended and overbroad. It does not minimally impair Montrealers' freedom of expression. There are other ways in which the respondent could have advertised its wares but the respondent is entitled to challenge a law that prohibits its *preferred* mode of communication. Montrealers want to be entertained by the radio and receive cell phone calls and use baby alarms and the fact they may be able to be entertained or receive communications in other ways does not diminish the fact their freedom of expression has been infringed in a way that is wholly disproportionate to the City's legitimate interest. Article 9(1), if it is not struck down, will inhibit free expression in many circumstances where alternative modes of expression are *not* available, and where the use of such sound equipment in no way bothers the neighbours or adversely affects the quality of urban life.

En résumé, la réduction de la pollution sonore est un objectif légitime, mais le par. 9(1) a une portée illimitée et excessive. L'atteinte qu'il porte à la liberté d'expression des Montréalais n'est pas minimale. Certes, l'intimée disposait d'autres moyens de promouvoir ses spectacles, mais elle a le droit de contester une loi qui lui interdit d'utiliser son mode de communication *préféré*. Les Montréalais veulent être divertis par la radio, recevoir des appels sur leur téléphone cellulaire et utiliser des moniteurs pour bébé, et le fait qu'ils puissent être divertis ou recevoir des appels autrement ne diminue en rien le fait que leur liberté d'expression a été violée d'une manière qui est tout à fait disproportionnée au regard de l'intérêt légitime de la Ville. S'il n'est pas annulé, le par. 9(1) portera atteinte à la liberté d'expression dans bien des cas où d'autres modes d'expression *ne* sont *pas* possibles et où l'utilisation d'appareils sonores ne gêne nullement les voisins et ne nuit pas à la qualité de la vie urbaine.

175 Article 9(1) should be declared to be null and void as inconsistent with expressive rights guaranteed under the *Canadian Charter*.

Le paragraphe 9(1) devrait être déclaré inopérant parce qu'incompatible avec la liberté d'expression protégée par la *Charte canadienne*.

G. Article 9(1) Infringes Freedom of Expression Under Article 3 of the Quebec *Charter*

G. Le paragraphe 9(1) porte atteinte à la liberté d'expression protégée par l'art. 3 de la *Charte* québécoise

176 Enough has been said already to indicate that art. 9(1) of the by-law is equally in violation of art. 3 of the Quebec *Charter* and is not justified under art. 9.1 of the Quebec *Charter*.

Les motifs déjà exprimés suffisent pour indiquer que le par. 9(1) va également à l'encontre de l'art. 3 de la *Charte* québécoise et n'est pas justifié en application de l'art. 9.1 de cette *Charte*.

H. Conclusion

H. Conclusion

177 As, in my opinion, the provision in the by-law under which the respondent was convicted is invalid, the conviction was properly quashed by the Quebec Court of Appeal. I would therefore dismiss the appeal.

Comme, selon moi, la disposition réglementaire en application de laquelle l'intimée a été déclarée coupable est invalide, c'est à bon droit que la Cour d'appel du Québec a annulé sa condamnation. Je suis donc d'avis de rejeter le pourvoi.

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

APPENDIX

By-law concerning noise, R.B.C.M. 1994, c. B-3

SECTION I
GENERAL PROVISIONS

1. In this by-law, the following words mean:

"background noise": a noise of a level equivalent to that reached or exceeded by the environmental noise during 95% of the observation period;

"disruptive noise": a noise that can be detected as separate from the environmental noise and considered as a source for analysis purposes, and includes a noise defined as such in this article;

"disturbed place": an inhabited place whose environment is subjected to a disruptive noise;

"environmental noise": a combination of usual noises from various sources, including noises that are exterior in origin, more or less regular in character, that can be detected within a given period, excluding any disruptive noise;

"holder": the driver, lessee, possessor or last registered owner of a registered motor vehicle;

"information-bearing noise": a disruptive noise involving verbal or musical elements separate from its other sound elements;

"inhabited place": a building or an unbuilt area in which or on which people reside, work or stay, and includes a dwelling, office building, hospital, camping ground or other similar place or part of such place constituting separate premises under the terms of an ordinance;

"intermittent noise": a recurring and disruptive noise;

"motor vehicle" or "vehicle": any vehicle driven other than by muscular force and adapted for transportation on public roads, but not on rails;

"noise with audible pure sounds": a disruptive noise whose sound energy is concentrated around certain frequencies;

"occupant": a person who stays, works or resides in a disturbed place;

"pulsating noise": a disruptive noise involving discrete impulses such as hammering or riveting;

"standardized noise": a disruptive noise to which has been applied, as a result of a measuring test in accord-

ANNEXE

Règlement sur le bruit, R.R.V.M. 1994, ch. B-3

SECTION I
DISPOSITIONS GÉNÉRALES

1. Aux fins du présent règlement, les mots suivants signifient :

« bruit à caractère impulsif » : un bruit perturbateur comportant des impulsions discrètes de bruit, tel le martelage ou le rivetage;

« bruit comportant des sons purs audibles » : un bruit perturbateur dont l'énergie acoustique est concentrée autour de certaines fréquences;

« bruit d'ambiance » : un ensemble de bruits habituels de diverses provenances, y compris des bruits d'origine extérieure, à caractère plus ou moins régulier et repérables dans un temps déterminé en dehors de tout bruit perturbateur;

« bruit de fond » : un bruit d'un niveau équivalent à la valeur atteinte ou dépassée par le bruit d'ambiance durant 95 % du temps d'observation;

« bruit fluctuant » : un bruit perturbateur dont le niveau subit des variations supérieures à celles qui sont retenues pour l'évaluation du bruit stable;

« bruit intermittent » : un bruit perturbateur entrecoupé de pauses;

« bruit normalisé » : un bruit perturbateur auquel a été appliqué, lors d'une mesure effectuée en conformité d'une ordonnance, l'indice de correction prescrit eu égard aux caractéristiques de ce bruit, à la durée d'émission et au bruit de fond; le nombre de décibels ainsi obtenu étant le niveau de l'intensité de bruit à retenir aux fins de comparaison avec les échelles maximales de tolérance établies dans cette ordonnance;

« bruit perturbateur » : un bruit repérable distinctement du bruit d'ambiance et considéré comme source aux fins d'analyse, et comprend un bruit défini comme tel au présent article;

« bruit porteur d'information » : un bruit perturbateur comportant des éléments verbaux ou musicaux distincts des autres éléments sonores qui le composent;

« bruit stable » : un bruit perturbateur dont le niveau ne subit pas de variations importantes entre certaines valeurs limites qui sont fonction du lieu et de la période de la journée, telles qu'établies par ordonnance;

2005 SCC 62 (CanLII)

ance with an ordinance, the prescribed correction index for the characteristics of such noise, the duration of its emission and background noise; the number of decibels thus reached is the noise intensity level to be retained for comparison with maximum tolerance scales determined by that ordinance;

"steady noise": a disruptive noise whose level indicates no major variations within certain limit values that are dependent on the location and on the time of day, as determined by ordinance;

"undulating noise": a disruptive noise whose level indicates variations greater than those determined for the evaluation of a steady noise;

"user": a person who uses an object, a device or an instrument through which a disruptive noise is emitted, and includes the owner, lessee or possessor of that object, device or instrument, or any person responsible thereof.

2. Noise whose sound pressure level is greater than the maximum set by ordinance, or noise specifically prohibited under this by-law, constitutes a nuisance and is prohibited as being contrary to peace and order.

SECTION II
NOISE PRODUCED BY A MOTOR VEHICLE

3. The provisions of this section apply at all times to any motor vehicle in the city, regardless of traffic conditions.

4. Any holder of a motor vehicle that produces a noise whose sound pressure level is greater than the maximum set by ordinance contravenes this by-law.

5. Despite article 4, where the noise produced by a motor vehicle results from a sudden maneuver intended to avoid an accident while the vehicle is running in accordance with traffic regulations, no offence is considered to have been committed.

6. Apart from the noise referred to in article 4, the following noises are specifically prohibited:

(1) noise produced by the banging of an object transported on a vehicle, or the banging of part of a vehicle;

« détenteur » : notamment le conducteur, le locataire, le possesseur et le dernier propriétaire d'un véhicule automobile immatriculé;

« lieu habité » : un bâtiment ou un espace non bâti dans lequel ou sur lequel des personnes résident, travaillent ou séjournent, et comprend une habitation, un édifice à bureaux, un hôpital, un campement ou tout autre lieu analogue ou partie d'un tel lieu qui constitue un local distinct aux termes d'une ordonnance;

« lieu perturbé » : un lieu habité dont l'ambiance subit l'influence d'un bruit perturbateur;

« occupant » : une personne qui séjourne, travaille ou réside dans un lieu perturbé;

« usager » : une personne qui utilise un objet, un appareil ou un instrument au moyen duquel est émis un bruit perturbateur, et comprend le propriétaire, le locataire ou le possesseur d'un tel objet, appareil ou instrument, ou quiconque en a la garde;

« véhicule automobile » ou « véhicule » : un véhicule mû par un autre pouvoir que la force musculaire et adapté au transport sur les chemins publics mais non sur des rails.

2. Le bruit dont le niveau de pression acoustique est supérieur au maximum fixé par ordonnance ou celui qui est spécifiquement prohibé par le présent règlement constitue une nuisance et est interdit comme étant contraire à la paix et à l'ordre publics.

SECTION II
BRUIT ÉMIS PAR UN VÉHICULE AUTOMOBILE

3. Les dispositions de la présente section sont applicables en tout temps, sans égard à l'état et aux conditions de la circulation, à tout véhicule automobile qui se trouve dans la ville.

4. Le détenteur d'un véhicule automobile qui émet un bruit d'un niveau de pression acoustique supérieur au maximum fixé par ordonnance contrevient au présent règlement.

5. Malgré l'article 4, si le bruit émis par le véhicule automobile est dû à une manœuvre brutale destinée à éviter un accident alors que le véhicule roule d'une manière conforme aux règlements de la circulation, aucune infraction n'est censée avoir été commise.

6. Outre le bruit mentionné à l'article 4, est spécifiquement prohibé :

1° le bruit provenant du claquement d'un objet transporté sur le véhicule ou du claquement d'une partie du véhicule;

2005 SCC 62 (CanLII)

(2) noise produced by the use of the motor of a vehicle at high revolutions, particularly on starting or stopping, or resulting from repeated accelerations;

(3) noise resulting from the needless or excessive use of a whistle, siren or similar device in a motor vehicle;

(4) excessive or unusual noise produced by a radio or any device designed to reproduce sounds in a motor vehicle.

7. Any holder of a motor vehicle in which or by the use of which is produced a noise specifically prohibited under article 6 contravenes this by-law.

SECTION III
NOISE IN INHABITED PLACES

8. No disruptive noise whose sound pressure level is greater than the maximum standardized noise level determined by ordinance, with respect to the inhabited place subjected to that emission, may be emitted.

9. In addition to the noise referred to in article 8, the following noises, where they can be heard from the outside, are specifically prohibited:

(1) noise produced by sound equipment, whether it is inside a building or installed or used outside;

(2) noise produced by a siren or other alarm device, except in accordance with a permit issued for that purpose or except in case of need;

(3) noise produced by a strolling musician with musical instruments or objects used as such, at all times where percussion or electrically powered instruments are used, and at night in other cases;

(4) noise resulting from cries, clamors, singing, altercations or cursing and any other form of uproar.

10. Noise having a sound pressure level higher than the one determined by ordinance is specifically prohibited in offices or commercial premises fitted with a sound system and in premises ordinarily used for dancing and music.

11. No noise specifically prohibited under articles 9 or 10 may be produced, whether or not it affects an inhabited place.

2º le bruit provenant de l'utilisation du moteur d'un véhicule à des régimes excessifs, notamment lors du démarrage ou de l'arrêt, ou produit par des accélérations répétées;

3º le bruit provenant de l'utilisation inutile ou abusive d'un sifflet, d'une sirène ou d'un appareil analogue dans un véhicule automobile;

4º le bruit excessif ou insolite provenant de la radio ou d'un appareil propre à reproduire des sons dans un véhicule automobile.

7. Le détenteur d'un véhicule automobile dans lequel ou à l'usage duquel est produit un bruit spécifiquement prohibé à l'article 6 contrevient au présent règlement.

SECTION III
BRUIT DANS LES LIEUX HABITÉS

8. L'émission d'un bruit perturbateur d'un niveau de pression acoustique supérieur au niveau maximal de bruit normalisé fixé par ordonnance à l'égard du lieu habité touché par cette émission est interdite.

9. Outre le bruit mentionné à l'article 8, est spécifiquement prohibé lorsqu'il s'entend à l'extérieur :

1º le bruit produit au moyen d'appareils sonores, qu'ils soient situés à l'intérieur d'un bâtiment ou qu'ils soient installés ou utilisés à l'extérieur;

2º le bruit d'une sirène ou d'un autre dispositif d'alerte, sauf en conformité d'un permis délivré à cet effet ou sauf en cas de nécessité;

3º le bruit produit par un musicien ambulant au moyen d'instruments de musique ou d'objets utilisés comme tels, en tout temps s'il est fait usage d'instruments à percussion ou d'instruments fonctionnant à l'électricité, et en période de nuit dans les autres cas;

4º le bruit de cris, de clameurs, de chants, d'altercations ou d'imprécations et toute autre forme de tapage.

10. Le bruit d'un niveau de pression acoustique supérieur au niveau fixé par ordonnance est spécifiquement prohibé dans un bureau ou un local commercial sonorisés et dans un local ordinairement utilisé pour la danse et la musique.

11. L'émission, touchant ou non un lieu habité, d'un bruit spécifiquement prohibé aux articles 9 ou 10, est interdite.

12. The director of the department responsible for the enforcement of this section may, at the request of the occupant of an inhabited place, make an analysis to determine the type, level and origin of any disruptive noise in the environment of that place.

13. The analysis referred to in article 12 must be made with the devices and in accordance with the measuring methods prescribed by ordinance, and those procedures must be noted in the analysis report.

Subject to the first paragraph, the analysis may, in the cases provided for by ordinance, consist in simply identifying the type, origin and level of noise, without using the devices and methods specified in the first paragraph, and in such cases, it must be so noted in the analysis report.

Despite the first paragraph, an analysis by simple identification is sufficient in the case of noises specifically prohibited under article 9.

14. Where the analysis report drawn up in accordance with article 13 established that a disruptive noise exceeds the maximum level set by ordinance or is a noise specifically prohibited under this by-law, a complaint may be filed against the user of the object, device or instrument through which that noise is produced, as well as against any person who may be responsible for its production.

15. A peace officer who believes on reasonable grounds that a person in a residential building is disturbed by a noise that he finds excessive in view of the time, location and other circumstances, may order any person causing that disturbance to stop immediately.

Any person who does not immediately comply with an order given by a peace officer in accordance with the first paragraph contravenes this by-law.

16. No permit may be issued for an establishment or an occupancy where the activities carried on in that establishment or for the purposes of that occupancy are inconsistent with the requirements of this by-law.

All activities producing, in the premises covered by a permit application, a noise that exceeds, in adjoining premises, the prescribed sound pressure level, are inconsistent under the terms of the first paragraph.

For the purposes of the first paragraph, the director of the department responsible for the enforcement of this

12. Le directeur du service chargé d'appliquer la présente section peut, à la demande de l'occupant d'un lieu habité, effectuer une analyse visant à déterminer le type, le niveau et la provenance d'un bruit qui perturbe l'ambiance d'un tel lieu.

13. L'analyse prévue à l'article 12 doit se faire à l'aide des appareils et suivant les méthodes de mesure prescrits par ordonnance et le procès-verbal d'analyse doit faire état de ces procédés.

Sous réserve du premier alinéa, l'analyse peut, dans les cas prévus par ordonnance, consister en une simple identification par la personne chargée d'effectuer l'analyse du type, de la provenance et du niveau du bruit, sans l'usage des appareils et méthodes mentionnés au premier alinéa et, dans ce cas, le procès-verbal d'analyse doit en faire mention.

Malgré le premier alinéa, l'analyse par simple identification suffit dans le cas des bruits spécifiquement prohibés à l'article 9.

14. Lorsque le procès-verbal de l'analyse effectuée conformément à l'article 13 établit que le bruit perturbateur dépasse le niveau maximal fixé par ordonnance ou est un bruit spécifiquement prohibé par le présent règlement, une plainte peut être déposée contre l'usager de l'objet, de l'appareil ou de l'instrument au moyen duquel ce bruit est émis, de même que contre la personne qui peut être responsable d'une telle émission.

15. L'agent de la paix qui a des motifs raisonnables de croire que la tranquillité d'une personne se trouvant dans un bâtiment d'habitation est troublée par un bruit qu'il estime excessif compte tenu de l'heure, du lieu et de toutes autres circonstances, peut ordonner à quiconque cause cette nuisance de la faire cesser immédiatement.

Quiconque n'obtempère pas sur-le-champ à l'ordre de l'agent de la paix donné conformément au premier alinéa contrevient au présent règlement.

16. Aucun permis ne peut être délivré pour un établissement ou une occupation lorsque les activités exercées dans cet établissement ou aux fins de cette occupation sont incompatibles avec les exigences du présent règlement.

Sont incompatibles au sens du premier alinéa les activités produisant dans le local qui fait l'objet de la demande de permis un bruit qui dépasse, dans un local voisin, le niveau de pression acoustique réglementaire.

Aux fins du premier alinéa, le directeur du service chargé de l'application du présent règlement peut faire

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

by-law may have a technical assessment made of the noise produced by similar activities.

17. A permit issued after the verifications provided for in article 16 does not exempt any person from the application of this by-law.

18. No permit may be issued for an establishment or an occupancy listed below, whose premises are next to a building or part of a building occupied for residential purpose and located in a zone where housing is authorized:

(1) dance hall, dance floor;

(2) demolition material site;

(3) discothèque;

(4) dump;

(5) entertainment hall;

(6) establishment comprising commercial premises fitted with a sound system;

(7) music studio, music rehearsal studio;

(8) open-air site for junk or second-hand goods;

(9) reception hall;

(10) scrap site.

For the purposes of the first paragraph, the word "premises" includes the open-air site of a site or dump referred to in paragraphs 2, 4, 8 and 10.

19. Articles 16 to 18 prevail over the provisions of any other by-law.

SECTION IV
ORDINANCES

20. For the purposes of this by-law, the executive committee may, by ordinance:

(1) designate the department director responsible for the enforcement of this by-law or one of its sections;

(2) determine the sound pressure level of noise which, in the circumstances described and in the cases referred to in this by-law, may not be exceeded;

(3) determine a proper method of measuring noise intensity;

procéder à une évaluation technique du bruit produit par de semblables activités.

17. Un permis délivré après les vérifications prévues à l'article 16 n'a pas pour effet d'exempter quiconque de l'application du présent règlement.

18. Aucun permis ne peut être délivré pour un établissement ou une occupation ci-après mentionné, dont le local est adjacent à un bâtiment ou à une partie d'un bâtiment occupé à des fins d'habitation et qui se trouve dans une zone où l'habitation est autorisée :

1º dépôt d'articles de bric-à-brac ou d'effets d'occasion exploité en plein air;

2º dépôt de ferraille;

3º dépôt de matériaux provenant de démolition;

4º dépotoir;

5º discothèque;

6º établissement comportant un local commercial sonorisé;

7º salle de danse, parquet de danse;

8º salle de réception;

9º salle de spectacle;

10º studio de musique, studio de répétition de musique.

Aux fins de l'application du premier alinéa, le mot « local » comprend le site d'opérations en plein air d'un dépôt ou d'un dépotoir mentionné aux paragraphes 1, 2, 3 et 4.

19. Les articles 16 à 18 prévalent sur toute disposition d'un autre règlement.

SECTION IV
ORDONNANCES

20. Aux fins de l'application du présent règlement, le comité exécutif peut, par ordonnance :

1º désigner le directeur du service chargé de l'application du présent règlement ou d'une de ses sections;

2º fixer le niveau de pression acoustique du bruit qui, dans les circonstances décrites et les cas mentionnés au présent règlement, ne peut être dépassé;

3º déterminer toute méthode appropriée de mesure de l'intensité d'un bruit;

(4) designate or describe any device or instrument to be used for measurement, analysis or other operations;

(5) determine certain areas where noise standards may need to be specified;

(6) single out certain periods of the day;

(7) set the terms and form of any notice.

For the purposes of section II, the executive committee may, by ordinance, determine different categories of vehicles.

For the purpose of section III, the executive committee may, by ordinance:

(1) prescribe methods for normalizing the noises measured;

(2) classify inhabited places into separate premises on the basis of the type of occupancy;

(3) determine the terms of exception to articles 9, 10 or 11 under circumstances or on the occasion of events, celebrations or demonstrations it specifies or authorizes.

SECTION V
PENAL PROVISIONS

21. Any person who contravenes this by-law is guilty of an offence and is liable:

(1) for a first offence, to a fine of $100 to $300;

(2) for a second offence, to a fine of $300 to $500;

(3) for a subsequent offence, to a fine of $500 to $1000.

Charter of the city of Montreal, 1960, S.Q. 1959-60, c. 102

517. For greater certainty as to the powers conferred on the council by article 516, but without restricting the scope thereof and subject to the reservations which it contains, and without restricting the scope of the powers otherwise conferred on the council by this charter, the authority and jurisdiction of the council extend to all the following matters:

a. the raising of money by taxation;

b. the borrowing of money on the city's credit;

4º désigner ou décrire tout appareil ou instrument à utiliser lors des mesures, analyses ou autres opérations;

5º déterminer certaines aires à l'égard desquelles il estime nécessaire de particulariser les normes de bruit;

6º distinguer certaines périodes de la journée;

7º établir les modalités et la forme de tout avis.

Aux fins de l'application de la section II, le comité exécutif peut, par ordonnance, établir différentes catégories de véhicule.

Aux fins de l'application de la section III, le comité exécutif peut, par ordonnance :

1º prescrire les méthodes de normalisation des bruits mesurés;

2º classifier les lieux habités en locaux distincts suivant leur mode d'utilisation;

3º déterminer, dans les circonstances ou à l'occasion d'événements, de fêtes ou de manifestations qu'il précise ou autorise, les modalités d'exception aux articles 9, 10 et 11.

SECTION V
DISPOSITIONS PÉNALES

21. Quiconque contrevient au présent règlement commet une infraction et est passible :

1º pour une première infraction, d'une amende de 100 $ à 300 $;

2º pour une première récidive, d'une amende de 300 $ à 500 $;

3º pour toute récidive additionnelle, d'une amende de 500 $ à 1 000 $.

Charte de la Ville de Montréal, 1960, S.Q. 1959-60, ch. 102

517. Pour plus ample certitude sur les pouvoirs conférés au conseil par l'article 516, mais sans en restreindre la portée et sous les réserves qu'il contient, sans restreindre non plus l'étendue des pouvoirs que cette charte attribue par ailleurs au conseil, l'autorité et la juridiction de ce dernier s'étendent à toutes les matières suivantes :

a) la perception de deniers par l'imposition de taxes;

b) l'emprunt d'argent sur le crédit de la cité;

2005 SCC 62 (CanLII)

2005 SCC 62 (CanLII)

c. streets, lanes and highways, and the right of passage above, across, along or beneath the same;

d. sewers, drains and aqueducts;

e. parks, squares and ferries;

f. licenses for trading and peddling;

g. the public order, peace and safety;

h. health and sanitation;

i. vaccination and inoculation;

j. public works and improvements;

k. explosive substances;

l. nuisances;

m. markets and abattoirs;

n. decency and good morals;

o. masters and servants;

p. water, light, heat, electricity and railways;

q. the granting of franchises and privileges;

r the inspection of food;

s. generally all matters concerning the proper administration of the affairs of the city, public interest and the welfare of its population.

. . .

520. Without prejudice to articles 516, 517, 518 and 519 and subject to the provisions of articles 529 to 538, the council may, by by-law:

. . .

72. Define what shall constitute a nuisance and abate the same, and impose fines upon persons who create nuisances or permit them to exist;

. . .

Appeal allowed with costs, BINNIE J. *dissenting.*

Solicitors for the appellant: Charest, Séguin, Caron, Montréal.

c) les rues, ruelles et voies publiques et le droit de passage au-dessus, au travers, le long ou au-dessous de celles-ci;

d) les égouts, drains et aqueducs;

e) les parcs, squares et traverses;

f) les licences de commerce et de colportage;

g) l'ordre, la paix et la sécurité publics;

h) l'hygiène et la salubrité;

i) la vaccination et l'inoculation;

j) les travaux et améliorations publics;

k) les substances explosibles;

l) les nuisances;

m) les marchés et abattoirs;

n) la décence et les bonnes mœurs;

o) les maîtres et serviteurs;

p) l'eau, la lumière, le chauffage, l'électricité et les chemins de fer;

q) l'octroi de franchises et de privilèges;

r) l'inspection des aliments;

s) généralement tout ce qui concerne la bonne administration des affaires de la cité, l'intérêt public et le bien-être de sa population.

. . .

520. Sans préjudice des articles 516, 517, 518 et 519 et sous réserve des dispositions des articles 529 à 538, le conseil peut, par règlement :

. . .

72° Définir ce qui constitue une nuisance; prohiber et supprimer les nuisances et imposer des amendes aux personnes qui en créent ou en laissent subsister,

. . .

Pourvoi accueilli avec dépens, le juge BINNIE *est dissident.*

Procureurs de l'appelante : Charest, Séguin, Caron, Montréal.

Solicitors appointed by the Court as amicus curiae: Beauchemin, Paquin, Jobin, Brisson & Philpot, Montréal.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

Procureurs nommés par la Cour en qualité d'amicus curiae : Beauchemin, Paquin, Jobin, Brisson & Philpot, Montréal.

Procureur de l'intervenant : Procureur général de l'Ontario, Toronto.

2005 SCC 62 (CanLII)

Indexed as:

Régie des rentes du Québec v. Pension Commission of Ontario

Between
La Régie des rentes du Québec, applicant, and
La Commission des Régimes de Retraite de l'Ontario,
respondent, and
McColl-Frontenac Petroleum Inc. and Léo Deschamps, intervenors

[2000] O.J. No. 2845

189 D.L.R. (4th) 304

135 O.A.C. 201

24 C.C.P.B. 111

25 C.C.P.B. 304

98 A.C.W.S. (3d) 1118

Court File No. 98-DV-183

Ontario Superior Court of Justice
Divisional Court

Charbonneau, Sedgwick and Aitken JJ.

Heard: October 25-27 and November 8, 1999.
Judgment: July 26, 2000.

(63 paras.)

Master and servant -- Remuneration -- Pension or retirement benefits -- Withdrawal of funds from plan by employer -- Distribution of surplus funds -- Regulation -- Administrative law -- Judicial review -- Procedure -- Parties, what constitutes interested party -- Boards and tribunals -- Jurisdiction of particular boards and tribunals -- Pension Commission of Ontario -- Regie des rents du Quebec -- Bars -- Delay -- Alternate remedy -- Scope of review -- Grounds -- Unreasonableness of decision attacked -- Error of law.

Application by the Regie des rentes du Quebec for judicial review of a decision of the Pension Commission of Ontario that approved the withdrawal of a pension plan surplus. The Regie regulated pension plans in Quebec. The Commission and the Regie entered into a Reciprocal Agreement to regulate pension plans of employers whose employees were in more than one province. The intervenor McColl-Frontenac Petroleum had employees in Ontario and Quebec. The Commission regulated McColl pursuant to the Agreement. McColl applied to the Commission to withdraw the surplus in the pension plan of Leco. Leco was a predecessor company to McColl. Its plan was governed by Ontario and Quebec law. Several Quebec employees and the Regie objected to the application. The order that approved the withdrawal was made on July 9, 1997. No written reasons were provided. The Commission did not inform the Regie about its decision. The Regie only found out about it when it contacted the Commission. The Commission did not respond to the Regie's request for information. The Regie attempted to resolve this matter with McColl before it commenced this application. The Regie brought this application on February 10, 1998. McColl claimed that the Regie lacked the constitutional right or standing to bring this application. The Regie was not entitled to relief because it delayed its application. There were other means by which it could have sought relief.

HELD: Application allowed. The decision of the Commission was quashed as it affected Quebec members of the plan. The matter was remitted to the Commission for reconsideration. The Commission was required to give written reasons for the new decision. The Regie did not apply to enforce its regulatory functions. It wanted the order referred back to the Commission to ensure that it complied with the Agreement. The Regie did not attempt to replace the Commission. The Supplemental Pension Plan Act gave the Regie the powers of a natural person. This legislation authorized this application. The Regie had standing to bring this application because of the breach of the Agreement. It was not a party to McColl's application. The only way it could correct the decision was to apply for judicial review. The Regie did not waive its rights and did not unreasonably delay its application. The issue in this case was whether the Commission's interpretation of the Agreement and its application of the Pension Benefits Act were reasonable. The decision was not correct and it was not reasonable. The Agreement and the Quebec Act said nothing about the governing law for the Quebec members. The Commission should have known that Quebec law applied to those members based on the governing law clause in the plan. The lack of written reasons indicated that the decision was not reasonable.

Statutes, Regulations and Rules Cited:

Pension Benefits Act, R.S.O. 1990, c. P-8, ss. 79(5), 95, 95(1)(a).

Supplemental Pension Plan Act, s. 249, 249(1).

Supplemental Pension Plan Act Regulations, ss. 21, 53, 92.

Counsel:

Charles Gibson, for the applicant.
Alex Turko and Stan Sokol, for the respondent.
Lawrence E. Ritchie and Christopher P. Naudie, for the intervenor McColl-Frontenac Petroleum Inc.
Anne Sheppard, for the intervenor Léo Deschamps.

The judgment of the Court was delivered by

CHARBONNEAU J.:--

THE NATURE OF THIS PROCEEDING

1 In March 1997, the intervenor McColl-Frontenac Petroleum Inc. ("McColl-Frontenac") made an application to the Respondent Pension Commission of Ontario ("Commission") under the Pension Benefits Act, R.S.O. 1990, c. P.8 (the "Ontario Act"), to obtain the Commission's consent to the withdrawal of the surplus remaining in the Revised Pension Plan (the "Plan") of Leco Inc., a predecessor corporation to McColl-Frontenac. In its decision rendered on June 26, 1997, the Commission approved the payment of the surplus to McColl-Frontenac in accordance with the procedural framework of the Ontario Act and pursuant to its powers as the designated "major authority" under the terms of the Memorandum of Reciprocal Agreement entered into by the Commission, the Applicant and other provincial pension authorities in 1968 (the "Reciprocal Agreement").

2 The Applicant, the Régie des rentes du Québec (the "Régie"), brings this application for judicial review of the Commission's decision. The Régie says that the Commission ought to have applied Québec pension legislation to Québec members of the Plan and that its decision should be quashed and the matter remitted to the Commission for reconsideration.

GENERAL BACKGROUND TO THE APPLICATION

3 In March 1997, McColl-Frontenac, as plan sponsor, filed its surplus application with the Commission to obtain its consent to the withdrawal of the surplus. At all material times, the Plan included members in Ontario and Québec, but the majority of members reported to work in Ontario. Accordingly, under the terms of the Reciprocal Agreement, the Plan was registered solely with the Commission in Ontario and the Commission acted as the "major authority" in relation to the Plan.

4 The Reciprocal Agreement exists to give effect to the mutual delegation of authority between provincial pension authorities where a pension plan covers employees in more than one province. It includes the following provisions:

AND WHEREAS the said signatories have deemed it desirable that statutory functions and powers in respect of any one pension plan be exercised by one signatory only, acting both on its own behalf and on behalf of any other signatory having statutory functions and powers in respect of such plan;

1.

d) "major authority" means, with respect to a plan, the participating authority of the province where the plurality of the plan members are employed (save that members employed in a province not having a participating authority shall not be counted);

e) "minor authority" means, with respect to a plan, the participating authority of any province where one or more plan members are employed, but does not include the major authority.

2. The major authority for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.
3. Any authority may except itself from the operation of section 2 in respect of a specific plan by giving written notice to that effect to the major authority (or, if the major authority is the excepting authority, then to all the minor authorities) for such plan; and in such event the excepting authority shall be deemed not to be a participating authority in respect of the such plan.
8. A major authority acting pursuant to section 2 shall fully inform each minor authority as to the exercise of any functions and powers exercised on behalf of such minor authority.
9. Where a major authority is unable to exercise a particular power of enforcement available to one of the minor authorities, it shall so advise that minor authority.
10. Participation by any authority in the foregoing Administrative Arrangement commences upon the date it becomes a signatory to this Memorandum ...

5 The Régie is a statutory body established under the laws of Québec, and exercises responsibilities for the administration and regulation of pension plans within the province of Québec. The Régie exercises its functions and powers pursuant to the Supplemental Pension Plan Act (the "Québec Act"). At all material times, since 1981, when the plan's registration was transferred from Québec to Ontario, up to the Commission's decision, the Commission has acted as the major authority and the Régie has acted as the minor authority in relation to the Plan under the Reciprocal Agreement.

6 Pursuant to its delegated powers as major authority, at its meeting on June 26, 1997, the Commission approved the payment of the surplus to McColl-Frontenac. It did so in accordance with the provisions of the Ontario Act.

7 The Plan specifically provided as follows:

> 13.6 The Plan shall be construed and administered in accordance with the laws of the Province of Québec, the Province of Ontario and the rules of the Department of National Revenue.
>
> 14.2 ..., in the event of the termination of the Plan, the Employer shall not be obligated to make any further contributions to the Plan and, if there be any excess to the Plan after the benefits accrued under the Plan have been purchased from an Insurance Company, such excess amount shall be paid to the Employer. It is provided, however, that the provisions of any Pension Benefits Act to which the Plan is subject will be applied on termination of the Plan.

8 The Plan was terminated and wound up as of June 16, 1987. The wind-up report for the Plan indicated the existence of the surplus. On July 22, 1988, the Superintendent of Pensions of Ontario approved the payment of basic benefits to employees in accordance with the wind-up report. The Superintendent communicated to McColl-Frontenac that it might apply to the Commission for withdrawal of the surplus under the terms of the Ontario Act.

9 The wind-up was effected under the terms of the Ontario Act. From 1987 until the Commission's decision on June 26, 1997, McColl-Frontenac had no dealings or communications with the Régie in relation to the administration and termination of the Plan.

10 In June 1993, McColl-Frontenac advised the Superintendent that it was proceeding with an application to withdraw the surplus. Pursuant to the procedures established under the Ontario Act, McColl-Frontenac was required to pursue two separate and independent steps:

> (1) An application to the Commission to obtain its consent to the withdrawal of the surplus; and
> (2) An application to the Ontario Court (General Division) (now the Superior Court of Justice) to obtain its authorization to the withdrawal of the surplus.

11 On January 8, 1997, McColl-Frontenac filed a formal notice of the surplus application under step (1) with the Commission. In accordance with the requirements of the Ontario Act, a copy of the Notice was forwarded to members and former members of the Plan in Québec (including Mr. Deschamps). As well, a newspaper notice was published in the Québec press. The Notice disclosed that McColl-Frontenac would be making the surplus application to the Commission, and indicated

that interested persons could make written submissions within 44 days to the Commission at an indicated address.

12 In February 1997, a number of members (including Mr. Deschamps) wrote the Commission and objected to the distribution of the surplus to McColl-Frontenac. At that time, none of these members disputed the Commission's jurisdiction to apply the Ontario Act procedures to the surplus application or raised the issue of the arbitration procedure provided by the Québec Act for withdrawal of surplus applications.

13 In March 1997, McColl-Frontenac filed its surplus application. The surplus application specifically disclosed that there were former members of the Plan located in Québec.

14 On April 23, 1997, Mr. Taillon, an actuarial consultant for the Le Syndicat national des employés de Leco Inc. (CSN) ("Union") wrote the Commission on behalf of the Québec members of the Plan and identified a number of objections to the proposed distribution of the surplus to McColl-Frontenac. One of these objections was that, as to the Québec members, the surplus application ought to be determined on the basis of the arbitration procedure under the Québec Act. Mr. Taillon states:

> 1. - The Union represents Quebec members and the issue must be settled on the basis of the provisions of the Quebec Supplemental Pension Plans Act (the SPPA). This law specifically provides that a member may request arbitration if no agreement is reached on surplus distribution. Please note that it is effectively the intention of the Union to request arbitration to decide who will be entitled to the surplus and what share of that surplus will revert to the Quebec members (see sections 230.1 and following of the SPPA). [Translation]

15 The Régie received a copy of Mr. Taillon's letter from him. Its staff had a number of prior telephone discussions with Mr. Taillon regarding the surplus application in March and April 1997.

16 The Registrar of the Commission responded to Mr. Taillon's letter on April 24, 1997, stating that the Commission would consider Mr. Taillon's representations, and invited him to submit further documentation. The Registrar did not indicate whether the Commission would apply the arbitration procedure under the Québec Act to the surplus application.

17 On June 10, 1997, the Registrar of the Commission wrote Messrs. Taillon and Deschamps separately to advise them of the upcoming hearing, and that they were both entitled to make written submissions with respect to the surplus application, and could attend the Commission's meeting on June 26, 1997. These separate letters specifically enclosed a copy of the report prepared by the Superintendent's Staff in relation to the surplus application, dated June 6, 1997. The report expressly noted that Mr. Taillon had previously objected to the surplus application on the ground that "the provisions regarding arbitration under the [Québec Act] were applicable".

18 On June 26, 1997, the Commission convened its scheduled meeting to consider the surplus application. At the meeting, the Commission rendered its decision, consenting to the payment of the surplus to McColl-Frontenac.

19 On that date, Mr. Deschamps wrote the solicitors for McColl-Frontenac to request arbitration under the Québec Act. The letter was copied to the Commission, but it was not received by the Commission until 1:35 p.m. on June 27, 1997. The solicitors for McColl-Frontenac only replied to Mr. Deschamps on October 17, 1997.

20 On July 9, 1997, the Commission transmitted its decision in writing to McColl-Frontenac indicating that it had consented under the Ontario Act to the withdrawal of the surplus by McColl-Frontenac. The letter was copied to Mr. Taillon, Mr. Deschamps and other members of the Plan but not to the Régie, which up to that point had not communicated with the Commission about the surplus application. The Commission did not give written reasons for its decision.

21 On July 14, 1997, the Régie communicated directly with the Commission by telephone for the first time about this surplus application. The Commission advised the Régie that it had consented to the withdrawal of the surplus over the opposition of the Québec members. The representative of the Régie reported these communications to her supervisor.

22 On July 17, 1997, the Régie wrote Mr. Deschamps, indicating that it had already been informed of the decision by the Commission, and that the Régie was aware that the members contemplated an appeal. The next day, the Régie wrote the Commission requesting additional information with respect to the Plan and a copy of its decision. The Commission never replied to this letter although the letter raised questions about the applicability to Québec members of the Québec Act and its arbitration procedure to McColl-Frontenac's surplus application.

23 In October 1997, Mr. Deschamps wrote the Régie and requested the intervention of the Régie on the ground that the employer had refused to apply the arbitration procedure. In response to this request, on November 12, 1997, the Régie wrote the Commission. The Régie advised the Commission that it objected to the decision on the ground that the arbitration procedure should have been applied. On or about November 26, 1997, the Régie rendered a decision whereby it purported under section 3 to except itself from the operation of the Reciprocal Agreement in relation to the Plan.

24 On December 2nd, 1997, the Régie issued a further order rescinding the consent to the distribution of the surplus granted by the Commission earlier as it affected the Québec members of the plan. The Régie wrote to the solicitors for McColl-Frontenac requiring that the surplus application be submitted to arbitration as required by the Québec Act. On December 22nd, McColl-Frontenac brought an application for judicial review in Québec Superior Court challenging this decision by the Régie. This application was dismissed by Madam Justice Julien on November 26, 1998. That dismissal is presently under appeal to the Québec Court of Appeal.

25 The Ontario Act allows for an appeal to this court within 30 days of the Commission's decision. An appeal was begun in March 1998 in Ontario by Mr. Deschamps and the Union for judicial review of the Commission's decision. This appeal was abandoned in August 1998. McColl-Frontenac began an application in the Superior Court of Justice for Ontario on November 19, 1997, for the court's authorization to the withdrawal of the surplus in accordance with the requirements of the Ontario Act. On February 10, 1998, the Régie commenced this application in the Divisional Court for judicial review of the Commission's decision dated June 27, 1997. At the request of the parties, McColl-Frontenac's application to the Superior Court of Justice, dated November 19, 1997, was adjourned sine die pending the decision of this court on the present application.

THE POSITION OF THE RÉGIE

26 The position of the Régie may be summarised as follows.

27 The Ontario Act can only apply to employees in Ontario. The provincial legislature cannot extend its effect beyond its own borders. Only the Québec legislature could pass a law that the legislative regime of another province would apply to employees in Québec. In the particular circumstances of this case, Québec has not done so.

28 The Reciprocal Agreement only has the effect of delegating the administrative functions and powers of the Régie to the Commission. When deciding the merits of the surplus application, the Commission had to apply Québec law to that portion of the application which affected Québec employees. The standard of review in such a case should be correctness. As to Québec members, the Québec Act only provides for referral of such application to arbitration. The Commission could not make a decision which the Régie itself was not empowered to render under Québec law. Therefore, the decision is clearly incorrect.

29 Even if the standard of review is patent unreasonableness, by not considering and applying Québec law, the Commission's decision, insofar as it affected the Québec members of the Plan, was patently unreasonable.

30 Further, the Commission breached the Reciprocal Agreement by not properly informing the Régie of its actions, contrary to section 8.

THE POSITION OF MR. DESCHAMPS

31 In addition to supporting the position of the Régie, Mr. Deschamps submits that the Commission's decision is patently unreasonable because the Commission failed to transmit written reasons for its decision which it is strictly required to do by section 79(5) of the Ontario Act.

THE POSITION OF MCCOLL-FRONTENAC

32 McColl-Frontenac first submitted that the application should be dismissed on the following preliminary grounds:

1. The Régie has no statutory or constitutional authority to bring this application;
2. The Régie has no private or public standing to seek judicial review of the decision;
3. The Régie failed to exhaust its alternative remedies prior to seeking judicial review of the decision;
4. The Régie has acted with unreasonable delay in seeking judicial review;
5. The Régie is effectively seeking to circumvent the expired appeal period; and
6. The Régie and Mr. Deschamps have, by their conduct, waived their rights to object to the Commission's procedure.

33 McColl-Frontenac further submits that the application should be dismissed on its merits on the following grounds:

1. The Commission is a specialized administrative tribunal, and its decisions should be subject to a high level of curial deference. This decision should only be subject to judicial intervention if it is patently unreasonable, which it is not.
2. There is no evidence that the Commission failed to consider the potential application of Québec law.
3. The Commission's decision was reasonable. The decision was consistent with the established understanding and practice within the pension industry, recognized and fostered by provincial pension authorities under the Reciprocal Agreement.
4. In any event, the Commission's decision was correct. The signatories to the Reciprocal Agreement delegated to the major authority by section 2, their "statutory functions and powers", to apply a single uniform procedural framework for the registration, regulation and termination of an inter-provincial pension plan. In this instance, the Commission properly exercised its delegated powers as major authority and determined the surplus application in accordance with the procedural framework of the Ontario Act.
5. In any event, the Commission's decision was correct as a matter of Québec law, since the Québec arbitration procedure did not apply in this particular case because:

(a) The Régie and the intervenor Léo Deschamps failed to deliver a formal

application for arbitration prior to the decision;

(b) The legal rules governing the determination and allocation of surplus assets of a terminated pension plan constitute "solvency standards" which are subject to a specific exemption under the Québec Act;

(c) The arbitration procedure under the Québec Act can only be applied to surplus assets of a plan that, at termination, covers employees located exclusively in Québec. Under Québec law, a pension surplus cannot be legally apportioned after termination into discrete amounts of surplus attributable to employees in different provinces.

THE COMMISSION'S POSITION

34 The Commission takes no formal position on the merits of the application by the Régie nor did it file any additional evidence or material. However, counsel did make the following submissions:

1. The Commission proceeded conscientiously and in good faith on what it understood was the proper practice at that time;
2. Section 79(5) of the Ontario Act should be interpreted to mean that written reasons are only transmitted when written reasons are actually given. Reasons are as a matter of practice only given when the nature of the procedure requires them. There is no positive duty to give reasons in every case;
3. Section 8 of the Reciprocal Agreement does not set out any specific manner how or when a major authority is to "inform" a minor authority as to an exercise of the functions and powers of the minor authority. Section 8 is, however, expressed in the past tense so that it should be interpreted to mean after the function or power has been exercised.
4. In previous cases where the surplus attributable to Québec employees was severed by the Commission and dealt with by arbitration in Québec, for example in The Great-West Life Assurance Company Canadian Agents' Pension Plan, a decision made by the Commission on March 26, 1998 (Applicant's Record Vol. I, Tab 4(K), pp. 153-4), the Commission was not asked to adjudicate this issue. Rather the matter proceeded in that fashion because of previous agreement or accommodation between the parties to the plan.
5. A new procedural framework for surplus applications involving employees in more than one province was put in place by the Commission only after this case, at the request of the Régie.
6. The standard of review should be the one established by the Ontario Court of Appeal in GenCorp Canada Inc. v. Ontario (Superintendent, Pensions) (1998), 158 D.L.R. (4th) 497, 503, that the reviewing court will only intervene if the Commission's decision is not reasonable simpliciter.

ANALYSIS

THE PRELIMINARY OBJECTIONS

1. Absence of statutory or constitutional authority

35 Mr. Ritchie correctly points out that a provincial legislature has no constitutional jurisdiction to promulgate legislation intended to operate beyond the territorial limits of the province. As an extension of this constitutional principle, no provincial court or administrative tribunal established by provincial legislation may operate or extend its process or exercise its statutory functions or powers beyond the territorial limits of the province.

36 In support of the above principles McColl-Frontenac relies on the cases of McGuire v. McGuire and Desordi [1953] O.R. 328 (C.A.) and Ewachniuk v. Law Society of B.C. (1998), 156 D.L.R. (4th) 1 (B.C.C.A.). In both cases the provincial tribunal was attempting to exercise its functions and powers beyond the provincial territory for which it was created. The question becomes whether in bringing this application the Régie is exercising its regulatory functions and powers?

37 The functions and powers of the Régie are to regulate pension plans covering Québec employees. By virtue of section 249 of the Québec Act, the Régie may enter into agreements with another provincial pension agency to, among other things, delegate its powers to that agency. When it brings an application in Ontario to have the Commission comply with the terms of the agreement the Régie is not carrying on its regulatory functions. At no time is the jurisdiction of the Commission to hear McColl-Frontenac's application being challenged. The Régie is not trying to substitute itself for the Commission in this matter. In fact it is simply asking that the matter be referred back to the Commission so that the Commission may deal with it in accordance with the Reciprocal Agreement. The Régie is attempting to enforce the terms of the Agreement. Such an action can only be brought against the Commission in Ontario. The right of the Régie to take such action must be necessarily implied from the Agreement itself, and the Commission must be deemed to have accepted this right when it entered into the Agreement.

38 McColl-Frontenac argues that in any event the Régie has not been given the specific statutory power to bring this action and that without such express authority it lacks legal capacity to do so. McColl-Frontenac relies on the decision of the Supreme Court of Canada in Director of Investigation and Research v. Newfoundland Telephone Co. [1987] 2 S.C.R. 466. That case makes it clear that while statutory authority to be a party to legal proceedings is required, that authority may be either expressed or implied. The Québec Act gives the Régie all the powers and capacities of a natural person. Coupled with that it gives the Régie the power to enter into the Reciprocal Agreement. It is a reasonable interpretation of the statute to conclude that the Québec Act at the very least grants the Régie the implied authority to bring this application in order to enforce the Agreement.

2. Absence of private or public standing

39 McColl-Frontenac contends that the Régie is not an aggrieved person nor has it suffered an injury to an identifiable personal interest. As a result thereof it does not have private standing to bring this application. McColl-Frontenac further submits that the Régie does not have public standing because it does not have a genuine interest in the Commission's proceeding and there are other reasonable and effective means by which this particular issue could have been brought before the courts.

40 As a party to the Reciprocal Agreement, the Régie alleges that the Commission breached that Agreement. If the Régie were right in its position it would certainly qualify as an aggrieved party. The question raised is certainly a serious and justiciable issue which can only be addressed in the context of an application for judicial review. The Régie was not a party to the surplus application and therefore could not appeal from the Commission's decision. The only way of correcting this particular decision of the Commission, if need be, is by bringing the present application for judicial review. Moreover, counsel for all parties have submitted that the present application is of utmost importance to the pension industry. We are all of the view that the Régie has public standing to bring this application.

3. Alternative remedies, unreasonable delay and waiver

41 We are all of the view that the evidence does not warrant a dismissal of this application on any of these grounds.

42 The Régie was aware in general terms that a surplus application was being made and that the plan in question included Québec employees. Moreover it knew as a result of Mr. Taillon's letter, dated April 24, 1997, that the Québec members were asking that the Québec Act apply and that the matter be referred to arbitration. Under the terms of the Reciprocal Agreement, the Régie had delegated to the Commission its functions and powers to deal with this application.

43 McColl-Frontenac argues that on the basis of the facts of this case, the Régie ought to have excepted itself under paragraph 3 of the Reciprocal Agreement in respect of this particular Plan, before the Commission made its decision. This is not a reasonable position unless it is established that the Régie could have known in advance what the Commission's decision would be. This is not an inference that can be made from the evidence before the court. The Commission did not inform the Régie in advance how it intended to rule on this issue. The Commission did not provide any information about its decision to the Régie until an officer of the Régie called the Commission on July 14th, some 18 days after the hearing.

44 The notes of that conversation and the subsequent letter of July 18th clearly establishes that there was, to say the least, a breakdown in communication between the two agencies. The two officials would appear to be talking about two different things.

45 Furthermore, the Commission never replied to the letter of the Régie dated July 18, 1997, although the Régie was asking for relevant information on the very issue before this court. Subsequently, the Régie took steps to except itself under the Reciprocal Agreement and rescinded the order of the Commission. It was not unreasonable for the Régie to then attempt to solicit the co-operation of McColl-Frontenac in an effort to settle the matter without recourse to the courts. In the circumstances there is neither unreasonable delay nor waiver of rights by the Régie.

THE STANDARD OF REVIEW

46 The Ontario Court of Appeal has recently held that the Commission is an expert and specialized tribunal and that its decisions are generally subject to a "considerable degree of curial deference." A decision by the Commission within its specialized mandate is subject to review according to a standard of "reasonableness simpliciter". Even more recently, the Divisional Court has held that procedural rulings of the Commission in respect of a surplus application are within the tribunal's "particular expertise" and are therefore subject to "considerable deference" on review.

> GenCorp Canada Inc. v. Ontario (Superintendent, Pensions) (1998), 158 D.L.R. (4th) 497, at pp. 502-505 (Ont. C.A.)
>
> C.U.P.E., Local 185 v. Etobicoke (City) (1998), 17 C.C.P.B. 278, at pp. 279-80 (Ont. Div. Ct.)

47 There is no reason to depart from the application of this standard of review in this case. The Régie does not challenge the jurisdiction of the Commission to deal with the surplus application. Notwithstanding Mr. Ritchie's able argument to the contrary, the evidence overwhelmingly establishes that the Commission made a deliberate choice to apply the Ontario Act to all members of the Plan including Québec members, to the complete exclusion of the procedure provided under the Québec Act. The real issue in this case is whether the Commission's interpretation of the Reciprocal Agreement and hence its decision to apply the provisions of the Ontario Act exclusively was reasonable in all the circumstances.

WAS THE COMMISSION'S DECISION REASONABLE?

48 McColl-Frontenac makes three submissions on this point.

1. The decision is reasonable because it was consistent with the established understanding and practice within the pension industry, recognized and fostered by provincial pension authorities.
2. The decision is not only reasonable but it is correct. The purpose of the Agreement was to facilitate and harmonize the regulation of inter-provincial pension plans. In order to achieve this aim the parties to the Agreement delegated to the major authority the power to apply a single uniform procedural framework to all aspects of pension regulation

including surplus application. The Commission's decision is therefore in accordance with the fundamental purpose and intent of the Reciprocal Agreement.

3. The decision was not only reasonable but correct since the Québec arbitration procedure did not apply even as a matter of Québec law.

49 Dealing with the last point first, the submission that a formal request was not made and, therefore, that the arbitration procedure was not triggered is not supported by the evidence. Mr. Taillon's letter clearly indicates that arbitration was being requested. Moreover, under Québec law the evidence does not establish that a specific formal application is required to trigger the arbitration procedure. In any event, in the absence of an agreement between the employer and a requisite number of plan members, arbitration appears to have been the only available procedure under Québec law.

50 Further, McColl-Frontenac contends the Québec Act specifically exempts the surplus application from arbitration by virtue of the specific exemption for "solvency standards". A reasonable interpretation of the words "solvency standards" cannot be said to include surplus applications. Regulation of solvency standards mainly arises while a pension plan is ongoing. Surplus applications arise only after a plan has been terminated and wound up.

51 Finally, McColl-Frontenac submitted expert evidence to the effect that under Québec law a pension surplus cannot be legally apportioned after termination of a plan. That evidence is far from convincing. The evidence of the Régie to the contrary is much more convincing. In addition, this court cannot overlook the decision of Madam Justice Julien who clearly indicates she sees no difficulty with such an apportionment. The evidence reveals that other surpluses have been apportioned after termination, for example The Great-West Life pension plan surplus. See item 4 in paragraph [34] above.

52 In order to properly deal with the other two grounds raised by McColl-Frontenac, it is necessary to refer more extensively to the sections of the Québec Act and the Ontario Act which grant power to their respective pension authorities to enter into reciprocal agreements. I will also refer to other sections of the Québec Act which specifically exempt certain aspects of inter-provincial plans from Québec law and also relevant interpretation bulletins issued by both pension authorities.

53 Section 249 of the Québec Act states:

> The Régie may enter into agreements according to law with any government, government department, international body or agency of a government or international body for the purposes of this Act.
>
> The agreements may, in particular,

(1) where a pension plan is governed both by this Act and by an Act of a legislative body other than the Parliament of Québec, determine on what conditions and to what extent each Act applies to the plan in respect of the employees referred to in section 1 who are parties to the plan and prescribe any other rule applicable to the plan;

(2) determine on what conditions and to what extent this Act applies to benefits or assets transferred from a pension plan governed by this Act to a pension plan governed by an Act of a legislative body other than the Parliament of Québec;

(3) provide for the delegation of powers that this Act confers on the Régie or that an Act of a legislative body other than the Parliament of Québec confers on a similar agency.

Every agreement bearing on a matter referred to in the second paragraph must be tabled in the National Assembly within 15 days after the date on which it is entered into if the Assembly is in session or, if not, within 15 days after the opening of the next session or resumption. The agreement acquires force of law from the time it is tabled in the National Assembly." (Emphasis added).

54 Section 95 of the Ontario Act states:

(1) The Commission may, subject to the approval of the Lieutenant Governor in Council,

(a) enter into agreements with the authorized representatives of another province or the Government of Canada to provide for the reciprocal application and enforcement of pension benefits legislation, the reciprocal registration, audit and inspection of pension plans and for the inspection of pension plans and for the establishment of a Canadian association of pension supervisory authorities;

(b) authorize a Canadian association of pension supervisory authorities to carry out such duties on behalf of the Commission as the Commission may require; and

(c) delegate to a pension supervisory authority or the government of a designated province such functions and powers under this Act as the Commission may determine and the Commission may accept similar delegations of functions and powers from a pension supervisory authority or the government of a designated province.

> (2) Where a pension plan required to be registered in Ontario is registered in a designated jurisdiction, the Commission by order may limit the application of this Act and the regulations to the pension plan and authorize the application of the law of the designated jurisdiction in respect of the pension plan. 1987, c. 35, s. 96. (Emphasis added)

55 The statutory provisions of the Québec Act and the Ontario Act are broad enough to authorize the Régie and the Commission to enter into an express agreement as to when one or the other, as major authority, will recognize and apply the law of the minor authority. They did not do so in the Reciprocal Agreement. According to the record before the Court, they did not do so prior to the Commission's decision on June 26, 1997. The reasonableness of the Commission's decision on that date, therefore, does not depend on the provisions of the Reciprocal Agreement.

56 What is also of importance is that sections 21, 53 and 92 of the regulations enacted pursuant to the Québec Act specifically exempts inter-provincial plans from the provisions of the Québec Act dealing with registration, inspection, solvency requirements and investment rules. It is reasonable to conclude that only the items specifically mentioned were intended to be exempted.

57 In a publication providing annotations and comments on the Québec Act, August 1996, the Régie had this to say about reciprocal agreements:

> Pursuant to these agreements it is provided that, in Québec, the law which applies to the pension plan will be applied to the individual rights of workers (for example, the individual rights of Ontario workers are governed by the law of Ontario) while the 'collective' aspects of the plan such as registration, inspection, solvency and investments -- which are subject to sections 21, 53 and 92 of the General Regulation respecting Supplemental Pension Plans (these sections are still in effect pursuant to Section 69 of the Regulation) -- are governed by the law of the place where the greatest number of members work. To give effect to these arrangements, the other provinces who are parties thereto (as well as the Northwest Territories and Yukon Territory) have adopted rules similar to those in effect in Québec. It is therefore incumbent upon the authority responsible for the supervision of pension plans in each province to apply the appropriate law to each of the members ... [Translation] (Emphasis added)

58 In its June 1992 information bulletin, the Commission had this to say about reciprocal agreements:

> Currently, the pension benefits legislation of a particular province or territory of Canada applies to members employed in that province or territory. Plans which have employees in various provinces must therefore apply the laws of more than

> one jurisdiction to the same plan. The existing Reciprocal Agreement among pension regulators, signed in 1968, requires pension regulators to administer the pension laws of other jurisdictions in relation to those plan members employed in such other jurisdictions.
>
> Sponsors of multi-jurisdictional plans face the administrative burden and added expense of applying a patchwork of differing (and sometimes contradictory) legislative requirements to various members of the same plan. As a result, a practice has been established whereby the rules of the jurisdiction of a member's employment are applied to benefit entitlement issues, (e.g. vesting) but the jurisdiction of registration of the plan are applied to administrative issues (such as payment of fees, filing, disclosure, accounting and auditing, etc.)
>
> The practice of distinguishing entitlement issues from administrative issues has helped to reduce the administrative burden on multi-jurisdictional plans. However, the informal agreement has proved to be inadequate in accounting for differing approaches to benefit and surplus entitlement taken by the various provinces." (Emphasis added)

59 McColl-Frontenac submits that there was a practice adhered to by both the Régie and the Commission which allowed the Commission to deal with the surplus application solely under the Ontario Act. First of all there is nothing in the interpretation bulletins to support this position. In fact the interpretation bulletin of the Commission is to the contrary since it raises the fact that "the informal agreement has proved to be inadequate in accounting for differing approaches to benefit and surplus entitlement taken by the various provinces." In other words, the administrative practice may work when the rules of both provinces are the same but not when they differ. In this particular case the rules differed substantially. In fact, the Régie did not have the power to decide surplus allocation. The Commission could not even rely on the powers delegated to it by the Régie.

60 McColl-Frontenac placed reliance on an article published in February 1999 by Mr. Martin Rochette the expert who testified on behalf of the Régie on this application. In that article, Mr. Rochette indicates that a general understanding had developed in the industry over the last 30 years to the effect that certain aspects of the administration of a plan, including surplus distribution, would be dealt according to the law of the major authority. However, this statement is qualified by his further statements in the same article that (1) as the law stands "the major authority must apply the law of the minor authority" and (2) "the Régie and the Commission have more or less endorsed" this practice. It is also noteworthy that in his affidavit and during his cross-examination, Mr. Rochette has steadfastly testified to the effect that the Régie never officially endorsed this practice.

61 The decision of the Commission is not correct nor is it reasonable. We conclude that the

Commission's decision was not reasonable as a result of the cumulative effect of the following:

1. In the absence of specific provisions stating otherwise, either in the reciprocal agreement or in the Québec Act, the Commission knew or ought to have known as a matter of constitutional law that the law of Québec applied to McColl-Frontenac's surplus application in so far as it affected the Québec members.
2. The Plan itself, which was part of the material filed before the Commission, provides that it will be construed and administered in accordance with the laws of Québec and Ontario. It is a reasonable inference from this provision that the rights of Québec members of the Plan would be governed by Québec law.
3. The Reciprocal Agreement clearly does not expressly provide to what extent each Act applies, as could have been provided for in accordance with subsection 249(1) of the Québec Act and subsection 95(1)(a) of the Ontario Act.
4. The Commission's own information bulletin of June 1992 calls in question the "administrative practice" of applying only Ontario law as it is said to relate to surplus entitlement, when the laws of the provinces differ.
5. The Commission was advised several months before its decision that the Québec members were requesting that the Québec Act, including the arbitration procedure, apply to the surplus application. Since no written reasons were given by the Commission for its decision, there is no way for the court to know whether this request was considered or was considered and denied.
6. The Commission did not give written reasons for its decision. Courts have said in the past that the existence of "clear and articulate reasons" militates in favour of a finding that a decision is reasonable (see Gencorp Canada, supra, at p. 505). In this case, the Commission failed to give any reasons whatsoever for its decision. This fact clearly militates against the reasonableness of the decision. This is so even if the words of section 79(5) may not justify imposing a positive duty on the Commission to provide reasons in every case.
7. In view of the express choice of law provisions of the Plan and the absence of any statutory provision exempting McColl-Frontenac's surplus application from Québec law, the Commission's decision was unreasonable and contrary to law.

CONCLUSION

62 Accordingly, for all of the above reasons, we allow the application, quash the decision of the Commission of June 26th, 1997 insofar as it affects the Québec members of the Plan and remit the

matter to the Commission for reconsideration. We also direct the Commission to provide written reasons for any further decision in this matter.

63 Order accordingly.

CHARBONNEAU J.
SEDGWICK J. -- I agree.
AITKEN J. -- I agree.

cp/s/qlala

1998 CanLII 837 (SCC)

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

N° du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

1998 CanLII 837 (SCC)

trarily deprive some of a means to cope with economic dislocation.

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

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1998 CanLII 837 (SCC)

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Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 74(1), 75(1).
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Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid*., art. 5(1)].

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1998 CanLII 837 (SCC)

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. n° 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, for the respondent.

Raymond M. Slattery, pour l'intimée.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

The judgment of the Court was delivered by

Version française du jugement de la Cour rendu par

1 IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur.

1. Facts

1. Les faits

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la

1998 CanLII 837 (SCC)

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

1998 CanLII 837 (SCC)

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

1998 CanLII 837 (SCC)

2. Relevant Statutory Provisions

2. Les dispositions législatives pertinentes

6 The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la «*LF*») et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la «*LNE*»).

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

1998 CanLII 837 (SCC)

1998 CanLII 837 (SCC)

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

1998 CanLII 837 (SCC)

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

1998 CanLII 837 (SCC)

11

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

12

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

1998 CanLII 837 (SCC)

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

17 Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

18 L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

1998 CanLII 837 (SCC)

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

1998 CanLII 837 (SCC)

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of ". . . the interests of employees by requiring employers to comply with

Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

1998 CanLII 837 (SCC)

1998 CanLII 837 (SCC)

certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

1998 CanLII 837 (SCC)

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

27

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

28

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

1998 CanLII 837 (SCC)

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

32

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

33

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

34

This interpretation is also consistent with statements made by the Minister of Labour at the time

Cette interprétation est également compatible avec les déclarations faites par le ministre du

1998 CanLII 837 (SCC)

1998 CanLII 837 (SCC)

he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

. . .

. . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

. . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

[TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.

. . .

. . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

[TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

. . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

36

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

37

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

38

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

1998 CanLII 837 (SCC)

amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

1998 CanLII 837 (SCC)

1998 CanLII 837 (SCC)

clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

41

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

42

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

6. Dispositif et dépens

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Pourvoi accueilli avec dépens.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

1998 CanLII 837 (SCC)

Her Majesty The Queen *Appellant*

v.

Royal Bank of Canada *Respondent*

INDEXED AS: ROYAL BANK OF CANADA *v.* SPARROW ELECTRIC CORP.

File No.: 24713.

1996: June 19; 1997: February 27.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Crown — Priority — Employee source deductions not paid by company in receivership — Company's inventory subject to fixed charge and to Bank Act security — Whether bank had priority to proceeds of sale of inventory over statutory trust in favour of Her Majesty — Bank Act, S.C. 1991, c. 46, s. 427 — Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), ss. 153, 227(4), (5) — Personal Property Security Act, S.A. 1988, c. P-4.05, s. 28(1).

Banks and banking operations — Security — Company's inventory subject to fixed charge and to Bank Act security — Employee source deductions not paid by company in receivership — Whether bank had priority to proceeds of sale of inventory over statutory trust in favour of Her Majesty — Bank Act, S.C. 1991, c. 46, s. 427 — Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), ss. 153, 227(4), (5) — Personal Property Security Act, S.A. 1988, c. P-4.05, s. 28(1).

The Royal Bank secured a loan made to Sparrow Electric with a general security agreement (GSA) covering Sparrow's present and after-acquired property and with *Bank Act* security (BAS) created by an assignment of inventory under s. 427 of the *Bank Act*. When Sparrow experienced financial difficulties, a standstill agreement was executed. This agreement allowed Sparrow to continue its business but permitted the bank, on default, to appoint a receiver and enforce its security. A receiver

Sa Majesté la Reine *Appelante*

c.

Banque Royale du Canada *Intimée*

RÉPERTORIÉ: BANQUE ROYALE DU CANADA *c.* SPARROW ELECTRIC CORP.

N° du greffe: 24713.

1996: 19 juin; 1997: 27 février.

Présents: Les juges La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Couronne — Priorité de rang — Retenues sur la paye d'employés non versées par la compagnie sous séquestre — Biens figurant dans l'inventaire de la compagnie assujettis à un privilège fixe et à une garantie de la Loi sur les banques — La banque avait-elle priorité de rang sur la fiducie légale constituée en faveur de Sa Majesté relativement au produit de la vente des biens figurant dans l'inventaire — Loi sur les banques, L.C. 1991, ch. 46, art. 427 — Loi de l'impôt sur le revenu, L.R.C. (1985), ch. 1 (5e suppl.), art. 153, 227(4), (5) — Personal Property Security Act, S.A. 1988, ch. P-4.05, art. 28(1).

Banques et opérations bancaires — Garantie — Biens figurant dans l'inventaire de la compagnie assujettis à un privilège fixe et à une garantie de la Loi sur les banques — Retenues sur la paye d'employés non versées par la compagnie sous séquestre — La banque avait-elle priorité de rang sur la fiducie légale constituée en faveur de Sa Majesté relativement au produit de la vente des biens figurant dans l'inventaire — Loi sur les banques, L.C. 1991, ch. 46, art. 427 — Loi de l'impôt sur le revenu, L.R.C. (1985), ch. 1 (5e suppl.), art. 153, 227(4), (5) — Personal Property Security Act, S.A. 1988, ch. P-4.05, art. 28(1).

La Banque Royale a garanti un prêt consenti à Sparrow Electric au moyen d'une convention de garantie générale (CGG) portant sur les biens que Sparrow possédait alors ou qu'elle acquerrait par la suite, et au moyen d'une garantie de la *Loi sur les banques* (GLB) résultant d'une cession des biens figurant dans l'inventaire de l'entreprise, consentie en vertu de l'art. 427 de la *Loi sur les banques*. Lorsque Sparrow a éprouvé des difficultés financières, un moratoire a été conclu. Ce

1997 CanLII 377 (SCC)

was appointed in November 1992 at which time it was discovered that Sparrow had not been remitting its payroll deductions as required by s. 153 of the *Income Tax Act* (*ITA*). It is probable that these defaults had occurred in 1992. In January 1993, the receiver received court permission to sell Sparrow's assets. An amount from the proceeds of sale equivalent to that owing the federal government was ordered to be held in trust pending resolution as to entitlement. The bank claimed priority based on its GSA and its BAS, which entitled it to inventory proceeds. The federal government's claim was based on the s. 227 *ITA* deemed trust provisions, which created a deemed statutory trust in the moneys deducted from wages but not remitted to Her Majesty.

On the first application to determine priority, the deemed trust was held to take priority over the GSA. On a subsequent application by the bank for a determination of whether its BAS took priority over the deemed trust, the Court of Queen's Bench found that the deemed trust took priority. The Court of Appeal found that the BAS took priority over the deemed trust. At issue here is whether the s. 227(5) *ITA* deemed trust takes priority over a previously executed GSA and a previously executed BAS with respect to the proceeds of the sale of the inventory.

Held (La Forest, Gonthier and Cory JJ. dissenting): The appeal should be dismissed.

(1) *Section 227(4) and (5) of the Income Tax Act*

Although the employer, at the point of withholding, becomes the trustee of a fund which is in law the property of its employee, s. 227(4) *ITA* has the effect of making Her Majesty the beneficiary under that trust. A conceptual difficulty arises when the tax debtor fails to set aside moneys which are to be remitted. The subject of Her Majesty's beneficial interest at that point becomes intermingled with the general assets of the tax debtor and Her Majesty's claim then becomes that of a beneficiary under a non-existent trust. Subsections (4) and (5) of s. 227 resolve this conceptual dilemma by clearly and unambiguously rendering amounts unremitted as held in

moratoire permettait à Sparrow de poursuivre ses activités, mais autorisait la banque, en cas de défaut de la part de Sparrow, à nommer un séquestre et à réaliser sa garantie. Un séquestre a été nommé en novembre 1992, au moment où on a découvert que Sparrow avait omis de verser les retenues sur la paye qu'elle avait effectuées et qu'elle était tenue de verser en vertu de l'art. 153 de la *Loi de l'impôt sur le revenu* (*LIR*). Il est probable que ces omissions sont survenues en 1992. En janvier 1993, le séquestre a obtenu une autorisation judiciaire de vendre des éléments d'actifs de Sparrow. Il a été ordonné qu'un montant tiré du produit de la vente et équivalant à la somme due au gouvernement fédéral soit détenu en fiducie jusqu'à ce que l'on ait décidé qui y aurait droit. La banque a revendiqué une priorité de rang fondée sur sa CGG et sa GLB, qui lui donnait droit au produit de la vente des biens figurant dans l'inventaire. La demande du gouvernement fédéral était fondée sur les dispositions en matière de fiducie réputée de l'art. 227 *LIR*, qui créaient une fiducie légale réputée relativement aux retenues sur la paye non versées à Sa Majesté.

À la suite de la première demande de détermination de l'ordre de priorité, il a été conclu que la fiducie réputée avait priorité de rang sur la CGG. Lors d'une demande subséquente présentée par la banque en vue de faire déterminer si la GLB qu'elle détenait avait priorité de rang sur la fiducie réputée, la Cour du Banc de la Reine a statué que la fiducie réputée avait priorité de rang. La Cour d'appel a décidé que la GLB avait priorité sur la fiducie réputée. Il s'agit en l'espèce de savoir si la fiducie réputée détenue en vertu du par. 227(5) *LIR* a priorité de rang sur une CGG et une GLB antérieures, quant au produit de la vente des biens figurant dans l'inventaire.

Arrêt (les juges La Forest, Gonthier et Cory sont dissidents): Le pourvoi est rejeté.

(1) *Les paragraphes 227(4) et (5) de la Loi de l'impôt sur le revenu*

Quoique l'employeur devienne, au moment d'effectuer les retenues, le fiduciaire de sommes qui, en droit, appartiennent à ses employés, le par. 227(4) *LIR* a pour effet de faire de Sa Majesté le bénéficiaire de cette fiducie. Une difficulté conceptuelle survient lorsque le débiteur fiscal omet de mettre de côté les sommes qui doivent être versées. L'objet du droit que Sa Majesté possède à titre bénéficiaire se confond alors avec l'ensemble de l'actif du débiteur fiscal et la créance de Sa Majesté devient alors celle d'un bénéficiaire d'une fiducie inexistante. Ce dilemme conceptuel est résolu par les par. 227(4) et (5) qui prévoient clairement et nettement

1997 CanLII 377 (SCC)

trust for Her Majesty. In particular, s. 227(5) is designed to, upon liquidation, assignment, receivership or bankruptcy, seek out and attach Her Majesty's beneficial interest to property of the debtor which is in existence at that time. The trust is not a real trust, as its subject matter cannot be identified from the date of the trust's creation. However, s. 227(5) has the effect of revitalizing the trust whose subject matter has lost all identity. This identification of the subject matter of the trust therefore occurs *ex post facto*. Her Majesty has a statutory right to access whatever assets the employer then has, and may realize from those assets the original trust debt. This interpretation is consistent with the scheme of distribution under the *Bankruptcy and Insolvency Act*.

The s. 227(5) deemed trust operates to Her Majesty's benefit in a secondary manner. Under it, Her Majesty's interest can attach retroactively to disputed collateral if the competing security interest has attached after the deductions giving rise to Her Majesty's claim in fact occurred. Conceptually, the s. 227(5) deemed trust allows that claim to go back in time and attach its outstanding s. 227(4) interest to the collateral before that collateral became subject to a fixed charge. The same result occurs when a statutory lien attaches prior to the mortgaging of disputed collateral. Here, the deductions of tax from the employees' pay cheques occurred after the attachment of the bank's fixed charge to the inventory, so this second aspect of s. 227(5)'s operation did not arise.

The mechanism of s. 227(5) cannot accurately be described as a means of "tracing"; indeed, this subsection is antithetical to tracing in the traditional sense in that it requires no link at all between the subject matter of the trust and the fund or asset into which the subject matter is being traced. Section 227(5) is more accurately described as a "relaxation of the equitable tracing rules".

Section 227(5) does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor. Subsections (4) and (5) of s. 227 are manifestly directed towards the property of the tax debtor, and it would be contrary to well-established authority to stretch the

que les sommes non versées sont conservées en fiducie pour Sa Majesté. En particulier, le par. 227(5) vise, en cas de liquidation, cession, mise sous séquestre ou faillite, à rattacher le droit que Sa Majesté détient à titre bénéficiaire aux biens que le débiteur possède alors. La fiducie n'est pas réelle, étant donné que son objet ne peut être identifié à compter de la date de création de la fiducie. Cependant, le par. 227(5) a pour effet de revitaliser la fiducie dont l'objet a perdu toute identité. L'identification de l'objet de la fiducie est donc faite après coup. La Loi confère à Sa Majesté un droit d'accès à tous les éléments d'actif, quels qu'ils soient, que l'employeur possède alors, au moyen desquels elle peut réaliser la fiducie initiale dont elle est bénéficiaire. Cette interprétation est compatible avec le régime de répartition établi par la *Loi sur la faillite et l'insolvabilité*.

La fiducie réputée visée au par. 227(5) profite à Sa Majesté d'une manière accessoire, en ce sens que le par. 227(5) permet de rattacher rétroactivement le droit de Sa Majesté au bien en litige donné en garantie, si la garantie concurrente s'est concrétisée après que les déductions à l'origine de la créance de Sa Majesté eurent été faites. Sur le plan conceptuel, la fiducie réputée, visée au par. 227(5), permet à la créance de Sa Majesté de s'appliquer rétroactivement et de rattacher le droit qu'elle possède en vertu du par. 227(4) au bien donné en garantie avant qu'il devienne grevé d'un privilège fixe. La même chose se produit lorsqu'un privilège légal s'applique avant la constitution d'une hypothèque sur un bien en litige donné en garantie. En l'espèce, les retenues fiscales sur la paye des employés ont été effectuées après que le privilège fixe de la banque eut grevé les biens figurant dans l'inventaire, de sorte que ce second aspect de l'application du par. 227(5) n'est pas en cause.

Il n'est pas exact de qualifier le mécanisme du par. 227(5) de moyen de «retracer l'origine d'un bien»; en fait, le sens de ce paragraphe est à l'opposé du sens traditionnel du mot «retracer», étant donné qu'il n'exige aucun lien entre l'objet de la fiducie et le fonds ou l'actif auquel on rattache cet objet. Il est plus exact de dire que le par. 227(5) constitue un «assouplissement des règles d'*equity* quant à l'origine d'un bien».

Le paragraphe 227(5) ne permet pas à Sa Majesté de faire valoir son droit à titre bénéficiaire sur un bien qui, au moment de la liquidation, cession, mise sous séquestre ou faillite, appartient à quelqu'un d'autre que le débiteur fiscal. Les paragraphes 227(4) et (5) visent manifestement les biens du débiteur fiscal, et il serait contraire à une jurisprudence bien établie de forcer le sens du

1997 CanLII 377 (SCC)

interpretation of s. 227(5) to permit the expropriation of the property of third parties who are not specifically mentioned in the statute.

Therefore, the proper analysis in determining whether Her Majesty is entitled to priority pursuant to these subsections must utilize principles of property law. The nature of the interests competing with those of Her Majesty must be scrutinized in order to determine whether and to what extent such interests have title in the disputed fund. If it is found that legal title in the collateral is in the bank, and not Sparrow, Her Majesty's deemed trust could only attach to Sparrow's equity of redemption.

The "statutory trust" approach can be distinguished from other legislative methods, such as an explicit "Crown priority" provision, used to secure an interest to unremitted payroll deductions. The application of such a provision to a priority competition can proceed without regard to the quality of the "security interest" which competes with Her Majesty's claim. Such a provision simply transfers title in the collateral to Her Majesty regardless of whose interest may compete with it, so long as its requirements are met.

(2) *Characterization of the Bank's Interests*

The bank's interest in Sparrow's inventory must be characterized as either a floating charge or a fixed and specific charge. A specific charge is one that, without more, fastens on ascertained and definite property or property capable of being ascertained and defined. A floating charge floats with the property which it is intended to affect until it crystallizes. Crystallization occurs upon the default of the debtor and transforms the interest into a fixed and specific charge over the inventory. The critical significance of the characterizing of an interest as being fixed or floating is that it describes the extent to which a creditor can be said to have a proprietary interest in the collateral. During the period in which a charge over inventory is floating, the creditor possesses no legal title to that collateral and a statutory trust or lien attaching during this time will attach to the debtor's interest and take priority over a subsequently crystallized floating charge. A security interest characterized as a fixed and specific charge, however, will take priority over a subsequent statutory lien or charge because all

par. 227(5) de manière à permettre l'expropriation des biens de tiers non mentionnés expressément dans la Loi.

Par conséquent, pour déterminer si Sa Majesté a droit à la priorité de rang en vertu de ces paragraphes, il faut recourir aux principes du droit des biens. Il faut examiner en profondeur la nature des droits qui sont en concurrence avec ceux de Sa Majesté, afin de déterminer dans quelle mesure, le cas échéant, ces droits s'appliquent aux fonds en litige. Si l'on conclut que c'est la banque, et non Sparrow, qui est légalement propriétaire du bien donné en garantie, la fiducie réputée de Sa Majesté ne pourra grever que le droit de rachat que possède Sparrow.

La méthode de la «fiducie légale» peut être distinguée d'autres méthodes que le législateur utilise pour garantir un droit à des retenues sur la paye non versées, dont le recours à une disposition expresse de la «priorité de rang de Sa Majesté». L'application d'une telle disposition dans une situation de concurrence pour la priorité de rang peut avoir lieu sans égard à la qualité de la «garantie» qui est en concurrence avec la créance de Sa Majesté. Cette disposition transfère simplement à Sa Majesté le droit de propriété sur le bien donné en garantie sans égard aux droits de qui que ce soit qui peuvent être en concurrence avec ce droit de propriété, pourvu que l'on ait satisfait à ses exigences.

(2) *La qualification des droits de la banque*

Le droit de la banque sur les biens figurant dans l'inventaire de Sparrow doit être qualifié soit de privilège flottant, soit de privilège fixe et spécifique. Un privilège spécifique grève, sans plus, certains biens déterminés ou qui peuvent être déterminés. Un privilège flottant flotte au-dessus des biens qu'il est destiné à grever, jusqu'à ce qu'il se cristallise. La cristallisation survient dès que le débiteur est en défaut, et transforme le droit en question en un privilège fixe et spécifique sur les biens figurant dans l'inventaire. L'importance cruciale de qualifier un droit de fixe ou de flottant réside dans le fait que cette qualification décrit la mesure dans laquelle on peut dire qu'un créancier possède un droit de propriété sur le bien donné en garantie. Pendant la période où un privilège sur les biens figurant dans un inventaire est flottant, le créancier ne possède aucun droit de propriété sur ces biens donnés en garantie, et une fiducie ou un privilège légal grevant ces biens pendant cette période grèvera le droit du débiteur et aura priorité de rang sur le privilège flottant subséquemment cristallisé. Cependant, une

1997 CanLII 377 (SCC)

that the lien can attach to is the debtor's equity of redemption in the collateral.

garantie qualifiée de privilège fixe et spécifique aura priorité de rang sur un privilège légal subséquent parce que tout ce que le privilège peut grever, c'est le droit de rachat que le débiteur possède sur le bien donné en garantie.

Common law principles did not alter the effect that legislation may have on the characterization of security interests. Here, the Alberta *Personal Property Security Act* (*PPSA*) and the *Bank Act* are determinative of the characterization of the bank's GSA and BAS, respectively. The *PPSA* explicitly removes statutory trusts from its operation and accordingly does not govern the priority competition between a statutory trust and a security interest. The Act's effect, however, fundamentally changes the characterization of security interests. Generally speaking, absent an express intention to the contrary, a security interest in all present and after-acquired personal property will attach when that agreement is executed by the parties. Once attachment has occurred, the GSA becomes in law a fixed and specific charge over the collateral. For these reasons, the GSA held by the respondent bank must be characterized as a fixed and specific charge with a licence to deal with the inventory that arose because of the bank's granting Sparrow permission to sell the encumbered inventory. The fixed charge attached on the agreement's execution.

Les principes de common law n'ont pas modifié l'effet que les lois en cause peuvent avoir sur la qualification des garanties. En l'espèce, la *Personal Property Security Act* (*PPSA*) de l'Alberta et la *Loi sur les banques* sont déterminantes pour ce qui est de qualifier, respectivement, la CGG et la GLB de la banque. La *PPSA* soustrait explicitement les fiducies légales à son application et ne s'applique donc pas pour déterminer l'ordre de priorité entre une fiducie légale et une garantie. La *PPSA* a cependant pour effet de changer fondamentalement la qualification des garanties. De façon générale, en l'absence d'intention contraire explicite, une garantie accordée sur tous les biens meubles actuels et sur ceux acquis après la date de la convention grèvera ces biens dès la conclusion de la convention par les parties. Dès que la garantie grève un bien, la CGG devient, en droit, un privilège fixe et spécifique sur le bien donné en garantie. Pour ces motifs, la CGG de la banque intimée doit être qualifiée de privilège fixe et spécifique, assorti d'une permission d'aliéner les biens figurant dans l'inventaire en raison de la permission de vendre les biens d'inventaire grevés, que la banque a accordée à Sparrow. Ce privilège fixe a grevé les biens en cause dès la conclusion de la convention.

1997 CanLII 377 (SCC)

Similarly, security taken under the *Bank Act* is in the nature of a fixed and specific charge. The concept of the fixed charge is correlative to the notion of a creditor's having legal proprietary rights in the collateral. It is misleading to suggest that s. 427 security is in the nature of a floating charge because the bank effectively acquires legal title. Unlike a floating charge which may apply to all property of a specified kind held by the borrower from time to time but does not affix itself specifically upon any particular item of property until it crystallizes upon default by the borrower, s. 427 security is a fixed charge on each item of assigned property held from time to time whether or not the loan is in default. This gives a bank significantly greater rights than it would hold under a floating charge debenture on inventory. For this reason, the security interest of the bank in the form of BAS should be characterized as a fixed and specific charge with a licence to sell the inventory.

De même, une garantie consentie en vertu de la *Loi sur les banques* tient d'un privilège fixe et spécifique. Le concept du privilège fixe correspond à la notion d'un créancier qui a les droits de propriété sur le bien donné en garantie. Il est trompeur de laisser entendre que la garantie prévue par l'art. 427 tient d'un privilège flottant parce que la banque acquiert effectivement le droit de propriété. Contrairement à un privilège flottant qui peut s'appliquer à tous les biens d'une catégorie donnée que l'emprunteur détient, mais qui ne grève pas spécifiquement l'un de ces biens tant qu'il ne s'est pas cristallisé à la suite du défaut de l'emprunteur, la garantie consentie en vertu de l'art. 427 est un privilège fixe qui s'applique à chacun des biens cédés, peu importe que l'emprunteur soit en défaut ou non. Cela confère à la banque des droits beaucoup plus grands que s'il s'agissait d'une obligation à charge flottante s'appliquant aux biens de l'inventaire. Pour ce motif, la garantie que la banque détient sous forme de GLB tient d'un privilège fixe et spécifique assorti d'une permission de vendre les biens figurant dans l'inventaire.

The traditional concept of the fixed charge seems to be at odds with the notion of having a proprietary right over collateral such as after-acquired inventory which is not yet in existence at the time the security agreement is executed. A fixed charge over all present and future inventory represents a proprietary interest over a dynamic collective of present and future assets. The conception of this form of charge must change to meet the modern realities of commercial law and in particular the legislative provisions which have been brought to bear in this appeal. In effect, the fixed and specific charge gives to the secured creditor the title (subject to the debtor's equitable right of redemption) to the present inventory of the debtor, as well as the after-acquired inventory of the debtor. In this way, the secured creditor becomes the legal owner of inventory as it comes into possession of the debtor.

Le concept traditionnel du privilège fixe semble incompatible avec l'idée de possession d'un droit de propriété sur des biens donnés en garantie tels que les biens d'inventaire acquis après coup qui n'existent pas encore au moment où la convention de garantie est conclue. Un privilège fixe sur tous les biens présents et futurs d'un inventaire représente un droit de propriété sur un ensemble dynamique d'éléments d'actif présents et futurs. La conception de cette forme de privilège doit évoluer en fonction des réalités contemporaines du droit commercial et, en particulier, des dispositions législatives qui ont été invoquées dans la présente affaire. En effet, le privilège fixe et spécifique confère au créancier garanti (sous réserve du droit de rachat que le débiteur possède en *equity*) le droit de propriété sur les biens actuels de l'inventaire du débiteur, de même que sur les biens de l'inventaire que ce dernier acquiert après coup. Le créancier garanti devient ainsi légalement propriétaire des biens de l'inventaire au fur et à mesure qu'ils entrent en la possession du débiteur.

1997 CanLII 377 (SCC)

Where a secured creditor holds a fixed charge over a debtor's inventory, that charge will have the effect of ensuring the creditor has legal title to any and all inventory subject to the charge at any given time, subject to the caveat (not operative here) that no outstanding statutory payroll deductions had in fact been made prior to the attachment of the fixed charge. Here, the inventory which was subject to the liquidation sale belonged in law to the respondent bank: both under its GSA and its BAS the bank held a fixed charge over Sparrow's inventory. Her Majesty's beneficial interest accordingly could only attach, before its sale, to Sparrow's equity of redemption in the property.

Lorsqu'un créancier garanti détient un privilège fixe sur les biens figurant dans l'inventaire d'un débiteur, ce privilège aura en tout temps pour effet d'assurer que le créancier possède un droit de propriété sur tous les biens d'inventaire assujettis au privilège, à la condition (non applicable en l'espèce) qu'aucune retenue sur la paye n'ait été effectuée, sans être versée, avant l'application du privilège fixe. Dans le présent pourvoi, les biens figurant dans l'inventaire qui ont fait l'objet d'une vente de liquidation appartenaient en droit à la banque intimée: la banque détenait, tant en vertu de sa CGG que de sa GLB, un privilège fixe sur les biens de l'inventaire de Sparrow. Le droit que Sa Majesté possédait à titre bénéficiaire ne pouvait donc s'appliquer avant la vente qu'au droit de rachat que Sparrow détenait en *equity* sur les biens.

(3) *Licence Theory*

(3) *La thèse de la permission*

Per Sopinka, McLachlin, Iacobucci and Major JJ.: The security interests that the respondent has under the *Bank Act* and the *PPSA* take priority over the deemed trust that arises in favour of Her Majesty by operation of s. 227(4) *ITA*. While the former interests are subject to a licence to sell, that licence is not nearly so broad as to encompass the satisfaction of income tax obligations. A licence to sell inventory authorizes at most only the satisfaction of obligations that are immediately incidental to an actual sale of the inventory.

Les juges Sopinka, McLachlin, Iacobucci et Major: Les garanties ou sûretés que l'intimée possède en vertu de la *Loi sur les banques* et de la *PPSA* ont priorité de rang sur la fiducie réputée qui prend naissance en faveur de Sa Majesté en vertu du par. 227(4) *LIR*. Bien que les garanties en vertu de la *Loi sur les banques* et de la *PPSA* soient assujetties à une permission de vendre, cette permission est loin d'avoir une portée assez large pour englober l'exécution d'obligations fiscales. Une permission de vendre des biens figurant dans un inventaire permet tout au plus d'exécuter les obligations directement rattachées à la vente réelle de ces biens.

The licence theory holds that a bank's security interest in a debtor's inventory, whether fixed and specific, is subject to a licence in the debtor to deal with that inventory in the ordinary course of business. The point is that the bank's claim to the inventory must as a consequence give way to any debts incurred in the ordinary course of business. In theory, a creditor who has granted a licence to sell inventory has thereby consented to his security interest's being subject to other obligations that may arise "in the ordinary course of business". The licence is thus supposed to afford evidence of the respondent's intention to take less than an entire security interest in the inventory.

The licence affords no such evidence. The potential sale of the inventory does not amount to an actual limitation of the security interest. A great difference exists between saying, on the one hand, that if a debtor sells inventory and applies the proceeds to a debt to a third party, then the third party takes the proceeds free of any security interest and saying, on the other hand, that because a third party could take the proceeds free of any security interest, no security interest exists in the proceeds as against that third party. A licence to sell inventory in the ordinary course of business is a condition of the former kind. The consequent (defeasance of the security interest) follows only if the antecedent (sale of the inventory and application of proceeds to an obligation to a third party) is satisfied. The security interest in the inventory disappears only if the debtor actually sells the inventory and applies the proceeds to a debt to a third party.

In accordance with s. 28(1) *PPSA*, the result of a sale of inventory is to give the purchaser an unencumbered interest in the inventory and the licensor a continuing security interest in the proceeds of the sale. Only if the debtor subsequently uses the proceeds to satisfy an obligation to a third party will the proceeds be removed from the scope of the licensor's security interest in them. Accordingly, a security agreement with a licence to sell creates a defeasible interest; but the event of defeasance is the actual sale of the inventory and the actual application of the proceeds against an obligation to a third party.

La thèse de la permission veut que, bien que la garantie qu'une banque possède sur les biens figurant dans l'inventaire d'un débiteur soit fixe et spécifique, elle soit assujettie à la permission qu'a le débiteur d'aliéner ces biens dans le cours normal de ses affaires. Cela signifie que les droits que la banque peut faire valoir sur les biens figurant dans l'inventaire doivent, en conséquence, céder le pas aux dettes contractées dans le cours normal des affaires. En théorie, un créancier qui a accordé la permission de vendre les biens figurant dans un inventaire a, de ce fait, consenti à ce que sa garantie soit assujettie à d'autres obligations pouvant prendre naissance «dans le cours normal des affaires». La permission est donc censée fournir la preuve de l'intention de l'intimée d'accepter moins qu'une garantie intégrale sur les biens de l'inventaire.

La permission ne prouve rien de tel. La vente potentielle des biens figurant dans l'inventaire n'équivaut pas à une restriction réelle de la garantie. Il existe une différence considérable entre affirmer, d'une part, que si un débiteur vend des biens de son inventaire et en utilise le produit pour rembourser une dette envers un tiers, ce tiers accepte alors ce produit libre de toute garantie, et affirmer, d'autre part, que puisqu'un tiers pourrait accepter le produit de la vente libre de toute garantie, le produit n'est grevé d'aucune garantie opposable à ce tiers. La permission de vendre les biens figurant dans un inventaire dans le cours normal des affaires est une condition du premier genre. La conséquence (l'extinction de la garantie) ne s'ensuit que si la condition préalable (la vente des biens figurant dans l'inventaire et l'utilisation du produit en découlant pour exécuter une obligation envers un tiers) est remplie. La garantie sur les biens figurant dans l'inventaire ne disparaît que si le débiteur vend réellement ces biens et utilise le produit de la vente pour rembourser une dette envers un tiers.

Conformément au par. 28(1) *PPSA*, la vente des biens figurant dans un inventaire a pour effet de conférer à l'acquéreur un droit libre de toute charge sur ces biens, et à la partie qui a donné la permission de vendre, une garantie permanente sur le produit de la vente. Ce n'est que si le débiteur utilise ensuite le produit pour s'acquitter d'une obligation envers un tiers que ce produit sera soustrait à la garantie que la partie qui a donné la permission de vendre possède sur celui-ci. Par conséquent, la convention de garantie assortie d'une permission de vendre crée un droit défectible, mais l'événement qui provoque l'extinction du droit est la vente réelle des biens figurant dans l'inventaire, suivie de l'utilisation réelle du produit en découlant pour exécuter une obligation envers un tiers.

1997 CanLII 377 (SCC)

By itself, s. 28(1) *PPSA* does not necessarily compel rejection of the broad interpretation of the licence to sell. However, the maxim *expressio unius est exclusio alterius* is appropriately invoked here to complete the argument. The statute prescribes certain consequences for the security interest that follow a dealing with inventory, and in particular, it prescribes the defeasance of the interest if the debtor actually sells the inventory and applies the proceeds to an obligation to a third party. Significantly, the statute does not contemplate a defeasance on the happening of any other event. The statute occupies the field and crowds out other possible interpretations of the licence.

Because the inventory in question was not sold pursuant to the licence, here the licence can have had no effect on the respondent's security interest. What the debtor might have done with the licence does not matter. If it were otherwise, the licence to sell inventory would entirely eviscerate the respondent's GSA.

The argument might be made that the deemed trust works by deeming an actual sale of the inventory to have been made. It this were correct, then it would not matter that the inventory was not actually sold pursuant to the licence. However, the deeming is not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. The deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. In this case the inventory was encumbered by the GSA.

The debtor's covenant in the GSA to pay all taxes was not part of the licence and was merely a covenant to obey the law. It adds nothing to s. 153(1) *ITA* and does not prescribe the outcome of a priority contest.

A number of policy considerations support this conclusion. Judicial innovation in this field risks legal uncertainty. Inventory financiers would have to provide against the risk that their security interest might be defeated by some rival claim. There is also a real possibility that recognition of a broad licence theory would obliterate the *PPSA* charge against inventory. If Parlia-

En soi, le par. 28(1) *PPSA* n'oblige pas nécessairement à rejeter l'interprétation large de la permission de vendre. Toutefois il convient, dans la présente affaire, d'invoquer la maxime *expressio unius est exclusio alterius* pour compléter l'argument. La Loi prévoit que l'aliénation de biens figurant dans un inventaire a certaines conséquences sur la garantie, et elle prévoit, notamment, l'extinction de la garantie si le débiteur vend réellement ces biens et utilise le produit de la vente pour exécuter une obligation envers un tiers. Fait révélateur, la Loi ne prévoit pas d'autres événements susceptibles d'entraîner l'extinction. La Loi est exhaustive et exclut toute autre interprétation de la permission de vendre.

Du fait que les biens figurant dans l'inventaire en question n'ont pas été vendus conformément à la permission donnée, cette permission n'a pu, en l'espèce, avoir aucun effet sur la garantie de l'intimée. Il n'importe pas de savoir ce que le débiteur aurait pu faire de la permission. S'il en était autrement, la permission de vendre les biens d'un inventaire ferait perdre tout son sens à la CGG de l'intimée.

On pourrait soutenir que la fiducie réputée s'applique en présumant l'existence d'une vente réelle des biens figurant dans l'inventaire. Si cela était exact, il importerait peu que les biens figurant dans l'inventaire n'aient pas été réellement vendus conformément à la permission donnée. Toutefois, la présomption n'est pas un moyen de supprimer une garantie existante. Elle permet plutôt de retourner en arrière pour chercher un élément d'actif qui, au moment où l'impôt est devenu exigible, n'était pas assujetti à une garantie opposée. La disposition en matière de fiducie réputée ne peut s'appliquer que s'il est préalablement déterminé qu'il existe des éléments d'actifs libres de toute charge qui peuvent faire l'objet d'une fiducie réputée. Dans le présent pourvoi, les biens figurant dans l'inventaire étaient grevés par la CGG.

L'engagement à payer tous les impôts, que le débiteur a pris dans la CGG, ne fait pas partie de la permission donnée et n'est qu'un engagement à respecter la loi. Il n'ajoute rien au par. 153(1) *LIR* et ne prescrit pas non plus l'issue d'une lutte pour obtenir la priorité de rang.

Un certain nombre de considérations de principe appuient cette conclusion. L'innovation judiciaire dans ce domaine risque de susciter une incertitude juridique. Les financiers de biens figurant dans un inventaire devraient se prémunir contre le risque qu'une réclamation opposée fasse obstacle à leur garantie. Il se peut aussi réellement que la reconnaissance d'une thèse

1997 CanLII 377 (SCC)

ment wishes to do so, it may step in and assign absolute priority to the deemed trust. But in the absence of clear statutory language to that effect, the bank's GSA must prevail.

Per La Forest, Gonthier and Cory JJ. (dissenting): The critical issue here was the scope of the contractual licence. In particular, if the bank's consent included the right to sell the inventory in order to pay wages, then that consent by necessity included the right to sell inventory to remit payroll deductions. In such a situation, Her Majesty's interest would be able to attach to the proceeds of the inventory and so take priority over the bank's interest.

The licence theory operates, in the context of the statutory scheme at issue here, as an exception to the general rule that at the time of "liquidation, assignment, receivership or bankruptcy" Her Majesty's interest cannot attach to property which is at that time the property of a secured creditor. Where a secured creditor has consented to the use of its collateral when deductions are made in order to pay the statutory deductions which are the object of a deemed trust, that creditor has bound itself by the statutory requirements relating to those deductions. Here, therefore, the wage deductions at issue were made at a time when the bank had permitted the sale of inventory in order to pay wages (and thus wage deductions), and the bank's inventory existent at the time of receivership can accordingly be attached under s. 227(5).

The critical factor in the "licence to sell" argument is the permission which must be found to have been granted with respect to the usage of the proceeds of the disputed collateral. While licences are often expressed in terms of a "right to sell in the ordinary course of business", this permission is made with respect to the usage of proceeds, which is the proper focus of the inquiry, and not necessarily the circumstances of sale. Here, Sparrow was permitted to sell its inventory in the ordinary course of its business and "use" the proceeds generated therefrom.

The licence to sell inventory in the ordinary course of business in this case necessarily included a licence to sell inventory to pay wages, and remit wage deductions, in the course of Sparrow's business. Where, as here, the

générale de la permission réduise à néant le privilège constitué, en vertu de la *PPSA*, sur les biens figurant dans un inventaire. Le législateur peut, s'il le souhaite, intervenir et accorder la priorité absolue à la fiducie réputée. Cependant, en l'absence de termes clairs en ce sens, la CGG de la banque doit l'emporter.

Les juges La Forest, Gonthier et Cory (dissidents): La question cruciale, en l'espèce, est celle de la portée de la permission contractuelle en cause. En particulier, si le consentement de la banque comprenait le droit de vendre les biens de l'inventaire pour payer les salaires, alors ce consentement comprenait nécessairement le droit de vendre ces mêmes biens pour verser les retenues sur la paye. Le droit de Sa Majesté pourrait alors s'appliquer au produit de la vente des biens figurant dans l'inventaire et, ainsi, avoir priorité sur le droit de la banque.

Dans le contexte du régime législatif en cause dans le présent pourvoi, la thèse de la permission constitue une exception à la règle générale voulant qu'au moment de la «liquidation, cession, mise sous séquestre ou faillite», le droit de Sa Majesté ne puisse pas grever des biens qui sont la propriété d'un créancier garanti. Si, au moment où les retenues ont été effectuées, un créancier garanti a consenti à ce que les biens qui lui ont été donnés en garantie servent à verser les retenues exigées par la loi qui font l'objet de la fiducie réputée, ce créancier s'est assujetti aux obligations légales relatives à ces retenues. En conséquence, dans la présente affaire, au moment où les retenues sur la paye qui sont en cause ont été effectuées, la banque avait permis la vente des biens figurant dans l'inventaire pour payer les salaires (et ainsi les retenues sur la paye), et le par. 227(5) peut donc s'appliquer aux biens qui figuraient dans l'inventaire de la banque au moment de la mise sous séquestre.

Le facteur déterminant dans l'argument de la «permission de vendre» est la conclusion que cette permission a été accordée quant à l'utilisation du produit de la vente des biens en litige donnés en garantie. Bien que les permissions soient souvent données sous la forme d'un «droit de vendre dans le cours normal des affaires», c'est la permission quant à l'utilisation du produit qui doit être au centre de l'examen, et non pas nécessairement les circonstances de la vente. Dans la présente affaire, Sparrow avait la permission de vendre les biens de l'inventaire dans le cours normal de ses affaires et d'«utiliser» le produit de cette vente.

La permission de vendre les biens de l'inventaire dans le cours normal des affaires comprenait nécessairement, en l'espèce, la permission de les vendre pour payer les salaires et verser les retenues sur la paye dans

1997 CanLII 377 (SCC)

secured party has security over the majority of the assets of the debtor, the security interest over the inventory must permit the debtor to sell the inventory and put it to the general use of its business, including towards the payment of wages. The scope of the licence can be ascertained either from the express terms of the security agreement or from the nature of the agreement and the conduct of the parties. The licence here was to sell inventory in the "ordinary course of [Sparrow's] business . . . and use [the proceeds]" which renders it of such a quality as to include a right to use the proceeds to pay wages. A licence to sell inventory may in certain circumstances be circumscribed so as not to include a right to use the proceeds to pay wages.

The true test of whether the licence to sell inventory includes the right to pay wages is a matter of interpreting the contractual arrangement between the parties. The focus is not so much on the circumstances of the selling of inventory, but rather the permitted usage of the proceeds of inventory. Where the licence has a limited scope, that licence may not include the right to use proceeds to pay wages. However, the expression of a limited use for proceeds of inventory cannot prevail if the arrangement between the parties is such as to allow, in practice, the debtor to use the inventory proceeds in the course of its business. The test should be whether the debtor had the freedom to use these funds in the ordinary course of business as opposed to being under an obligation to remit them to the secured party.

The GSA contained an express licence permitting Sparrow to sell inventory in the course of its business and use the proceeds available; the BAS contained an implied licence to this effect. While it is true that the GSA contained a trust proceeds clause, this clause cannot have the effect of limiting the scope of the licence where the real arrangement between the parties was, as expressly stated, that Sparrow could use the proceeds of inventory in the course of its business. The bank in this case was not a small inventory financier who required Sparrow to remit proceeds of inventory to it immediately. To the contrary, the bank was a large scale lender who permitted Sparrow to use inventory sales to maintain the viability of its enterprise. Under the licence at issue here, the bank permitted Sparrow to sell inventory

le cours des affaires de Sparrow. Lorsque, comme c'est le cas ici, le créancier garanti détient une garantie sur la majorité des éléments d'actif du débiteur, la garantie applicable aux biens de l'inventaire doit permettre au débiteur de vendre ces biens et d'utiliser le produit pour les fins générales de son entreprise, y compris pour payer les salaires. La portée de la permission peut être déterminée soit à partir des termes mêmes de la convention de garantie, soit à partir de la nature de la convention et de la conduite des parties. Il s'agit en l'espèce d'une permission de vendre les biens de l'inventaire dans le «cours normal de[s] affaires [de Sparrow] [. . .] et [. . .] [d']utiliser [le produit]», qui fait en sorte qu'elle inclut le droit d'utiliser le produit pour payer les salaires. La permission de vendre les biens d'un inventaire peut, dans certaines circonstances, être limitée de manière à ne pas inclure le droit d'utiliser le produit pour payer des salaires.

Le véritable critère pour déterminer si la permission de vendre les biens figurant dans un inventaire inclut le droit de payer les salaires est une question d'interprétation de l'arrangement contractuel intervenu entre les parties. L'attention ne doit pas tant porter sur les circonstances de la vente des biens de l'inventaire que sur l'utilisation permise du produit de la vente de ces biens. Lorsque la permission a une portée limitée, il se peut qu'elle n'inclue pas le droit d'utiliser le produit de la vente pour payer les salaires. Toutefois, l'expression de restrictions quant à l'utilisation du produit de la vente des biens figurant dans l'inventaire ne saurait prévaloir si l'arrangement entre les parties est de nature à permettre, en pratique, au débiteur d'utiliser le produit de cette vente dans le cours de ses affaires. Le critère devrait consister à déterminer si le débiteur était libre d'utiliser ces fonds dans le cours normal des affaires, au lieu d'être obligé de les verser au créancier garanti.

La CGG accordait expressément à Sparrow la permission de vendre les biens de l'inventaire dans le cours de ses affaires et d'utiliser le produit dont elle disposerait; la GLB comportait implicitement la même permission. Bien qu'il soit vrai que la CGG comportait une clause de produit en fiducie, cette clause ne peut pas avoir pour effet de limiter la portée de la permission alors que l'arrangement réel intervenu entre les parties voulait, comme cela a été précisé, que Sparrow puisse utiliser le produit de la vente des biens de l'inventaire dans le cours de ses affaires. Dans cette affaire, la banque n'était pas un petit financier de biens d'inventaire, qui exigeait que Sparrow lui verse immédiatement le produit de la vente des biens de l'inventaire. Au contraire, la banque était un gros bailleur de fonds qui permettait à Sparrow d'utiliser le produit de la vente des biens de

1997 CanLII 377 (SCC)

to pay wages and, necessarily, payroll deduction obligations.

The appellant's s. 227(5) deemed trust must take priority over the bank's security interests in the disputed collateral. The trust fund representing the deducted amounts, while without identified subject matter from the date of its inception, is capable of identifying property subject to that trust *ex post facto*. This result is not precluded with respect to the BAS by virtue of s. 428(1) of the *Bank Act*. Although s. 428(1) secures the respondent bank's proprietary right to the disputed collateral, the bank nevertheless consented to the divestment of this interest. Such a waiver of priority renders s. 428(1) of no assistance to the bank.

The licence theory, in addition to providing certainty in disputes between consensual and non-consensual security interests, achieves fairness in commercial law. In essence, the bank is willing to accept the benefits of Sparrow's non-payment of statutory deductions and has permitted the use of its collateral to pay these deductions, but refuses to accept the burden of Sparrow's unlawful action at the time of its receivership. It should be the policy of the law that the respondent bank be held accountable for Sparrow's outstanding statutory obligations. The licence theory ensures that in appropriate circumstances this result will obtain.

The licence theory does not go so far as to mean that every subsequent claim should prevail over the GSA because every rival claim might have to be satisfied out of the proceeds of a hypothetical sale of the inventory. The consent to pay wages is a necessary but not sufficient condition. It did not *simpliciter* lead to the conclusion that Her Majesty's interest must prevail. What is significant is that the bank consented to payment of wages, including deductions, out of inventory which, at the time of the deductions and upon actual payment of wages, were deemed by statute to be taken out of the estate of the debtor. The unique nature of the statutory provisions applicable to wage deductions, and the bank's consent thereto, are integral to the success of the s. 227(5) claim in the case at bar. In this way, the

l'inventaire pour maintenir la viabilité de son entreprise. Aux termes de la permission ici en cause, la banque permettait à Sparrow de vendre les biens de l'inventaire pour payer des salaires et, nécessairement, pour verser des retenues sur la paye.

La fiducie réputée dont bénéficie l'appelante en vertu du par. 227(5) doit avoir priorité de rang sur les garanties que la banque détient sur les biens en litige donnés en garantie. Le fonds en fiducie constitué des retenues effectuées, bien que sans objet identifié au moment de sa constitution, est capable de viser après coup les biens faisant l'objet de cette fiducie. Ce résultat n'est pas écarté relativement à la GLB en raison du par. 428(1) de la *Loi sur les banques*. Bien que le par. 428(1) garantisse le droit de propriété de la banque intimée sur les biens en litige donnés en garantie, la banque a néanmoins accepté d'être dépouillée de ce droit. Une telle renonciation à la priorité de rang fait en sorte que le par. 428(1) n'est d'aucun secours à la banque.

En plus d'offrir un élément de certitude dans les litiges opposant des garanties consensuelles et des garanties non consensuelles, la thèse de la permission assure l'équité en droit commercial. La banque est essentiellement disposée à accepter les bénéfices du non-versement par Sparrow des retenues légales sur la paye, et elle a permis que les biens qui lui avaient été donnés en garantie soient utilisés pour verser ces retenues, mais elle refuse d'assumer le fardeau de l'acte illégal accompli par Sparrow au moment de sa mise sous séquestre. Ce devrait être une politique de la loi que la banque intimée soit tenue responsable des obligations légales auxquelles Sparrow a manqué. La thèse de la permission garantit ce résultat dans les circonstances appropriées.

La thèse de la permission ne va pas jusqu'à signifier que toute créance ultérieure devrait avoir préséance sur la CGG parce qu'il se pourrait que chacune des créances concurrentes ait été acquittée sur le produit d'une vente hypothétique des biens figurant dans l'inventaire. Le consentement au paiement de salaires est une condition nécessaire, mais non suffisante. Ce consentement même n'amène pas à conclure que c'est l'intérêt de Sa Majesté qui doit prévaloir. Ce qui importe, c'est que la banque a consenti au paiement de salaires comportant des retenues, sur des biens figurant dans l'inventaire qui, au moment des retenues et une fois les salaires réellement payés, étaient réputés par la loi être retranchés du patrimoine du débiteur. La nature exceptionnelle des dispositions législatives applicables aux retenues sur la paye, et le consentement de la banque aux retenues, contribuent au succès de la demande fondée sur le par. 227(5) en

1997 CanLII 377 (SCC)

licence theory is circumscribed in its ability to defeat prior secured interests.

In addition, the licence theory as applied here is not inimical to the integrity of commercial law. It operates narrowly, in conjunction with unique statutory provisions, so as to actualize legally performed obligations. It does not create uncertainty in commercial transactions.

l'espèce. De cette façon, la thèse de la permission est circonscrite en ce qui concerne sa capacité de faire obstacle à des garanties antérieures.

En outre, la thèse de la permission appliquée dans le présent cas ne compromet pas l'intégrité du droit commercial. Elle s'applique de manière restreinte, de concert avec des dispositions législatives exceptionnelles, de façon à actualiser des obligations légalement exécutées. Elle ne crée pas d'incertitude dans les opérations commerciales.

1997 CanLII 377 (SCC)

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1997 CanLII 377 (SCC)

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APPEAL from a judgment of the Alberta Court of Appeal (1995), 28 Alta. L.R. (3d) 153, 165 A.R. 132, 89 W.A.C. 132, [1995] 6 W.W.R. 718, 33 C.B.R. (3d) 34, 10 P.P.S.A.C. (2d) 1, allowing an appeal from judgments of Agrios J. (1993), 19 Alta. L.R. (3d) 183, 10 P.P.S.A.C. (2d) 1, at p. 3, [1995] 1 C.T.C. 101, and (1994), 21 Alta. L. R. (3d) 275, 156 A.R. 187, [1994] 9 W.W.R. 338. Appeal dismissed, La Forest, Gonthier and Cory JJ. dissenting.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1995), 28 Alta. L.R. (3d) 153, 165 A.R. 132, 89 W.A.C. 132, [1995] 6 W.W.R. 718, 33 C.B.R. (3d) 34, 10 P.P.S.A.C. (2d) 1, qui a accueilli un appel interjeté contre des jugements du juge Agrios (1993), 19 Alta. L.R. (3d) 183, 10 P.P.S.A.C. (2d) 1, à la p. 3, [1995] 1 C.T.C. 101, et (1994), 21 Alta. L.R. (3d) 275, 156 A.R. 187, [1994] 9 W.W.R. 338. Pourvoi rejeté, les juges La Forest, Gonthier et Cory sont dissidents.

Edward R. Sojonky, Q.C., and *Michael J. Lema*, for the appellant.

Edward R. Sojonky, c.r., et *Michael J. Lema*, pour l'appelante.

Ray C. Rutman, for the respondent.

Ray C. Rutman, pour l'intimée.

The reasons of La Forest, Gonthier and Cory JJ. were delivered by

Version française des motifs des juges La Forest, Gonthier et Cory rendus par

1 GONTHIER J. (dissenting) — This case involves a determination of priority between a deemed statutory trust and various security instruments in regard to the proceeds of a liquidation sale of inventory. In particular, the appeal requires a determination of the priority status of Her Majesty's deemed trust under s. 227(4) and (5) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (hereinafter "*ITA*"), these provisions becoming operative in this case because of the misappropriation of unremitted payroll deductions lawfully belonging to Her Majesty. In competition to this claim, the Royal Bank of Canada asserts priority under both a general security agreement and an assignment of inventory under s. 427 of the *Bank Act*, S.C. 1991, c. 46.

LE JUGE GONTHIER (dissident) — Il s'agit, en l'espèce, de déterminer l'ordre de priorité entre une fiducie légale réputée et diverses garanties ou sûretés relativement au produit de la liquidation des biens figurant dans un inventaire. Plus particulièrement, il nous faut déterminer l'ordre de priorité d'une fiducie réputée de Sa Majesté, constituée en vertu des par. 227(4) et (5) de la *Loi de l'impôt sur le revenu*, L.R.C. (1985), ch. 1 (5e suppl.) (ci-après «*LIR*»), lesquels paragraphes s'appliquent en l'espèce en raison du détournement de retenues sur la paye non versées qui appartiennent légalement à Sa Majesté. À l'encontre de cette demande, la Banque Royale du Canada fait valoir qu'elle a priorité tant en vertu d'une convention de garantie générale (ou contrat de sûreté générale) que d'une cession de biens figurant dans un inventaire, consentie en vertu de l'art. 427 de la *Loi sur les banques*, L.C. 1991, ch. 46.

1997 CanLII 377 (SCC)

I — Facts

The debtor, Sparrow Electric Corporation (hereinafter "Sparrow"), carried on business as an electrical contractor in Alberta. The enterprise was of a substantial size, employing 200 to 300 employees in its business operations. To finance these operations, Sparrow borrowed heavily from the respondent Royal Bank of Canada (hereinafter the "bank"). The bank secured Sparrow's borrowing with various forms of security, covering most of the assets utilized in Sparrow's business. Of particular relevance to this appeal, however, the bank held a general security agreement over all of Sparrow's present and after-acquired personal property, as well as an assignment of inventory under s. 178 (now s. 427) of the *Bank Act*, R.S.C., 1985, c. B-1.

In 1992, it became apparent to the bank that Sparrow was having financial difficulties. On two occasions, August 5, 1992 and September 30, 1992, the bank wrote to Sparrow advising its management that Sparrow was in default on its loan obligations. On October 16, 1992, in order to give Sparrow some time to correct its default situation, the bank and Sparrow entered into a "Standstill Agreement". This agreement permitted Sparrow to continue carrying on business under the proviso that, should Sparrow's position fail to improve, the bank would be entitled to appoint a receiver and enforce its security.

Sparrow's financial position did not improve. For this reason, on November 19, 1992, the bank appointed a receiver to take over Sparrow's business, and on December 8, 1992, the bank successfully petitioned Sparrow into bankruptcy. The order appointing the receiver empowered the receiver to, among other things, carry on Sparrow's business as it deemed necessary. The receiver did in fact carry on Sparrow's business for some time, employing approximately 200 employees in order to fulfil Sparrow's outstanding con-

I — Les faits

2 La débitrice, Sparrow Electric Corporation (ci-après «Sparrow»), exploitait une entreprise d'entrepreneur électricien en Alberta. L'entreprise était de taille importante et comptait 200 à 300 employés. Pour financer l'exploitation de son entreprise, Sparrow a emprunté des sommes importantes à l'intimée la Banque Royale du Canada (ci-après la «banque»). Pour garantir les sommes prêtées, la banque a obtenu de Sparrow diverses formes de garantie portant sur la plupart des éléments d'actif utilisés dans l'entreprise de Sparrow. En l'espèce, il importe de souligner que la banque bénéficiait d'une convention de garantie générale portant sur tous les biens meubles que Sparrow possédait alors ou qu'elle acquerrait par la suite, de même que d'une cession des biens figurant dans l'inventaire de l'entreprise, consentie en vertu de l'art. 178 (maintenant l'art. 427) de la *Loi sur les banques*, L.R.C. (1985), ch. B-1.

3 En 1992, la banque s'est rendu compte que Sparrow éprouvait des difficultés financières. À deux reprises, les 5 août et 30 septembre 1992, la banque a écrit à la direction de Sparrow pour lui signaler son défaut de remplir les obligations de son emprunt. Le 16 octobre 1992, pour donner à Sparrow le temps de remédier à la situation, la banque et Sparrow ont conclu un «moratoire». Ce moratoire permettait à Sparrow de poursuivre ses activités à la condition que, dans le cas où sa situation ne s'améliorerait pas, la banque puisse nommer un séquestre et réaliser sa garantie.

4 La situation financière de Sparrow ne s'étant pas améliorée, la banque a, le 19 novembre 1992, nommé un séquestre qui prendrait le contrôle de l'entreprise de Sparrow, et, le 8 décembre 1992, elle a présenté avec succès une pétition en faillite contre Sparrow. L'ordonnance de séquestre conférait au séquestre le pouvoir, notamment, d'exploiter l'entreprise de Sparrow, s'il le jugeait nécessaire. Le séquestre a effectivement exploité l'entreprise de Sparrow pendant un certain temps, en recourant aux services d'environ 200 employés

1997 CanLII 377 (SCC)

tractual obligations. These employees were terminated effective January 15, 1993.

pour remplir les obligations contractuelles de Sparrow. Ces employés ont été licenciés le 15 janvier 1993.

5 In addition to the failure to pay the loan obligations which inevitably led to its bankruptcy and receivership, Sparrow had failed to honour other obligations in its attempt to remain in business. In particular, Sparrow failed to remit payroll deductions as required by s. 153 *ITA*. While the record does not disclose the exact date of these failures, it appears that the first instance of non-remittance could have occurred no later than August 7, 1992. Having regard to the amount of payroll deductions outstanding as of August 7, and to the average number of Sparrow's employees on the payroll, we can conclude that the actual payroll deductions which give rise to Her Majesty's claim in all likelihood occurred some time in the year 1992. In any event, by the time of its receivership, in addition to substantial amounts outstanding to the bank, Sparrow was indebted to the appellant ("Her Majesty") in the amount of $625,990.86 for unremitted income tax payroll deductions.

Outre son défaut de remplir les obligations de son emprunt, qui a mené inévitablement à sa faillite et à sa mise sous séquestre, Sparrow a manqué à d'autres obligations en tentant de rester en affaires. Elle a omis, en particulier, de verser des retenues sur la paye qu'elle était tenue de verser en vertu de l'art. 153 *LIR*. Bien que le dossier n'en révèle pas la date exacte, il semble que la première de ces omissions ait pu se produire dès le 7 août 1992. Compte tenu du montant des retenues sur la paye dues en date du 7 août, et du nombre moyen d'employés inscrits sur la liste de paye de Sparrow, nous pouvons conclure que les retenues sur la paye qui sont à l'origine de la demande de Sa Majesté ont vraisemblablement été effectuées en 1992. De toute façon, au moment de sa mise sous séquestre, Sparrow devait à l'appelante («Sa Majesté»), outre les montants considérables dûs à la banque, la somme de 625 990,86 $ pour le non-versement de retenues d'impôt sur le revenu effectuées sur la paye.

6 On January 12, 1993, the receiver applied to the Alberta Court of Queen's Bench for authorization to sell various Sparrow assets. Part of the pool of assets to be sold included Sparrow's inventory which is the subject of this appeal. On January 15, 1993, Wilson J. authorized both the sale of the assets and remittance of its proceeds to the bank in partial repayment of its claims, but ordered that an amount equal to Her Majesty's claim for unremitted payroll deductions be held in trust pending a resolution as to the entitlement to this portion of the proceeds. At some later date, the assets were in fact sold, and the amount of $625,990.86 set aside. It has been held in judicial proceedings that the amount held is constituted entirely of proceeds from inventory (*Royal Bank v. Sparrow Electric Corp.*, Alberta Court of Queen's Bench, Edmonton, November 24, 1993, unreported). That ruling is not at issue in this appeal.

Le 12 janvier 1993, le séquestre a demandé à la Cour du Banc de la Reine de l'Alberta l'autorisation de vendre divers éléments d'actif de Sparrow, notamment les biens figurant dans son inventaire qui font l'objet du présent pourvoi. Le 15 janvier 1993, le juge Wilson a autorisé à la fois la vente des éléments d'actif et le versement du produit de la vente à la banque à titre de remboursement partiel du montant qu'elle réclamait, mais il a ordonné qu'un montant égal à celui réclamé par Sa Majesté pour les retenues sur la paye non versées soit détenu en fiducie jusqu'à ce que l'on ait décidé qui aurait droit à cette partie du produit de la vente. Quelque temps plus tard, les éléments d'actif ont été vendus et la somme de 625 990,86 $ a été mise de côté. On a statué, au cours de procédures judiciaires, que le montant détenu est entièrement constitué du produit de la vente des biens figurant dans l'inventaire (*Royal Bank c. Sparrow Electric Corp.*, Cour du Banc de la Reine de l'Alberta, Edmonton, 24 novembre 1993, inédit). Cette décision n'est pas en cause devant nous.

1997 CanLII 387 (SCC)

At present, the fund being held and constituting the proceeds of inventory is sufficient to satisfy either Her Majesty's claim, or part of the outstanding claims owing to the bank. The determination of priority in this appeal will therefore be determinative as to which party is entitled to the entirety of the disputed fund.

II — The Competing Interests

For convenience, I will at the outset outline the claims of the bank and of Her Majesty which are advanced as being entitled to the proceeds of the inventory.

(A) *The Bank*

The respondent bank advances two distinct security instruments in order to establish its claim to the disputed fund. First, the bank argues that its general security agreement ("GSA"), executed on February 25, 1992, and perfected pursuant to the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"), is entitled to priority. By this agreement, Sparrow assigned to the bank a security interest in all of its present and after-acquired personal property, including "all inventory of whatever kind and wherever situate" (para. 1(a)(i)). In addition, para. 7 of that agreement provided that proceeds of the collateral received by Sparrow would be received and held in trust for the bank. Of significance to this appeal, however, para. 4 of the GSA contained two express covenants, providing:

> So long as this Security Agreement remains in effect Debtor covenants and agrees:
>
> (a) to defend the Collateral against the claims and demands of all other parties claiming the same or an interest therein; to keep the Collateral free from all Encumbrances . . . ; provided always that, until default, Debtor may, in the ordinary course of Debtor's busi-

7 Actuellement, les fonds détenus, qui proviennent du produit de la vente des biens figurant dans l'inventaire, sont suffisants pour satisfaire à la demande de Sa Majesté, ou pour rembourser une partie des sommes dues à la banque. La détermination de l'ordre de priorité, en l'espèce, sera donc décisive quant à savoir quelle partie a droit à la totalité des fonds contestés.

II — Les intérêts opposés

8 Pour des raisons de commodité, je vais commencer par exposer les moyens invoqués par la banque et par Sa Majesté à l'appui de leur droit au produit de la vente des biens figurant dans l'inventaire.

(A) *La banque*

9 La banque intimée invoque deux garanties distinctes à l'appui de sa demande de reconnaissance de son droit aux fonds contestés. Elle allègue, premièrement, que sa convention de garantie générale («CGG»), signée le 25 février 1992 et opposable conformément à la *Personal Property Security Act* de l'Alberta, S.A. 1988, ch. P-4.05 («*PPSA*»), doit avoir priorité. Par cette convention, Sparrow a cédé en garantie à la banque tous les biens meubles qu'elle possédait alors ou qu'elle acquerrait par la suite, y compris [TRADUCTION] «tous les biens figurant dans l'inventaire, quels qu'ils soient et où qu'ils soient» (sous-al. 1a)(i)). De plus, la clause 7 de cette convention prévoyait que le produit du bien donné en garantie, reçu par Sparrow, serait détenu en fiducie pour la banque. Cependant, il importe de noter, en l'espèce, que la clause 4 de la CGG comportait deux engagements explicites, à savoir:

> [TRADUCTION] Pour toute la durée de la présente convention de garantie, le débiteur prend l'engagement et convient:
>
> a) de protéger le bien donné en garantie contre les réclamations et les revendications de toute autre partie qui prétendrait avoir un droit sur ce bien; de le garder libre de toute charge [. . .]; toujours à la condition qu'à moins d'être en défaut le débiteur puisse, dans le cours

1997 CanLII 377 (SCC)

ness, sell or lease inventory and, subject to Clause 7 hereof, use Money available to Debtor,

. . .

(e) to pay all taxes, rates, levies, assessments and other charges of every nature which may be lawfully levied, assessed or imposed against or in respect of Debtor or Collateral as and when the same become due and payable; [Emphasis added.]

Additionally, under the credit facilities agreement between Sparrow and the bank, dated January 22, 1992, Sparrow covenanted as follows:

(3) it will promptly pay when due all business, income and other taxes properly levied on its operations and property and remit all statutory employee deductions when due; [Emphasis added.]

10 The bank's second claim is that its *Bank Act* security ("BAS") entitles it to priority to the inventory proceeds. That security instrument was executed on two occasions, January 29, 1990 and December 12, 1990. Under the General Assignment, Sparrow assigned to the bank, *inter alia*, "all goods inventory, [and] stock-in-trade" as continuing security for the payment of loans to the bank. In addition, as part of the Agreement as to Loans and Advances, Sparrow granted security in both its inventory and its proceeds. At the time these instruments were executed, s. 178 of the *Bank Act*, R.S.C., 1985, c. B-1, was in effect. However, on June 1, 1992, that Act was replaced with the *Bank Act*, S.C. 1991, c. 46. The relevant portions of these two acts are identical. However, as the facts giving rise to this case occurred while the latter Act was in force, I will refer to the provisions of this new Act for the purposes of this appeal. As such, the bank's claim for security under its BAS

normal de ses affaires, vendre ou louer les biens figurant dans l'inventaire et, sous réserve de la clause 7 des présentes, utiliser les sommes d'argent dont il dispose,

. . .

e) de payer tous les impôts, tarifs, redevances, cotisations et autres sommes de toute nature qui peuvent être légalement perçues, cotisées ou imposées à l'égard du débiteur ou d'un bien donné en garantie, lorsque ces sommes sont dues et exigibles; [Je souligne.]

De plus, dans la convention de crédit conclue avec la banque le 22 janvier 1992, Sparrow avait pris l'engagement suivant:

[TRADUCTION]

(3) elle paiera promptement, lorsqu'ils seront dus, toutes les taxes d'affaires, impôts sur le revenu et autres taxes perçues à bon droit sur ses affaires et ses biens et versera toutes les retenues légales sur le salaire des employés, lorsqu'elles seront dues; [Je souligne.]

La banque allègue, deuxièmement, que la garantie de la *Loi sur les banques* («GLB») lui donne droit à la priorité de rang quant au produit des biens figurant dans l'inventaire. Cette garantie a été consentie à deux occasions, soit les 29 janvier et 12 décembre 1990. Aux termes de la cession générale, Sparrow a notamment cédé à la banque [TRADUCTION] «tous les biens figurant dans l'inventaire, [et] articles de commerce» à titre de garantie permanente du paiement de ses emprunts à la banque. De plus, dans la convention relative aux prêts et aux avances de fonds, Sparrow a donné en garantie tant les biens figurant dans son inventaire que le produit de leur vente. Au moment où ces instruments ont été signés, l'art. 178 de la *Loi sur les banques*, L.R.C. (1985), ch. B-1, était en vigueur. Cependant, le 1er juin 1992, cette loi a été remplacée par la *Loi sur les banques*, L.C. 1991, ch. 46. Les dispositions pertinentes de ces deux lois sont identiques. Cependant, étant donné que les faits à l'origine de la présente affaire sont survenus pendant que cette dernière loi était en vigueur, je renverrai aux dispositions de cette nouvelle loi pour les fins du présent pourvoi. C'est pourquoi la demande de garantie que la banque a adressée en vertu de la GLB qu'elle possède est

1997 CanLII 377 (SCC)

is grounded in s. 427 (formerly s. 178) of the *Bank Act*, which provides:

427. (1) A bank may lend money and make advances

(*a*) to any wholesale or retail purchaser or shipper of, or dealer in, products of agriculture, products of aquaculture, products of the forest, products of the quarry and mine, products of the sea, lakes and rivers or goods, wares and merchandise, manufactured or otherwise, on the security of such products or goods, wares and merchandise and of goods, wares and merchandise used in or procured for the packing of such products or goods, wares and merchandise,

. . .

(2) Delivery of a document giving security on property to a bank under the authority of this section vests in the bank in respect of the property therein described

(*a*) of which the person giving security is the owner at the time of the delivery of the document, or

(*b*) of which that person becomes the owner at any time thereafter before the release of the security by the bank, whether or not the property is in existence at the time of the delivery,

the following rights and powers, namely,

(*c*) if the property is property on which security is given under paragraph (1)(*a*), (*b*), (*g*), (*h*), (*i*), (*j*) or (*o*), under paragraph (1)(*c*) or (*m*) consisting of aquacultural implements, under paragraph (1)(*d*) or (*n*) consisting of agricultural implements or under paragraph (1)(*p*) consisting of forestry implements, the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which that property was described, . . .

. . .

and all such property in respect of which such rights and powers are vested in the bank under this section is for the purposes of this Act property covered by the security. [Emphasis added.]

Section 425(1) (formerly contained within s. 2(1)) provides that:

425. (1) . . .
"goods, wares and merchandise" includes products of agriculture, products of aquaculture, products of the

fondée sur l'art. 427 (auparavant l'art. 178) de la *Loi sur les banques*, qui prévoit que:

427. (1) La banque peut consentir des prêts ou avances de fonds:

a) à tout acheteur, expéditeur ou marchand en gros ou au détail de produits agricoles, aquicoles, forestiers, des carrières, des mines ou aquatiques ou d'effets, denrées ou marchandises fabriqués ou autrement obtenus, moyennant garantie portant sur ces produits ou sur ces effets, denrées ou marchandises ainsi que sur les effets, denrées ou marchandises servant à leur emballage;

. . .

(2) La remise à la banque d'un document lui accordant, en vertu du présent article, une garantie sur des biens dont le donneur de garantie:

a) soit est propriétaire au moment de la remise du document,

b) soit devient propriétaire avant l'abandon de la garantie par la banque, que ces biens existent ou non au moment de cette remise,

confère à la banque, en ce qui concerne les biens visés, les droits et pouvoirs suivants:

c) s'il s'agit d'une garantie donnée soit en vertu des alinéas (1)*a*), *b*), *g*), *h*), *i*), *j*) ou *o*), soit en vertu des alinéas (1)*c*) ou *m*) et portant sur du matériel aquicole mobilier, soit en vertu des alinéas (1)*d*) ou *n*) et portant sur du matériel agricole mobilier, soit en vertu de l'alinéa (1)*p*) et portant sur du matériel sylvicole mobilier, les mêmes droits que si la banque avait acquis un récépissé d'entrepôt ou un connaissement visant ces biens;

. . .

Tous les biens, à l'égard desquels les droits sont dévolus à la banque sous le régime du présent article, sont, pour l'application de la présente loi, des biens affectés à la garantie. [Je souligne.]

Le paragraphe 425(1) (qui, auparavant, faisait partie du par. 2(1)) prévoit que:

425. (1) . . .
«effets, denrées ou marchandises» Tout objet de commerce, et plus particulièrement les produits agricoles

1997 CanLII 377 (SCC)

forest, products of the quarry and mine, products of the sea, lakes and rivers, and all other articles of commerce; [Emphasis added.]

And s. 435(2) (formerly s. 186(2)) provides:

435. . . .

(2) Any warehouse receipt or bill of lading acquired by a bank under subsection (1) vests in the bank, from the date of the acquisition thereof,

(*a*) all the right and title to the warehouse receipt or bill of lading and to the goods, wares and merchandise covered thereby of the previous holder or owner thereof; and

(*b*) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom the goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of the goods, wares and merchandise.

11 In addition, the respondent directed this Court's attention to s. 428(1) (formerly s. 179(1)), which it was submitted affected the priority position of the bank's BAS:

428. (1) All the rights and powers of a bank in respect of the property mentioned in or covered by a warehouse receipt or bill of lading acquired and held by the bank, and the rights and powers of the bank in respect of the property covered by a security given to the bank under section 427 that are the same as if the bank had acquired a warehouse receipt or bill of lading in which that property was described, have, subject to subsection 427(4) and subsections (3) to (6) of this section, priority over all rights subsequently acquired in, on or in respect of that property, and also over the claim of any unpaid vendor. [Emphasis added.]

Finally, s. 434(2) (formerly s. 185(2)) provides:

434. . . .

(2) Nothing in any charter, Act or law shall be construed as ever having been intended to prevent or as preventing a bank from acquiring and holding an absolute title to and in any mortgaged or hypothecated real property, whatever the value thereof, or from exercising or acting on any power of sale contained in any mortgage given to or held by the bank, authorizing or ena-

et aquicoles, les produits de la forêt, des carrières et des mines et les produits aquatiques. [Je souligne.]

Et le paragraphe 435(2) (auparavant le par. 186(2)) se lit ainsi:

435. . . .

(2) Tout récépissé d'entrepôt ou connaissement confère à la banque qui l'a acquis, en vertu du paragraphe (1), à compter de la date de l'acquisition:

a) les droit et titre de propriété que le précédent détenteur ou propriétaire avait sur le récépissé d'entrepôt ou le connaissement et sur des effets, denrées ou marchandises qu'il vise;

b) les droit et titre qu'avait la personne, qui les a cédés à la banque, sur les effets, denrées ou marchandises qui y sont mentionnés, si le récépissé d'entrepôt ou le connaissement est fait directement en faveur de la banque, au lieu de l'être en faveur de leur précédent détenteur ou propriétaire.

De plus, l'intimée a attiré l'attention de la Cour sur le par. 428(1) (auparavant le par. 179(1)), qui, soutenait-elle, avait une incidence sur le rang de la GLB de la banque dans l'ordre de priorité:

428. (1) Tous les droits de la banque sur les biens mentionnés ou visés dans un récépissé d'entrepôt ou un connaissement qu'elle a acquis ou détient, ainsi que ses droits sur les biens affectés à une garantie reçue en vertu de l'article 427, et qui équivalent aux droits découlant d'un récépissé d'entrepôt ou un connaissement visant ces biens priment, sous réserve du paragraphe 427(4) et des paragraphes (3) à (6) du présent article, tous les droits subséquemment acquis sur ces biens, ainsi que la créance de tout vendeur impayé. [Je souligne.]

Enfin, le par. 434(2) (auparavant le par. 185(2)) se lit ainsi:

434. . . .

(2) Aucune charte, loi ou règle de droit ne doit s'interpréter comme ayant été destinée à interdire ou comme interdisant à la banque d'acquérir et de détenir le titre absolu de propriété des biens immeubles grevés d'une hypothèque, quelle qu'en soit la valeur, ou d'exercer le droit découlant d'une hypothèque consentie en sa faveur ou détenue par elle, lui conférant l'autorisation

1997 CanLII 377 (SCC)

bling it to sell or convey any property so mortgaged. [Emphasis added.]

While no provision in the BAS explicitly permitted Sparrow to sell its inventory, the respondent bank has conceded that such a licence existed, as a practical matter, as between the parties. In any event, I would have thought that once a licence to sell inventory had been granted under the GSA, it would be impossible to grant a more restricted licence to deal with the same collateral under the provisions of the BAS.

(B) *Her Majesty's Interest*

Her Majesty's claim arises under the s. 227 deemed trust provisions of the *ITA*. Section 153(1)(*a*) of that Act requires employers to withhold from the pay cheques of its employees and remit to the Receiver General amounts on account of the payee's tax for the year:

153. (1) Every person paying at any time in a taxation year

(*a*) salary or wages or other remuneration,

. . .

shall deduct or withhold therefrom such amount as may be determined in accordance with prescribed rules and shall, at such time as may be prescribed, remit that amount to the Receiver General on account of the payee's tax for the year .... [Emphasis added.]

Such amounts are deemed to be held in trust for Her Majesty by virtue of s. 227(4) and (5) *ITA*, which provide:

227. . . .

(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.

(5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receiv-

ou lui permettant de vendre ou de transférer les biens grevés. [Je souligne.]

12 Même si aucune disposition de la GLB ne permettait explicitement à Sparrow de vendre les biens figurant dans son inventaire, la banque intimée a concédé qu'en pratique les parties avaient cette permission. De toute façon, j'aurais cru que, dès qu'une permission de vendre les biens d'un inventaire a été accordée en vertu de la GLB, il serait impossible d'accorder une permission plus restreinte d'aliéner le même bien donné en garantie en vertu des dispositions de la GLB.

1997 CanLII 377 (SCC)

(B) *L'intérêt de Sa Majesté*

13 La demande de Sa Majesté est fondée sur les dispositions en matière de fiducie réputée de l'art. 227 *LIR*. L'alinéa 153(1)*a*) de cette loi exige que les employeurs prélèvent sur le chèque de paye de leurs employés des sommes au titre de l'impôt du bénéficiaire ou du dépositaire pour l'année, et qu'ils les versent au receveur général:

153. (1) Toute personne qui verse au cours d'une année d'imposition l'un des montants suivants:

a) un traitement, un salaire ou autre rémunération;

. . .

doit en déduire ou en retenir la somme qui peut être prescrite et doit, au moment qui peut être fixé par règlement, remettre cette somme au receveur général au titre de l'impôt du bénéficiaire ou du dépositaire, selon le cas, pour l'année . . . [Je souligne.]

Ces sommes sont réputées être détenues en fiducie pour Sa Majesté en vertu des par. 227(4) et (5) *LIR*, dont voici le texte:

227. . . .

(4) Toute personne qui déduit ou retient un montant quelconque en vertu de la présente loi est réputée retenir le montant ainsi déduit ou retenu en fiducie pour Sa Majesté.

(5) Malgré la *Loi sur la faillite*, en cas de liquidation, cession, mise sous séquestre ou faillite d'une personne, un montant égal à l'un ou l'autre des montants suivants est considéré comme tenu séparé et ne formant pas partie du patrimoine visé par la liquidation, cession, mise sous séquestre ou faillite, que ce montant ait été ou non,

ership or bankruptcy of or by a person, an amount equal to any amount

(*a*) deemed by subsection (4) to be held in trust for Her Majesty, . . .

. . .

shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

As of June 15, 1994, these provisions have been repealed and replaced by a revised s. 227(4): S.C. 1994, c. 21, s. 104(1). However, as this amendment was not effective at the time the facts of this appeal arose, I decline to comment on the application of the new s. 227(4) to this case.

III — Judgments of the Courts Below

Alberta Court of Queen's Bench (1993), 19 Alta. L.R. (3d) 183

14 The first application brought to determine the priority over the inventory proceeds involved the competing claims under the GSA advanced by the bank, and Her Majesty's deemed trust. Agrios J. held that the deemed trust took priority over the GSA. In characterizing the statutory trust, Agrios J. concluded at p. 189 that the trust attaches to "whatever assets are left" upon bankruptcy. With regard to the GSA security interest, Agrios J. was of the view that it took the form of a fixed charge on the inventory with a licence to sell in the ordinary course of business. However, this latter characterization was not necessary to reach his decision, as the learned chambers judge ultimately reasoned, at p. 188, "[w]hether the charge is floating or fixed, if there is an ability to deal with an asset such as inventory, the asset becomes exposed to the normal market incidents of carrying on business". Relying on the decision of McLachlin J.A. (as she then was) in *R. in Right of B.C. v. F.B.D.B.*, [1988] 1 W.W.R. 1 (B.C.C.A.) (hereinafter "*FBDB*"), Agrios J. found that a normal incident of selling inventory was the payment of statutory

en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine:

a) le montant réputé, selon le paragraphe (4), être détenu en fiducie pour Sa Majesté;

Le 15 juin 1994, ces dispositions ont été abrogées et remplacées par un nouveau par. 227(4): L.C. 1994, ch. 21, par. 104(1). Cependant, étant donné que cette modification ne s'appliquait pas au moment où sont survenus les faits à l'origine du présent pourvoi, je ne fais aucun commentaire sur l'application du nouveau par. 227(4) à la présente affaire.

III — Les juridictions inférieures

Cour du Banc de la Reine de l'Alberta (1993), 19 Alta. L.R. (3d) 183

La première demande de détermination de l'ordre de priorité quant au produit de la vente des biens figurant dans l'inventaire opposait la réclamation de la banque fondée sur la CGG et celle fondée sur la fiducie réputée de Sa Majesté. Le juge Agrios a statué que la fiducie réputée avait priorité de rang sur la CGG. En définissant la fiducie légale, le juge Agrios conclut, à la p. 189, qu'elle s'applique à [TRADUCTION] «tous les biens qui restent» à la suite d'une faillite. En ce qui concerne la garantie découlant de la CGG, le juge Agrios était d'avis qu'elle prenait la forme d'un privilège fixe sur les biens de l'inventaire, assorti d'une permission de vendre dans le cours normal des affaires. Toutefois, le juge en chambre n'avait pas à la qualifier ainsi pour arriver à sa décision étant donné qu'il a fini par affirmer, à la p. 188: [TRADUCTION] «[q]ue le privilège soit flottant ou fixe, s'il y a capacité d'aliéner un élément d'actif comme les biens figurant dans un inventaire, cet élément d'actif devient alors exposé aux activités normales rattachées à l'exploitation d'une entreprise». Se fondant sur la décision du juge

1997 CanLII 377 (SCC)

liens. The sale of the inventory therefore permitted the statutory trust to attach.

McLachlin (maintenant juge de notre Cour) dans l'arrêt *R. in Right of B.C. c. F.B.D.B.*, [1988] 1 W.W.R. 1 (C.A.C.-B.) (ci-après «*FBDB*»), le juge Agrios a conclu que le remboursement de dettes garanties par des privilèges légaux était une activité normale rattachée à la vente des biens d'un inventaire. La vente des biens figurant dans l'inventaire permettait donc à la fiducie légale de s'appliquer.

1997 CanLII 377 (SCC)

Alberta Court of Queen's Bench (1994), 21 Alta. L.R. (3d) 275

Cour du Banc de la Reine de l'Alberta (1994), 21 Alta. L.R. (3d) 275

15 The bank subsequently applied for a determination of whether their BAS over Sparrow's inventory took priority over Her Majesty's deemed trust. For substantially similar reasons, Agrios J. held that the deemed trust once again took priority. Whether the BAS could be characterized as a fixed charge with a licence to sell, or a floating charge, the sale of the inventory subjected the bank's interest in it to the "normal incidents of business" (at p. 283). And, in Agrios J.'s view, one of these incidents was the paying of wages and withholdings. As these proceeds were impressed with the deemed trust, whatever interest the bank had could not attach to them, as they were no longer the property of Sparrow.

La banque a, par la suite, demandé de déterminer si la GLB qu'elle détenait relativement aux biens figurant dans l'inventaire de Sparrow avait priorité de rang sur la fiducie réputée de Sa Majesté. Pour des motifs essentiellement similaires, le juge Agrios a statué que la fiducie réputée avait, encore là, priorité de rang. Que la GLB ait pu être qualifiée de privilège fixe assorti d'une permission de vendre, ou encore de privilège flottant, la vente des biens figurant dans l'inventaire assujettissait le droit de la banque sur ces biens aux [TRADUCTION] «activités normales des affaires» (à la p. 283). Et, selon le juge Agrios, le paiement des salaires et le versement des retenues faisaient partie de ces activités. Étant donné que le produit de cette vente était sujet à la fiducie réputée, tout droit que la banque pouvait avoir ne pouvait pas s'appliquer à ce produit, étant donné qu'il n'appartenait plus à Sparrow.

Alberta Court of Appeal (1995), 28 Alta. L.R. (3d) 153

Cour d'appel de l'Alberta (1995), 28 Alta. L.R. (3d) 153

16 Both the decisions of Agrios J. were appealed to the Alberta Court of Appeal. As such, the priority of both the GSA and the BAS were at issue before that court. However, the Court of Appeal, unanimously deciding to dispose of the appeal solely on the grounds that the BAS took priority over the statutory trust, neither heard oral argument nor ruled with regard to the priority of the GSA.

Les deux décisions du juge Agrios ont été portées en appel devant la Cour d'appel de l'Alberta, où l'ordre de priorité de la CGG et de la GLB a été en cause. Toutefois, la Cour d'appel a décidé, à l'unanimité, de statuer sur l'appel uniquement en fonction du fait que la GLB avait priorité de rang sur la fiducie légale, et elle n'a entendu aucune plaidoirie ni statué sur la priorité de rang de la CGG.

17 The Court of Appeal began with the premise that BAS was a fixed and specific charge transferring legal title to the bank and not a floating charge

La Cour d'appel est partie du principe que la GLB était un privilège fixe et spécifique qui transférait le titre de propriété à la banque, et non pas

over inventory. For this proposition, the court relied upon two judgments of this Court, *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182, and *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, both decisions which the court considered binding upon it. As the claim of Her Majesty arose subsequent to the execution of the BAS, in the court's opinion, the deemed trust could have nothing to attach to. In addition, the court rejected the argument that the inventory was subject to a licence to sell which would provide Her Majesty with an opportunity to attach its interest. The Court of Appeal found *FBDB*, *supra*, relied upon by Agrios J. to be distinguishable on the basis that the intimacy in that case between the sale of inventory and the statutory trust was not present in the case before it. In contrast, in the present case, the court found no conceptual or evidentiary link between the sale of inventory and the withholding of payroll deductions. In any event, the court found that any licence to sell inventory only lasted until default, and as the sale in this case occurred well after any default by Sparrow, the licence must therefore have been extinguished at the relevant time. For these reasons, the Court of Appeal found that the BAS took priority over Her Majesty's deemed trust.

un privilège flottant sur les biens figurant dans un inventaire. Elle a invoqué, à l'appui de cette proposition, deux arrêts de notre Cour qui, selon elle, la liaient, à savoir *Dauphin Plains Credit Union Ltd. c. Xyloid Industries Ltd.*, [1980] 1 R.C.S. 1182, et *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121. La cour était d'avis que, puisque la demande de Sa Majesté découlait de la signature de la GLB, la fiducie réputée était dépourvue d'objet. De plus, la cour a rejeté l'argument selon lequel les biens figurant dans l'inventaire faisaient l'objet d'une permission de vendre qui donnerait à Sa Majesté l'occasion de faire valoir son droit. La Cour d'appel a conclu que l'arrêt *FBDB*, précité, sur lequel s'était appuyé le juge Agrios, pouvait faire l'objet d'une distinction du fait que le lien de proximité qu'on y trouvait entre la vente des biens figurant dans l'inventaire et la fiducie légale n'existait pas dans l'affaire dont elle était saisie. Par contre, dans la présente affaire, la cour a conclu à l'absence de lien conceptuel ou probant entre la vente des biens figurant dans l'inventaire et les retenues sur la paye. De toute façon, la cour a conclu que toute permission de vendre les biens figurant dans l'inventaire ne valait que tant qu'il n'y aurait pas défaut et qu'étant donné que la vente en l'espèce avait eu lieu bien après le défaut de Sparrow, la permission ne devait donc plus être valide à l'époque pertinente. Pour ces motifs, la Cour d'appel a conclu que la GLB avait priorité de rang sur la fiducie réputée de Sa Majesté.

1997 CanLII 377 (SCC)

IV — Issues

18 There are two issues to be resolved in this appeal: (1) whether, on the facts of this case, Her Majesty's s. 227(5) *ITA* deemed trust takes priority over a previously executed GSA with respect to the proceeds of the sale of inventory; and (2) whether, on the facts of this case, Her Majesty's s. 227(5) *ITA* deemed trust takes priority over a previously executed BAS with respect to the proceeds of the sale of inventory?

IV — Les questions en litige

Il y a deux questions à trancher en l'espèce: (1) celle de savoir si, d'après les faits de la présente affaire, la fiducie réputée que Sa Majesté détient en vertu du par. 227(5) *LIR* a priorité de rang sur une CGG antérieure, quant au produit de la vente des biens figurant dans l'inventaire, et (2), celle de savoir si, d'après les faits de la présente affaire, la fiducie réputée que Sa Majesté détient en vertu du par. 227(5) *LIR* a priorité de rang sur une GLB antérieure, quant au produit de la vente des biens figurant dans l'inventaire.

V — Analysis

(A) *Introduction*

V — Analyse

(A) *Introduction*

The law reports are replete with cases involving competing claims between statutory liens and deemed trusts, such as the one found in s. 227 *ITA*, and other previously executed consensual security interests: *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, *supra*; *Board of Industrial Relations v. Avco Financial Services Realty Ltd.*, [1979] 2 S.C.R. 699; *Royal Bank of Canada v. G. M. Homes Inc.* (1984), 52 C.B.R. (N.S.) 244 (Sask. C.A.); *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1992] 2 W.W.R. 641 (Man. C.A.); *FBDB*, *supra*; *Ford Motor Co. of Canada Ltd. v. Manning Mercury Sales Ltd. (Trustee of)*, [1994] 6 W.W.R. 372 (Sask. Q.B.); *National Bank of Canada v. Director of Employment Standards* (1986), 5 P.P.S.A.C. 326 (Ont. Div. Ct.); *Abraham v. Coopers & Lybrand Ltd.* (1993), 13 O.R. (3d) 649 (Gen. Div.) (under appeal); *Armstrong v. Coopers & Lybrand Ltd.* (1986), 53 O.R. (2d) 468 (H.C.), aff'd (1987), 61 O.R. (2d) 129 (C.A.), leave refused, *sub nom. National Bank of Canada v. Armstrong*, [1988] 1 S.C.R. xii. The ubiquitousness of this legal dilemma in our courts speaks no doubt, at least in part, to the prevalence of the unfortunate factual situation which such statutory trusts and liens were meant to counter. Namely, such deemed trusts or liens are devices which legislators often employ in order to recover moneys which ought to have lawfully been paid to them but have been unlawfully misappropriated by a debtor who subsequently encounters financial difficulty and is forced into winding up its business, e.g., *Canada Pension Plan*, R.S.C., 1985, c. C-8, s. 23(3) and (4); *Unemployment Insurance Act*, R.S.C., 1985, c. U-1, s. 57(2) and (3); and the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), s. 227(4) and (5). Indeed, it is perhaps more accurate to speculate that this sort of misappropriation of public funds is often a manifestation of an already-existing financial difficulty in a debtor's business, as a debtor foregoes statutory payments as required of it in order to increase artificially its supply of working capital.

19 Les recueils de jurisprudence regorgent de cas où il est question de demandes opposées relatives à des privilèges légaux et à des fiducies réputées, comme celle dont il est question à l'art. 227 *LIR*, et à des garanties consensuelles antérieures: *Dauphin Plains Credit Union Ltd. c. Xyloid Industries Ltd.*, précité; *Commission des relations de travail c. Avco Financial Services Realty Ltd.*, [1979] 2 R.C.S. 699; *Royal Bank of Canada c. G.M. Homes Inc.* (1984), 52 C.B.R. (N.S.) 244 (C.A. Sask.); *Roynat Inc. c. Ja-Sha Trucking & Leasing Ltd.*, [1992] 2 W.W.R. 641 (C.A. Man.); *FBDB*, précité; *Ford Motor Co. of Canada Ltd. c. Manning Mercury Sales Ltd. (Trustee of)*, [1994] 6 W.W.R. 372 (B.R. Sask.); *National Bank of Canada c. Director of Employment Standards* (1986), 5 P.P.S.A.C. 326 (C. div. Ont.); *Abraham c. Coopers & Lybrand Ltd.* (1993), 13 O.R. (3d) 649 (Div. gén.) (en appel); *Armstrong c. Coopers & Lybrand Ltd.* (1986), 53 O.R. (2d) 468 (H.C.), conf. par (1987), 61 O.R. (2d) 129 (C.A.), autorisation de pourvoi refusée, *sub nom. National Bank of Canada c. Armstrong*, [1988] 1 R.C.S. xii. L'omniprésence de ce dilemme juridique devant nos tribunaux témoigne, du moins en partie, du caractère généralisé de la situation de fait malheureuse à laquelle devaient parer ces fiducies et privilèges légaux. Les fiducies ou privilèges réputés sont des moyens auxquels les législateurs ont souvent recours pour recouvrer des sommes qui auraient dû leur être versées, mais qui ont été illégalement détournées par un débiteur qui a, par la suite, éprouvé des difficultés financières et s'est vu forcé de liquider son entreprise; voir, par exemple, le *Régime de pensions du Canada*, L.R.C. (1985), ch. C-8, par. 23(3) et (4), la *Loi sur l'assurance-chômage*, L.R.C. (1985), ch. U-1, par. 57(2) et (3), et la *Loi de l'impôt sur le revenu*, L.R.C. (1985), ch. 1 (5e suppl.), par. 227(4) et (5). En fait, il est peut-être plus exact de supposer que cette sorte de détournement de fonds publics indique souvent que l'entreprise d'un débiteur est déjà aux prises avec des difficultés financières lorsque celui-ci omet de faire les versements requis par la loi, afin d'accroître artificiellement son fonds de roulement.

At the same time that legislators have sought to protect the fiscal integrity of public institutions

20 En même temps que les législateurs ont cherché à préserver l'intégrité financière de corps publics

1997 CanLII 377 (SCC)

through the devices of statutory trusts and liens, however, they have also endeavoured to protect the security interests of those private institutions who are involved in providing credit to Canadian businesses. For example, the *Bank Act* has historically provided for the protection of the collateral of banking institutions. The current provision of the *Bank Act* granting a security interest in a debtor's inventory, s. 427, can be traced back over one hundred years to the enactment of its predecessor section, s. 74, in 1890 (S.C. 1890, c. 31). The historical and societal importance of this form of security was observed by this Court in *Hall*, *supra*, where, at p. 139, La Forest J. commented that "[i]n a word, the creation of the *Bank Act* security interest has been a key factor in the evolution of banking in this country". Later, at p. 140, La Forest J. concluded:

> The above considerations establish, to my satisfaction, that the s. 178 security interest, which originated as a policy response to structural deficiencies in the lending regimes of the nascent Canadian economy, has, since its inception, played a primordial role in facilitating access to capital by several groups that play a key role in the national economy. [Emphasis added.]

21 More recently, provincial legislatures have moved to protect secured creditors generally through the enactment of personal property security legislation: e.g. *Personal Property Security Act*, R.S.O. 1990, c. P.10; *Personal Property Security Act*, S.B.C. 1989, c. 36; and the *PPSA*. These statutory regimes have been implemented to increase certainty and predictability in secured transactions through the creation of a coherent system of priorities: Ronald C. C. Cuming and Roderick J. Wood, *British Columbia Personal Property Security Act Handbook* (2nd ed. 1993), at pp. 4-5; *G.M. Homes Inc.*, *supra*, at p. 252. The benefits of such certainty in commercial transactions, on basic economic principles, are intended to accrue to the health of the economy in general.

22 It can be seen from the foregoing, therefore, that the priority competition between statutory trusts and consensual security interests represents, in a broad sense, a clash between conflicting legislative

au moyen de fiducies et de privilèges légaux, ils ont toutefois aussi tenté de protéger les garanties des établissements de crédit privés qui traitent avec des entreprises canadiennes. Par exemple, la *Loi sur les banques* a, de tout temps, assuré la protection des biens donnés en garantie aux établissements bancaires. La disposition actuelle de la *Loi sur les banques* qui accorde une garantie sur les biens figurant dans l'inventaire d'un débiteur, à savoir l'art. 427, remonte à l'adoption de l'art. 74, il y a plus de cent ans, en 1890 (S.C. 1890, ch. 31). L'importance historique et sociale de ce type de garantie a été soulignée par notre Cour dans l'arrêt *Hall*, précité, où le juge La Forest fait remarquer, à la p. 139, qu'«[e]n un mot, l'établissement de la sûreté de la *Loi sur les banques* a joué un rôle-clé dans l'évolution des opérations bancaires au pays». Le juge La Forest conclut ensuite, à la p. 140:

> Les considérations qui précèdent me convainquent que la sûreté de l'art. 178, qui tire son origine d'une réponse du législateur aux déficiences structurelles des régimes de crédit dans l'économie canadienne naissante, a, depuis son avènement, joué un rôle primordial en permettant à plusieurs groupes qui jouent un rôle-clé dans l'économie nationale d'obtenir plus facilement des capitaux. [Je souligne.]

Plus récemment, les législateurs provinciaux ont entrepris de protéger les créanciers garantis, en adoptant généralement des lois en matière de sûretés mobilières: par exemple, la *Loi sur les sûretés mobilières*, L.R.O. 1990, ch. P.10, la *Personal Property Security Act*, S.B.C. 1989, ch. 36, et la *PPSA*. Ces régimes législatifs ont été adoptés pour accroître la certitude et la prévisibilité des opérations garanties en créant un système cohérent de priorités: Ronald C. C. Cuming et Roderick J. Wood, *British Columbia Personal Property Security Act Handbook* (2e éd. 1993), aux pp. 4 et 5; *G.M. Homes Inc.*, précité, à la p. 252. Sur le plan des principes économiques, les avantages de cette certitude dans les opérations commerciales sont destinés à accroître la santé de l'économie en général.

Par conséquent, il ressort de ce qui précède que la concurrence pour la priorité de rang entre les fiducies légales et les garanties consensuelles représente, au sens large, un affrontement entre des

1997 CanLII 377 (SCC)

objectives. To this extent, then, a resolution of the priority competition in the present case requires a sensitivity to the differing legislative objectives here at play. In particular, however, to the extent that the aim of personal property security regimes is to effect certainty in commercial transactions, the interpretation by the courts of such legislation and the development of the jurisprudence generally in this area must, to every extent possible, seek to achieve predictable results.

It has been unfortunate that the development of the case law, to this point, has not inspired the degree of certainty which is so manifestly desirable in this area of commercial law. Indeed, the jurisprudence has been referred to as a "troubled area of the law" (*Manitoba (Minister of Labour) v. Omega Autobody Ltd. (Receiver of)* (1989), 59 D.L.R. (4th) 34 (Man. C.A.), at p. 36), and has been the subject of, at times, scathing academic criticism (Roderick J. Wood, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*" (1995), 10 *B.F.L.R.* 429, and Roderick J. Wood and Michael I. Wylie, "Non-Consensual Security Interests in Personal Property" (1992), 30 *Alta. L. Rev.* 1055). The general view, I believe, has been summarized by Professor Wood in his most helpful case commentary, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *supra*, at p. 430: "[i]t is somewhat of an embarrassment that after more than two decades we still cannot confidently predict the outcome of a priority dispute between a deemed trust and a security interest". The above judicial and academic commentary, I believe, invites this Court to proceed steadfastly towards the pronouncement of clear principles to be applied in determining the priority between statutory trusts and consensual security interests.

With these general observations in mind, I will now proceed to analyze the specific aspects of the competing claims advanced by the parties in the present case.

objectifs législatifs conflictuels. Dans cette mesure, la détermination de la priorité de rang en l'espèce exige alors que l'on tienne compte des objectifs législatifs divergents qui entrent en jeu ici. Plus particulièrement, toutefois, dans la mesure où les régimes de sûretés mobilières visent à créer la certitude en matière d'opérations commerciales, l'interprétation de ces textes législatifs par les tribunaux et l'évolution de la jurisprudence en général dans ce domaine doivent, le plus possible, viser l'atteinte de résultats prévisibles.

23 Il est malheureux que, jusqu'à maintenant, la jurisprudence n'ait pas su susciter la certitude qui est si manifestement souhaitable dans ce domaine du droit commercial. En fait, la jurisprudence a été qualifiée de [TRADUCTION] «secteur trouble du droit» (*Manitoba (Minister of Labour) c. Omega Autobody Ltd. (Receiver of)* (1989), 59 D.L.R. (4th) 34 (C.A. Man.), à la p. 36), et elle a fait l'objet, à certains moments, de critiques acerbes de la part d'auteurs de doctrine (Roderick J. Wood, «Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*» (1995), 10 *B.F.L.R.* 429, ainsi que Roderick J. Wood et Michael I. Wylie, «Non-Consensual Security Interests in Personal Property» (1992), 30 *Alta. L. Rev.* 1055). L'opinion générale a, je crois, été résumée par le professeur Wood dans son commentaire de décision fort utile, «Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*», *loc. cit.*, à la p. 430: [TRADUCTION] «[i]l est quelque peu embarrassant de constater qu'après plus de deux décennies, nous ne pouvons toujours pas prédire en toute confiance le résultat d'un litige quant à la priorité de rang entre une fiducie réputée et une garantie». Les commentaires ci-dessus tirés de la jurisprudence et de la doctrine invitent, je crois, notre Cour à s'orienter résolument vers une énonciation de principes clairs qui permettront de déterminer la priorité de rang entre les fiducies légales et les garanties consensuelles.

24 Gardant à l'esprit ces observations générales, je vais maintenant entreprendre l'analyse des aspects particuliers des demandes opposées que les parties ont présentées en l'espèce.

1997 CanLII 377 (SCC)

(B) *The Nature of Section 227(4) and (5) Statutory Trusts*

25 Section 153(1)(*a*) *ITA* places an affirmative duty upon employers to deduct and withhold amounts from their employees' pay cheques, and remit those withholdings to the Receiver General on account of the employees' tax payable. By virtue of s. 153(3) *ITA*, these withholdings are deemed to become the property of the employee:

> **153.** ...
>
> (3) When an amount has been deducted or withheld under subsection (1), it shall, for all the purposes of this Act, be deemed to have been received at that time by the person to whom the remuneration, benefit, payment, fees, commissions or other amounts were paid.

In a perfect world, these deductions would be made, a cash fund would be set aside by the employer, and the withheld amounts would be promptly remitted to the Receiver General when due. The deducted amounts, lawfully the property of the employee, would in this way be transferred to Her Majesty to be set against his overall tax payable.

26 As a practical reality, however, these deductions are often not remitted as required under the *ITA*. Instead, the withholdings are commonly made solely as a book entry, and therefore the deduction of taxes from wages becomes merely a notional transaction; no cash is actually set aside for remittance and, often, the deductions are not transferred to the Receiver General: see, e.g., *Re Deslauriers Construction Products Ltd.*, [1970] 3 O.R. 599 (C.A.), at p. 601. It is at this point which a business becomes indebted to Her Majesty for the amount of moneys only fictionally deducted. I hasten to add, however, that while it can be said Her Majesty at this point becomes *de facto*, if not *de jure*, a creditor of the non-remitting employer, the arrangement is dissimilar to an ordinary debtor-creditor situation in two fundamental respects. First, in contrast to usual negotiated credit arrangements, this transaction is of manifestly a non-consensual nature. Second, by virtue of s. 153(3), the debtor can in law be considered to

(B) *La nature des fiducies légales créées par les par. 227(4) et (5)*

L'alinéa 153(1)*a*) *LIR* impose aux employeurs l'obligation positive de déduire et de retenir des sommes du chèque de paye de leurs employés, et de remettre ces retenues au receveur général au titre de l'impôt exigible des employés. En vertu du par. 153(3) *LIR*, ces retenues sont réputées appartenir à l'employé:

> **153.** ...
>
> (3) Lorsqu'une somme a été déduite ou retenue en vertu du paragraphe (1), elle est, pour l'application générale de la présente loi, réputée avoir été reçue à ce moment par la personne à qui la rémunération, la prestation, le paiement, les honoraires, les commissions ou d'autres sommes ont été payés.

Idéalement, ces déductions seraient faites, un fonds de caisse serait mis de côté par l'employeur et les sommes retenues seraient promptement versées au receveur général à échéance. Les sommes déduites, qui sont légalement la propriété de l'employé, seraient ainsi transférées à Sa Majesté pour être défalquées du montant global de l'impôt dû par cet employé.

En pratique, toutefois, il arrive souvent que ces déductions ne soient pas versées conformément aux exigences de la *LIR*. Au lieu de cela, les retenues ne sont généralement qu'une inscription comptable et, par conséquent, la déduction de l'impôt du salaire devient simplement une opération abstraite; aucune somme d'argent n'est véritablement mise de côté en vue d'être versée et, souvent, ces déductions ne sont pas transférées au receveur général: voir, par exemple, *Re Deslauriers Construction Products Ltd.*, [1970] 3 O.R. 599 (C.A.), à la p. 601. C'est à ce moment qu'une entreprise devient endettée envers Sa Majesté relativement aux sommes qui n'ont fait l'objet que d'une déduction fictive. Cependant, je m'empresse d'ajouter que bien que l'on puisse dire que Sa Majesté devient alors, en fait, sinon en droit, un créancier de l'employeur en défaut, la situation diffère, à deux égards importants, de celle qui existe normalement dans le cas d'un créancier et de son débiteur. Premièrement, contrairement aux ententes de

1997 CanLII 377 (SCC)

be utilizing an asset which is the property of its employees. In this sense, it is not inaccurate to characterize the non-remittance of payroll deductions as a "misappropriation" of the property of another. Indeed, the authorities, correctly in my view, commonly refer to the conduct of the tax debtor in this manner: *Roynat*, *supra*, at p. 646, *per* Twaddle J.A.; and *Pembina on the Red Development Corp. Ltd. v. Triman Industries Ltd.* (1991), 85 D.L.R. (4th) 29 (Man. C.A.), at p. 48, *per* Lyon J.A. dissenting.

crédit négociées normalement, l'opération n'est manifestement pas de nature consensuelle. Deuxièmement, en vertu du par. 153(3), on peut considérer, en droit, que le débiteur utilise un élément d'actif appartenant à ses employés. En ce sens, il n'est pas inexact de qualifier le non-versement des retenues sur la paye de «détournement» du bien d'autrui. En fait, la jurisprudence qualifie ainsi souvent, et correctement à mon avis, la conduite du débiteur fiscal: *Roynat*, précité, à la p. 646, le juge Twaddle, et *Pembina on the Red Development Corp. Ltd. c. Triman Industries Ltd.* (1991), 85 D.L.R. (4th) 29 (C.A. Man.), à la p. 48, le juge Lyon, dissident.

27

The economic reality of this sort of misappropriation of statutory deductions is artificially to increase the working capital of the tax debtor. By foregoing a cash payment to Her Majesty in the amount of the payroll deductions, the tax debtor is able to utilize the freed resources elsewhere in its business. The effect of non-remittance was summarized by Lyon J.A. in his dissenting reasons in *Pembina on the Red Development*, *supra*, at p. 48:

> . . . either the tax debtor used the misappropriated deductions for its own purposes or the pool of moneys available for distribution to the tax debtor's creditors . . . has been increased by the amount which the tax debtor failed to remit to the Receiver-General.

Sur le plan économique, ce genre de détournement des retenues effectuées en vertu de la loi contribue à accroître artificiellement le fonds de roulement du débiteur fiscal. En ne versant pas à Sa Majesté le montant des retenues sur la paye, le débiteur fiscal est en mesure d'utiliser ailleurs dans son entreprise les ressources libérées. Dans les motifs de dissidence qu'il a rédigés dans *Pembina on the Red Development*, précité, le juge Lyon résume l'incidence du non-versement, à la p. 48:

> [TRADUCTION] . . . soit que le débiteur fiscal a utilisé les retenues détournées pour ses propres fins, soit que la somme globale susceptible d'être répartie entre les créanciers du débiteur fiscal [. . .] a été augmentée du montant que le débiteur fiscal a omis de verser au receveur général.

28

It is against the backdrop of this unfortunate factual scenario that the provisions of s. 227(4) and (5) can be seen to have been enacted. While it can be said that at the point of withholding the employer becomes the trustee of a fund which is in law the property of its employee, s. 227(4) has the effect of making Her Majesty the beneficiary under that trust. I agree with the observation of the mechanics of s. 227(4) made by Twaddle J.A. in *Roynat*, *supra*, at p. 646, where he states:

> Although [s. 227(4)] calls the trust created by it a deemed one, the trust is in truth a real one. The employer is required to deduct from his employees' wages the amounts due by the employees under the statute. This money does not belong to the employer any-

On peut considérer que les dispositions des par. 227(4) et (5) ont été adoptées dans le contexte de ce malheureux scénario. Quoique l'on puisse dire qu'au moment d'effectuer les retenues l'employeur devient le fiduciaire de sommes qui, en droit, appartiennent à ses employés, le par. 227(4) a pour effet de faire de Sa Majesté le bénéficiaire de cette fiducie. Je suis d'accord avec les observations que le juge Twaddle fait quant au fonctionnement du par. 227(4), dans *Roynat*, précité, à la p. 646:

> [TRADUCTION] Bien que [le par. 227(4]) désigne la fiducie ainsi créée comme étant une fiducie réputée, cette fiducie est, à vrai dire, réelle. L'employeur doit déduire du salaire de ses employés les sommes qu'ils doivent en vertu de la loi. Cet argent n'appartient plus à l'em-

1997 CanLII 377 (SCC)

more. It belongs to the employees. The employer holds it in a statutory trust to satisfy their obligations.

The conceptual difficulty arises, of course, when the tax debtor fails to set aside moneys which are to be remitted. At this point, the subject of Her Majesty's beneficial interest becomes intermingled with the general assets of the tax debtor. As Twaddle J.A. rightly observed in *Roynat*, *supra*, at p. 646, "Her Majesty's claim ... then be[comes] that of a beneficiary under a non-existent trust". In short, the misappropriation of statutory deductions conceptually problematizes the legal vehicle — the concept of the trust — which Parliament has invoked in order to regain the moneys lawfully owed to Her Majesty.

ployeur. Il appartient aux employés. L'employeur le conserve dans une fiducie légale dans le but de remplir leurs obligations.

La difficulté conceptuelle survient, bien sûr, lorsque le débiteur fiscal omet de mettre de côté les sommes qui doivent être versées. L'objet du droit que Sa Majesté possède à titre bénéficiaire se confond alors avec l'ensemble de l'actif du débiteur fiscal. Comme le juge Twaddle le fait observer, à juste titre, dans *Roynat*, précité, à la p. 646, [TRADUCTION] «la créance de Sa Majesté [. . .] dev[ient] alors celle d'un bénéficiaire d'une fiducie inexistante». Bref, le détournement des déductions effectuées en vertu de la loi rend problématique, sur le plan conceptuel, le moyen légal — le concept de fiducie — que le législateur a invoqué pour récupérer les sommes légalement dues à Sa Majesté.

29 This conceptual dilemma is resolved by s. 227(5). That provision states that:

227. . . .

(5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount

(*a*) deemed by subsection (4) to be held in trust for Her Majesty, . . .

. . .

shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

The effect of s. 227(5) naturally falls to be determined through a proper interpretation of the language contained in that subsection.

Ce dilemme conceptuel est résolu par le par. 227(5). Ce paragraphe se lit ainsi:

227. . . .

(5) Malgré la *Loi sur la faillite*, en cas de liquidation, cession, mise sous séquestre ou faillite d'une personne, un montant égal à l'un ou l'autre des montants suivants est considéré comme tenu séparé et ne formant pas partie du patrimoine visé par la liquidation, cession, mise sous séquestre ou faillite, que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine:

a) le montant réputé, selon le paragraphe (4), être détenu en fiducie pour Sa Majesté;

Naturellement, il reste à déterminer, par une interprétation juste de son libellé, quel est l'effet du par. 227(5).

30 This Court recently had occasion to review the principles of law to be applied to the interpretation of tax legislation. In *Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R.*, [1996] 1 S.C.R. 963, at pp. 975-76, Cory J. quoted

Notre Cour a récemment eu l'occasion d'examiner les principes de droit qui doivent être appliqués à l'interprétation des lois fiscales. Dans *Alberta (Treasury Branches) c. M.R.N.; Banque Toronto-Dominion c. M.R.N.*, [1996] 1 R.C.S. 963, aux

1997 CanLII 377 (SCC)

this Court's decision in *Friesen v. Canada*, [1995] 3 S.C.R. 103, at pp. 112-14, where the relevant principles were summarized as follows:

> In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, is to apply the plain meaning rule. Estey J. at p. 578 relied on the following passage from E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> The principle that the plain meaning of the relevant sections of the *Income Tax Act* is to prevail unless the transaction is a sham has recently been affirmed by this Court in *Canada v. Antosko*, [1994] 2 S.C.R. 312. Iacobucci J., writing for the Court, held at pp. 326-27 that:
>
> > While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed: *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175, at p. 194; see also *Symes v. Canada*, [1993] 4 S.C.R. 695.

I accept the following comments on the *Antosko* case in P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (1995), Section 22.3(c) "Strict and purposive interpretation", at pp. 453-54:

> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision .... (The *Antosko* case) is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its

pp. 975 et 976, le juge Cory cite l'arrêt de notre Cour *Friesen c. Canada*, [1995] 3 R.C.S. 103, où les principes pertinents sont résumés ainsi, aux pp. 112 à 114:

> Pour interpréter les dispositions de la *Loi de l'impôt sur le revenu*, il convient, comme l'affirme le juge Estey dans l'arrêt *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536, d'appliquer la règle du sens ordinaire. À la page 578, le juge Estey se fonde sur le passage suivant de l'ouvrage de E. A. Driedger, intitulé *Construction of Statutes* (2e éd. 1983), à la p. 87:
>
> > [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.
>
> Le principe voulant que le sens ordinaire des dispositions pertinentes de la *Loi de l'impôt sur le revenu* prévale, à moins d'être en présence d'une opération simulée, a récemment été approuvé par notre Cour dans l'arrêt *Canada c. Antosko*, [1994] 2 R.C.S. 312. Le juge Iacobucci affirme, au nom de la Cour, aux pp. 326 et 327:
>
> > Même si les tribunaux doivent examiner un article de la *Loi de l'impôt sur le revenu* à la lumière des autres dispositions de la Loi et de son objet, et qu'ils doivent analyser une opération donnée en fonction de la réalité économique et commerciale, ces techniques ne sauraient altérer le résultat lorsque les termes de la Loi sont clairs et nets et que l'effet juridique et pratique de l'opération est incontesté: *Mattabi Mines Ltd. c. Ontario (Ministre du Revenu)*, [1988] 2 R.C.S. 175, à la p. 194; voir également *Symes c. Canada*, [1993] 4 R.C.S. 695.

J'accepte les commentaires suivants qui ont été faits à l'égard de l'arrêt *Antosko* dans l'ouvrage de P. W. Hogg et J. E. Magee, intitulé *Principles of Canadian Income Tax Law* (1995), dans la section 22.3c) [TRADUCTION] «Interprétation stricte et fondée sur l'objet visé», aux pp. 453 et 454:

> [TRADUCTION] La Loi de l'impôt sur le revenu serait empreinte d'une incertitude intolérable si le libellé clair d'une disposition détaillée de la Loi était nuancé par des exceptions tacites tirées de la conception qu'un tribunal a de l'objet de la disposition. (...) (L'arrêt *Antosko*) ne fait que reconnaître que «l'objet» ne peut jouer qu'un rôle limité dans l'interprétation d'une loi aussi précise et détaillée que la Loi de l'impôt sur le revenu. Lorsqu'une disposition est rédigée dans des termes précis qui n'engen-

1997 CanLII 377 (SCC)

application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.

At pp. 976-77 of *Alberta (Treasury Branches), supra*, Cory J. concluded:

Thus, when there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts then the statutory provision must be applied regardless of its object or purpose. I recognize that agile legal minds could probably find an ambiguity in as simple a request as "close the door please" and most certainly in even the shortest and clearest of the ten commandments. However, the very history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal of Alberta indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. It would therefore seem to be appropriate to consider the object and purpose of the legislation. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the "scheme of the Act, the object of the Act, and the intention of Parliament".

31 In the present case, I find the language in s. 227(5) to be clear and unambiguous, especially when viewed as a provision directly following s. 227(4), which renders amounts unremitted as held in trust for Her Majesty. In my view, this section is designed to, upon liquidation, assignment, receivership or bankruptcy, seek out and attach Her Majesty's beneficial interest to property of the debtor which at that time is in existence. The trust is not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust: D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117. However, s. 227(5) has the effect of revitalizing the trust whose subject matter has lost all identity. This identification of the subject matter of the trust therefore occurs *ex post facto*. In this respect, I agree with the conclusion of Twaddle J.A. in *Roynat, supra*, where he states the effect of s. 227(5) as follows, at p. 647: "Her Majesty has a statutory right of access

drent aucun doute ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée nonobstant son objet. Ce n'est que lorsque le libellé de la loi engendre un certain doute ou une certaine ambiguïté, quant à son application aux faits, qu'il est utile de recourir à l'objet de la disposition.

Aux pages 976 et 977 de l'arrêt *Alberta (Treasury Branches)*, précité, le juge Cory conclut:

En conséquence, lorsqu'il n'y a aucun doute quant au sens d'une mesure législative ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée indépendamment de son objet. Je reconnais que des juristes habiles pourraient probablement déceler une ambiguïté dans une demande aussi simple que «fermez la porte s'il vous plaît», et très certainement même dans le plus court et le plus clair des dix commandements. Cependant, l'historique même de la présente affaire, conjugué aux divergences évidentes d'opinions entre les juges de première instance et la Cour d'appel de l'Alberta, révèle que, pour des juristes doués et expérimentés, ni le sens de la mesure législative ni son application aux faits ne sont clairs. Il semblerait donc convenir d'examiner l'objet de la mesure législative. Même si l'ambiguïté n'était pas apparente, il importe de signaler qu'il convient toujours d'examiner «l'esprit de la loi, l'objet de la loi et l'intention du législateur» pour déterminer le sens manifeste et ordinaire de la loi en cause.

En l'espèce, j'estime que le texte du par. 227(5) est clair et sans ambiguïté, compte tenu, particulièrement, du fait que cette disposition suit immédiatement le par. 227(4), qui prévoit que les sommes non versées sont conservées en fiducie pour Sa Majesté. À mon avis, ce paragraphe vise, en cas de liquidation, cession, mise sous séquestre ou faillite, à rattacher le droit que Sa Majesté détient à titre bénéficiaire aux biens que le débiteur possède alors. À vrai dire, la fiducie n'est pas réelle, étant donné que son objet ne peut être identifié à compter de la date de création de la fiducie: D. W. M. Waters, *Law of Trusts in Canada* (2e éd. 1984), à la p. 117. Cependant, le par. 227(5) a pour effet de revitaliser la fiducie dont l'objet a perdu toute identité. L'identification de l'objet de la fiducie est donc faite après coup. À cet égard, je suis d'accord avec la conclusion que le juge Twaddle tire dans l'arrêt *Roynat*, précité, lorsqu'il affirme, à la p. 647, au sujet de l'effet du par. 227(5), que

1997 CanLII 378 (SCC)

to whatever assets the employer then has, out of which to realize the original trust debt due to Her".

I add that this approach was taken to a provision substantially similar to s. 227(5) by Gale C.J. in *Re Deslauriers Construction Products Ltd.*, *supra*, at p. 601, whose reasoning was affirmed by this Court in *Dauphin Plains*, *supra*. The *Deslauriers* case, *supra*, involved a priority competition between a trustee-in-bankruptcy and a statutory deemed trust provision created under the *Canada Pension Plan*, S.C. 1964-65, c. 51. Section 24(3) and (4) of that Act stated:

24. . . .

(3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted such amount to the Receiver General of Canada, the employer shall keep such amount separate and apart from his own moneys and shall be deemed to hold the amount so deducted in trust for Her Majesty.

(4) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (3) is deemed to be held in trust for Her Majesty shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

This Court in *Dauphin Plains*, *supra*, at p. 1198, approved of Gale C.J.'s conclusion as to the interpretation of s. 24(4) (at p. 601 of *Deslauriers*, *supra*):

It seems to us that s-s. (4), and particularly the concluding six words thereof, were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the creation of a trust and making those moneys the property of the Minister.

This interpretation of s. 227(5) also has the virtue of being consistent with the scheme of distribu-

[TRADUCTION] «la Loi confère à Sa Majesté un droit d'accès à tous les éléments d'actif, quels qu'ils soient, que l'employeur possède alors, au moyen desquels elle peut réaliser la fiducie initiale dont elle est bénéficiaire».

32

J'ajoute que, dans l'arrêt *Re Deslauriers Construction Products Ltd.*, précité, à la p. 601, le juge en chef Gale a adopté ce point de vue relativement à une disposition semblable au par. 227(5), et que notre Cour a confirmé la validité de son raisonnement dans l'arrêt *Dauphin Plains*, précité. Dans l'affaire *Deslauriers*, précitée, un syndic de faillite et le bénéficiaire d'une fiducie légale réputée créée par le *Régime de pensions du Canada*, S.C. 1964-65, ch. 51, se faisaient la lutte pour obtenir la priorité de rang. Les paragraphes 24(3) et (4) de cette loi prévoyaient ceci:

24. . . .

(3) L'employeur qui a déduit de la rémunération d'un employé un montant au titre de la cotisation que ce dernier est tenu de verser, ou à valoir sur celle-ci, mais ne l'a pas remis au receveur général du Canada, doit garder ce montant à part, en un compte distinct du sien et il est réputé détenir le montant ainsi déduit en fiducie pour Sa Majesté.

(4) En cas de liquidation, de cession ou de faillite d'un employeur, un montant égal à celui qui, selon le paragraphe (3), est réputé détenu en fiducie pour Sa Majesté doit être considéré comme étant séparé et ne formant pas partie des biens en liquidation, cession ou faillite, que ce montant ait été ou non, en fait, conservé distinct et séparé des propres fonds de l'employeur ou de la masse des biens.

À la page 1198 de l'arrêt *Dauphin Plains*, précité, notre Cour approuve la conclusion du juge en chef Gale (à la p. 601 de l'arrêt *Deslauriers*, précité) quant à l'interprétation du par. 24(4):

[TRADUCTION] Il nous semble que le par. (4), en particulier les six derniers mots, a été inséré dans la Loi dans le but spécifique de soustraire de la masse des biens du failli, par la création d'une fiducie, un montant équivalent aux déductions et d'en faire la propriété du ministre.

33

Cette interprétation du par. 227(5) a aussi l'avantage d'être compatible avec le régime de

1997 CanLII 377 (SCC)

tion under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. Section 67 of that Act expressly removes claims for unremitted payroll deductions, which are held in trust (*inter alia*) pursuant to s. 227 *ITA*, from the bankrupt's estate:

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

. . .

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of subsections 227(4) and (5) of the *Income Tax Act*, subsections 23(3) and (4) of the *Canada Pension Plan* or subsections 57(2) and (3) of the *Unemployment Insurance Act* . . . .

34 It is to be observed that in addition to attaching Her Majesty's interest to the debtor's property upon the triggering of any of the events mentioned in s. 227(5), the deemed trust operates to the benefit of Her Majesty in a secondary manner. Namely, s. 227(5) permits Her Majesty's interest to attach to collateral which is subject to a fixed charge if the deductions giving rise to Her Majesty's claim arose before that charge attached to that collateral. This proposition flows from the decision of this Court in *Dauphin Plains*, *supra*. *Dauphin Plains* involved a determination as to priority in respect of the proceeds of a liquidation sale of a receiver-manager. In that case, the claims of Her Majesty (*inter alia*) arose by virtue of the non-remittance of payroll deductions in regard to payments under the *Canada Pension Plan*, R.S.C. 1970, c. C-5, and the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48. Those Acts provided Her Majesty with claims pursuant to deemed trusts whose language is substantially similar to the version of s. 227(4)

répartition établi par la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3. L'article 67 de cette loi retire expressément de la masse des biens du failli les créances relatives à des retenues sur la paye non versées et conservées en fiducie (notamment) en vertu de l'art. 227 *LIR*:

67. (1) Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants:

a) les biens détenus par le failli en fiducie pour toute autre personne;

. . .

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des paragraphes 227(4) et (5) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) et (4) du *Régime de pensions du Canada* ou des paragraphes 57(2) et (3) de la *Loi sur l'assurance-chômage* . . .

Il faut remarquer qu'en plus de rattacher le droit de Sa Majesté aux biens du débiteur lorsque survient l'un des événements précisés au par. 227(5), la fiducie réputée profite encore à Sa Majesté d'une manière accessoire, en ce sens que le par. 227(5) permet de rattacher le droit de Sa Majesté à un bien donné en garantie qui est grevé d'un privilège fixe, si les déductions à l'origine de la demande de Sa Majesté ont été faites avant que le privilège ne soit rattaché au bien donné en garantie. Cette proposition découle de l'arrêt de notre Cour *Dauphin Plains*, précité, où il était question de déterminer l'ordre de priorité quant au produit d'une vente de liquidation d'un administrateur-séquestre. Dans cette affaire, les créances de Sa Majesté (notamment) résultaient du non-versement de retenues sur la paye liées à l'application du *Régime de pensions du Canada*, S.R.C. 1970, ch. C-5, et de la *Loi de 1971 sur l'assurance-chômage*, S.C. 1970-71-72, ch. 48. Ces lois rendaient Sa Majesté bénéficiaire de créances conformément à

1997 CanLII 377 (SCC)

and (5) at issue in this appeal. In finding that these claims took precedence over a floating charge which had crystallized after the deductions at issue were actually made, Pigeon J. stated at p. 1199:

> It should first be observed that, for reasons similar to those on which the decision in the *Avco* case, *supra*, was based, the claim for Pension Plan and Unemployment Insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. From the moment such charge was created, the assets subject thereto, were no longer the property of the debtor except subject to that charge. The claim for the deductions arose subsequently and thus cannot affect this charge in the absence of a statute specifically so providing. However, the floating charge did not crystallize prior to the issue of the writ and the appointment of the receiver. In the present case it makes no difference which of the two dates is selected, both are subsequent to the deductions. [Emphasis added.]

Thus, s. 227(5) alternatively permits Her Majesty's interest to attach retroactively to the disputed collateral if the competing security interest has attached after the deductions giving rise to Her Majesty's claim in fact occurred. Conceptually, the s. 227(5) deemed trust allows Her Majesty's claim to go back in time and attach its outstanding s. 227(4) interest to the collateral before that collateral became subject to a fixed charge. The same result occurs when a statutory lien attaches prior to the mortgaging of disputed collateral. In *Avco*, *supra*, this Court *per* Martland J. commented upon just such a scenario, at p. 706:

> From that date, the lien attaches to the employer's property and, as provided in subs. (1), it will take priority over any other claim, including an assignment or mortgage. In other words, after the lien attaches, its priority is unaffected by a disposition of his property made by the employer. Where a mortgage has been made prior to the lien attaching, it is not affected. The lien will only attach to the employer's equity in that property. [Emphasis added.]

des fiducies réputées créées en vertu de dispositions dont le texte était fort semblable à celui des par. 227(4) et (5) dont il est question en l'espèce. En concluant que ces créances avaient priorité sur un privilège flottant qui s'était cristallisé après que les retenues en cause eurent été faites, le juge Pigeon a affirmé à la p. 1199:

> Il faut d'abord faire remarquer que, pour des raisons analogues à celles qui motivent l'arrêt *Avco* précité, la réclamation des déductions au titre du Régime de pensions et de l'assurance-chômage ne peut affecter le produit de la réalisation de biens grevés d'un privilège fixe et spécifique. À partir de la création de cette charge, l'actif qui en est grevé n'est plus la propriété du débiteur qu'à charge de ce privilège. La réclamation des déductions est née plus tard et ne peut donc primer ce privilège en l'absence d'une loi le prescrivant spécifiquement. Cependant, le privilège général ne s'est pas cristallisé avant la délivrance du bref d'assignation et la nomination du séquestre. En l'espèce, que l'on choisisse l'une ou l'autre date n'a pas d'importance, les deux étant postérieures aux déductions. [Je souligne.]

Ainsi, le par. 227(5) permet subsidiairement de rattacher rétroactivement le droit de Sa Majesté au bien en litige donné en garantie, si la garantie concurrente s'est concrétisée après que les déductions à l'origine de la créance de Sa Majesté eurent été faites. Sur le plan conceptuel, la fiducie réputée, visée au par. 227(5), permet à la créance de Sa Majesté de s'appliquer rétroactivement et de rattacher le droit qu'elle possède en vertu du par. 227(4) au bien donné en garantie avant qu'il devienne grevé d'un privilège fixe. La même chose se produit lorsqu'un privilège légal s'applique avant la constitution d'une hypothèque sur un bien en litige donné en garantie. Dans l'arrêt *Avco*, précité, le juge Martland, s'exprimant au nom de notre Cour, fait le commentaire suivant au sujet d'un tel scénario (à la p. 706):

> À compter de ce jour, le privilège s'applique aux biens de l'employeur et, comme le prévoit le par. (1), il prévaut sur toute autre créance, y compris une cession ou une hypothèque. En d'autres termes, lorsque le privilège s'applique, l'ordre de préférence n'est pas modifié par une disposition du bien par l'employeur. L'hypothèque consentie avant la création du privilège n'est pas touchée. Le privilège s'applique uniquement au droit de l'employeur dans ce bien. [Je souligne.]

1997 CanLII 377 (SCC)

See also *G.M. Homes Inc.*, *supra*, at p. 250.

35 In this appeal, however, the deductions of tax from the employees' pay cheques occurred after the attachment of the bank's fixed charge to the inventory. As such, this second aspect of s. 227(5)'s operation is not at issue in this case.

36 I find support for the interpretation of s. 227(5) that I have taken in as much as it is consistent with the overall purpose of s. 227(4) and (5). In *Pembina on the Red Development*, *supra*, Lyon J.A. (dissenting) had occasion to comment upon the purpose of the predecessor section to the current s. 224(1.2) *ITA*, namely s. 224(1.2) and (1.3) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, which were added by S.C. 1987, c. 46, s. 66. I find that Lyon J.A.'s comments in this respect to be fully applicable to the articulation of the purpose of s. 227(5). At p. 51, Lyon J.A. stated:

> One must always remember that the withholding tax or source deduction to which s. 224 applies is at the heart of the collection procedures for personal income taxation in Canada. Indeed, if one makes a calculation from the statistics reported in "Taxation Statistics, 1987", a publication of Revenue Canada Taxation, Catalogue No. RV-1987, one finds that 87% of all personal income taxes paid in Canada are collected by source deductions. It can thus be seen that Parliament in passing s. 224(1.2) made it as all-encompassing as it is in order to ensure its continued viability. No other system is so crucial to the overall collection procedure adopted by the Crown. Parliament clearly meant to protect this system. Using the employer as a tax collector requires such extra protection in cases such as the one at bar where the employer converts the withheld tax money to its own purposes. Understandably, that conversion cannot be countenanced if the integrity of that system is to be preserved. Parliament, therefore, acting within its constitutional authority, has taken this extraordinary remedy to protect a major collection source.

Similarly, Parliament has clearly sought to protect the collection of unremitted payroll deductions through the device of the statutory deemed trust. Accordingly, s. 227(5) must be interpreted in light of this purpose. To summarize, it operates in a

Voir aussi *G.M. Homes Inc.*, précité, à la p. 250.

En l'espèce, toutefois, les retenues fiscales sur la paye des employés ont été effectuées après que le privilège fixe de la banque eut grevé les biens figurant dans l'inventaire. C'est pourquoi ce second aspect de l'application du par. 227(5) n'est pas en cause ici.

J'appuie mon interprétation du par. 227(5) sur sa compatibilité avec l'objet global des par. 227(4) et (5). Dans *Pembina on the Red Development*, précité, le juge Lyon (dissident) s'est exprimé sur l'objet des dispositions qui ont précédé l'actuel par. 224(1.2) *LIR*, notamment les par. 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*, S.C. 1970-71-72, ch. 63, qui ont été ajoutés par L.C. 1987, ch. 46, art. 66. Je considère que les commentaires du juge Lyon à cet égard s'appliquent parfaitement à la détermination de l'objet du par. 227(5). Le juge Lyon affirme, à la p. 51:

> [TRADUCTION] Il faut toujours se rappeler que les retenues fiscales ou à la source, auxquelles s'applique l'art. 224, sont au cœur des procédures de perception de l'impôt sur le revenu des particuliers au Canada. En réalité, si on fait un calcul à partir des statistiques fournies par Revenu Canada Impôt dans sa publication «Statistiques fiscales de 1987», nº de catalogue RV-1987, on découvre que 87 pour 100 de tout l'impôt sur le revenu des particuliers payé au Canada est perçu au moyen de retenues à la source. On peut donc constater qu'en adoptant le par. 224(1.2), le législateur a voulu qu'il englobe tout afin d'en garantir la viabilité. Aucun autre système n'est aussi crucial pour la procédure générale de perception adoptée par l'État. Le législateur a nettement voulu protéger ce système. Le recours à l'employeur comme percepteur d'impôt requiert cette protection supplémentaire dans les cas où, comme en l'espèce, l'employeur détourne les retenues fiscales à ses propres fins. Naturellement, ce détournement ne saurait être admis si l'on veut préserver l'intégrité du système. Par conséquent, le législateur a exercé son pouvoir constitutionnel pour adopter ce moyen extraordinaire dans le but de protéger une source de perception importante.

De même, le législateur a clairement cherché à protéger, au moyen de la fiducie légale réputée, le recouvrement des retenues sur la paye non versées. Il faut donc interpréter le par. 227(5) en fonction de cet objet. En résumé, il s'applique de deux

1997 CanLII 377 (SCC)

twofold manner: upon the triggering of an event specified in s. 227(5), Her Majesty's beneficial interest (i) attaches to the tax debtor's property then in existence; or (ii) attaches to collateral subject either to a fixed charge, or a crystallized floating charge, if the actual deductions giving rise to Her Majesty's claim occurred before the fixed charge attached, or the floating charge crystallized, respectively.

manières: lorsque survient l'un des événements précisés au par. 227(5), le droit que Sa Majesté possède à titre bénéficiaire (i) s'applique aux biens que le débiteur fiscal possède alors, ou (ii) s'applique aux biens donnés en garantie qui sont grevés soit d'un privilège fixe, soit d'un privilège flottant cristallisé, si les retenues à l'origine de la créance de Sa Majesté ont été effectuées avant que le privilège fixe vienne grever le bien en cause ou que le privilège flottant se cristallise, respectivement.

1997 CanLII 377 (SCC)

37

One further point with respect to terminology is necessary before leaving the present discussion. The method of attachment of Her Majesty's beneficial interest pursuant to s. 227(5) has been referred to at times as a "mechanism for tracing": *Roynat*, *supra*, at p. 647. This was indeed how it was presented by counsel for Her Majesty in his submissions before this Court. During the hearing of this case, it was questioned whether this was not an awkward usage of the word "tracing". After considering the matter, it is my view that it is not accurate to describe the mechanism of s. 227(5) as a means of "tracing"; indeed, it would seem that this subsection is antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into: D. W. M. Waters, *Law of Trusts in Canada*, *supra*, at pp. 1037-53. For this reason, I find Professor Wood's description of the operation of s. 227(5), namely, a "relaxation of the equitable tracing rules", to be most accurate: Roderick J. Wood, "The Floating Charge in Canada" (1989), 27 *Alta. L. Rev.* 191, at p. 221; see also *Omega*, *supra*, at p. 43; and *Re Deslauriers Construction Products Ltd.*, *supra*, at p. 603.

Il faut régler une autre question de terminologie avant de clore cette partie de l'analyse. La façon dont le droit que Sa Majesté possède à titre bénéficiaire grève un bien conformément au par. 227(5) a parfois été qualifiée de [TRADUCTION] «moyen de retracer l'origine d'un bien»: *Roynat*, précité, à la p. 647. C'est en fait la façon dont cette question a été présentée à la Cour par l'avocat de Sa Majesté. Lors de l'audition de la présente affaire, on s'est demandé si ce n'était pas là une façon maladroite d'utiliser le mot «retracer». Après avoir examiné cette question, je suis d'avis qu'il n'est pas exact de qualifier le mécanisme du par. 227(5) de moyen de «retracer l'origine d'un bien»; en fait, il semblerait que le sens de ce paragraphe est à l'opposé du sens traditionnel du mot «retracer», dans la mesure où il ne nécessite aucun lien entre l'objet de la fiducie et le fonds ou l'actif auquel on rattache cet objet: D. W. M. Waters, *Law of Trusts in Canada*, *op. cit.*, aux pp. 1037 à 1053. Pour cette raison, je considère que la façon dont le professeur Wood décrit l'application du par. 227(5), à savoir un [TRADUCTION] «assouplissement des règles d'*equity* quant à l'origine d'un bien», est des plus exactes: Roderick J. Wood, «The Floating Charge in Canada» (1989), 27 *Alta. L. Rev.* 191, à la p. 221; voir aussi *Omega*, précité, à la p. 43, et *Re Deslauriers Construction Products Ltd.*, précité, à la p. 603.

38

In conclusion, s. 227(5) is a provision designed to minimize the adverse effect upon Her Majesty from the misappropriation of trust funds held by tax debtors on account of their employees' tax payable. The provision contemplates an intermingling of Her Majesty's property with that of a tax debt-

En conclusion, le par. 227(5) est une disposition conçue pour réduire au minimum l'incidence préjudiciable sur Sa Majesté du détournement de fonds que des débiteurs fiscaux détiennent en fiducie, au titre de l'impôt de leurs employés. Cette disposition envisage la confusion des biens de Sa

or's, such that the subject matter of the trust cannot be (or indeed never was) identifiable. To address this conceptual problem, s. 227(5) allows Her Majesty to attach its interest to any property which lawfully belongs to the debtor at the time of liquidation, assignment, receivership or bankruptcy; this property is then deemed to exist "separate" and apart from the tax debtor's estate. The *ITA* thus permits Her Majesty to transfer title in the property from the tax debtor to Herself in order to satisfy the tax debtor's outstanding unremitted payroll obligations.

Majesté avec ceux du débiteur fiscal, qui fait en sorte que l'objet de la fiducie n'est pas identifiable (ou, en réalité, ne l'a jamais été). Pour résoudre ce problème conceptuel, le par. 227(5) permet à Sa Majesté de faire valoir son droit sur tout bien qui appartient légalement au débiteur au moment de la liquidation, cession, mise sous séquestre ou faillite; ce bien est alors réputé être «séparé» et ne pas faire partie du patrimoine du débiteur fiscal. La *LIR* permet ainsi à Sa Majesté de se transférer à elle-même le droit de propriété sur le bien du débiteur fiscal afin de remplir les obligations de verser les retenues sur la paye, dont ne s'est pas acquitté le débiteur fiscal.

1997 CanLII 377 (SCC)

39 I would hasten to add to this, however, that this provision does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor. Section 227(4) and (5) are manifestly directed towards the property of the tax debtor, and it would be contrary to well-established authority to stretch the interpretation of s. 227(5) to permit the expropriation of the property of third parties who are not specifically mentioned in the statute. As Martland J. stated in *Avco*, *supra*, at p. 706:

The property to which a s. 5A lien attaches is not defined nor identified. In the absence of a specific statutory provision to that effect, in my view it should not be construed in a manner which could deprive third parties of their pre-existing property rights.

Similarly, in *Pembina on the Red Development*, *supra*, Scott C.J. stated the presumption against expropriation of property, at p. 38:

In Cross, *Statutory Interpretation* (London: Butterworths, 1987), the author writes at p. 180:

> There is a general presumption that Parliament does not intend to take away private property rights unless the contrary is clearly indicated. Lord Atkinson stated that there is a canon of interpretation "that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms." After all, the protection of property is generally

Cependant, je m'empresse d'ajouter que cette disposition ne permet pas à Sa Majesté de faire valoir son droit à titre bénéficiaire sur un bien qui, au moment de la liquidation, cession, mise sous séquestre ou faillite, appartient à quelqu'un d'autre que le débiteur fiscal. Les paragraphes 227(4) et (5) visent manifestement les biens du débiteur fiscal, et il serait contraire à une jurisprudence bien établie de forcer le sens du par. 227(5) de manière à permettre l'expropriation des biens de tiers non mentionnés expressément dans la Loi. Comme le juge Martland l'affirme dans *Avco*, précité, à la p. 706:

Les biens auxquels s'applique le privilège de l'art. 5A ne sont pas définis ou désignés. En l'absence d'une disposition statutaire en ce sens, l'art. 5A ne doit pas être interprété de façon à dépouiller les tiers de leurs droits antérieurs sur ces biens.

De même, dans *Pembina on the Red Development*, précité, à la p. 38, le juge en chef Scott énonce la présomption contre l'expropriation de biens:

[TRADUCTION] Dans Cross, *Statutory Interpretation* (London: Butterworths, 1987), l'auteur écrit à la p. 180:

> Il existe une présomption générale que le législateur n'a pas l'intention de retirer le droit à la propriété privée à moins d'une indication contraire manifeste. Lord Atkinson a affirmé qu'il existe un principe d'interprétation qui veut «qu'une intention d'enlever le bien d'un sujet sans lui accorder le droit à une compensation pour sa perte ne doit pas être imputée au législateur à moins que cette intention n'ait été exprimée clairement». Après tout, la protection des biens

regarded as one of the fundamental values of a liberal society. [Emphasis added.]

d'une personne est généralement considérée comme l'une des valeurs fondamentales d'une société libérale. [Je souligne.]

Later in that same case, Twaddle J.A., in separate concurring reasons, articulated this same principle as follows, at p. 46, "[i]t is a long-established principle of law that, in the absence of clear language to the contrary, a tax on one person cannot be collected out of property belonging to another".

Plus loin, dans le même arrêt, le juge Twaddle énonce ainsi ce même principe, dans des motifs concordants distincts (à la p. 46): [TRADUCTION] «[i]l est établi depuis longtemps en droit que, en l'absence de termes clairs exprimant le contraire, l'impôt dû par une personne ne peut pas être perçu sur les biens d'une autre personne».

1997 CanLII 377 (SCC)

40 Thus, while s. 227(5) can be seen as a provision enacted to solve the conceptual dilemma precipitated by an intermingling of unremitted payroll deductions with a tax debtor's general assets, it is a legal vehicle not without its own conceptual limitations. Namely, while the s. 227(5) deemed trust permits Her Majesty to attach Her beneficial interest to property of the tax debtor upon liquidation (assignment, receivership or bankruptcy), it does not permit the expropriation of property which may belong to a third party creditor at the time the subsection becomes engaged.

Ainsi, bien que le par. 227(5) puisse être considéré comme une disposition adoptée pour résoudre le dilemme conceptuel engendré par la confusion des retenues sur la paye non versées avec l'ensemble de l'actif du débiteur fiscal, c'est un mécanisme juridique qui n'est pas sans avoir ses propres limites conceptuelles. Autrement dit, bien que la fiducie réputée du par. 227(5) permette à Sa Majesté de faire valoir le droit qu'elle possède à titre bénéficiaire sur les biens du débiteur fiscal lors de la liquidation (cession, mise sous séquestre ou faillite), elle ne permet pas l'expropriation de biens qui peuvent appartenir à un tiers créancier au moment où le paragraphe entre en application.

41 However, as will be discussed in further detail, *infra*, it is my opinion that the licence theory may, in certain cases, create an exception to this general principle. In particular, where a secured creditor consents to the disposition of his collateral in order to pay wage deductions, that consent, coupled with the statutory trust provisions here at issue, may act to divest that creditor of its proprietary interest in that collateral at the time of liquidation, assignment, receivership or bankruptcy. Indeed, it is my view that this exception is engaged in the present case such that the s. 227(5) claim of Her Majesty must prevail.

Cependant, comme nous le verrons plus en détail ci-dessous, je suis d'avis que la thèse de la permission peut, dans certains cas, créer une exception à ce principe général. Plus particulièrement, lorsqu'un créancier garanti consent à la vente du bien qu'il a donné en garantie, pour payer des retenues sur la paye, ce consentement, conjugué aux dispositions relatives à la fiducie légale ici en cause, peut, au moment de la liquidation, cession, mise sous séquestre ou faillite, avoir pour effet de dépouiller ce créancier de son droit de propriété sur le bien donné en garantie. En fait, j'estime que cette exception joue en l'espèce de sorte que la créance de Sa Majesté, fondée sur le par. 227(5), doit l'emporter.

(C) *The Nature of the Bank's Security Interests*

(C) *La nature des garanties de la banque*

42 I begin from the observation that Parliament, in enacting s. 227(4) and (5), has chosen to secure Her Majesty's claims to unremitted payroll deductions through employing the concept of a deemed trust. Therefore, the proper analysis to follow in

Je pars de la constatation qu'en adoptant les par. 227(4) et (5) le législateur a choisi de garantir, au moyen du concept de la fiducie réputée, les créances de Sa Majesté relatives aux retenues sur la paye non versées. Par conséquent, pour détermi-

determining whether Her Majesty is entitled to priority pursuant to these subsections must utilize principles of property law. For this reason, it becomes relevant and indeed essential to scrutinize the nature of the interests which compete with Her Majesty's trust in order to determine whether and to what extent such interests have title in the disputed fund. As I mentioned previously, Her Majesty's trust can attach to the disputed collateral only to the extent that that collateral is not in law the property of a party other than the tax debtor at the time the deemed trust is engaged. More specifically, subject to the application of the licence theory, if it is found that legal title in the collateral is in the bank, and not Sparrow, Her Majesty's deemed trust could only attach to Sparrow's equity of redemption: see *Avco*, *supra*, at p. 706.

ner si Sa Majesté a droit à la priorité de rang en vertu de ces paragraphes, il faut recourir aux principes du droit des biens. Pour ce motif, il devient pertinent, voire essentiel, d'examiner en profondeur la nature des droits qui sont en concurrence avec la fiducie de Sa Majesté, afin de déterminer dans quelle mesure, le cas échéant, ces droits s'appliquent aux fonds en litige. Comme je l'ai déjà mentionné, la fiducie de Sa Majesté ne peut grever le bien en litige donné en garantie que dans la mesure où, en droit, il n'appartient pas à une autre partie que le débiteur fiscal au moment où la fiducie réputée entre en application. Plus précisément, sous réserve de l'application de la thèse de la permission, si l'on conclut que c'est la banque, et non Sparrow, qui est légalement propriétaire du bien donné en garantie, la fiducie réputée de Sa Majesté ne pourra grever que le droit de rachat que possède Sparrow: voir *Avco*, précité, à la p. 706.

1997 CanLII 377 (SCC)

43 This "statutory trust" approach can be distinguished from other legislative methods which are used to secure an interest to unremitted payroll deductions, namely, through employing an explicit "Crown priority" provision. An example of such a provision can be found in s. 224(1.2) *ITA*, a subsection which was recently the subject of consideration of this Court in *Alberta (Treasury Branches)*, *supra*. That provision reads:

224. . . .

(1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act*, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment

(*a*) to another person . . . who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the

Cette méthode de la «fiducie légale» peut être distinguée d'autres méthodes que le législateur utilise pour garantir un droit à des retenues sur la paye non versées, dont le recours à une disposition expresse de la «priorité de rang de Sa Majesté». Un exemple d'une telle disposition se trouve au par. 224(1.2) *LIR*, que notre Cour a récemment examiné dans *Alberta (Treasury Branches)*, précité. Cette disposition se lit ainsi:

224. . . .

(1.2) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite*, tout autre texte législatif fédéral, tout texte législatif provincial et toute règle de droit, s'il sait ou soupçonne qu'une personne donnée est ou deviendra, dans les 90 jours, débiteur d'une somme:

a) soit à [. . .] une personne redevable d'un montant cotisé en application du paragraphe 227(10.1) ou d'une disposition semblable;

b) soit à un créancier garanti, à savoir une personne qui, grâce à une garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal,

le ministre peut, par lettre recommandée ou signifiée à personne, obliger la personne donnée à payer au receveur général tout ou partie de cette somme, sans délai si la somme est payable immédiatement, sinon dès qu'elle devient payable, au titre du montant de la cotisation en application du paragraphe 227(10.1) ou d'une disposi-

Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision, and on receipt of that letter by the particular person, the amount of those moneys that is required by that letter to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest. [Emphasis added.]

In contrast to the "deemed trust" approach, the application of this section to a priority competition can proceed without regard to the quality of the "security interest" which competes with Her Majesty's claim. Indeed, s. 224(1.2) simply transfers title in the collateral to Her Majesty regardless of whose interest may compete with it, so long as the requirements of s. 224(1.2) are met: see, e.g., *Alberta (Treasury Branches)*, *supra*. For a general discussion of these two distinct analytical methods of determining priority between non-consensual security interests (such as statutory trusts) and consensual security interests, see Wood and Wylie, "Non-Consensual Security Interests in Personal Property", *supra*, at pp. 1072-83.

In the present case, it therefore becomes necessary to characterize the bank's interest in Sparrow's inventory as either a floating, or a fixed and specific charge.

The basic distinction between fixed and floating charges was articulated by Lord Macnaghten in *Illingworth v. Houldsworth*, [1904] A.C. 355 (H.L.), at p. 358:

A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

tion semblable dont le débiteur fiscal est redevable. Sur réception de la lettre par la personne donnée, la somme qui y est indiquée comme devant être payée devient, malgré toute autre garantie au titre de cette somme, la propriété de Sa Majesté et doit être payée au receveur général par priorité sur toute autre garantie au titre de cette somme. [Je souligne.]

Contrairement à la méthode de la «fiducie réputée», l'application de ce paragraphe dans une situation de concurrence pour la priorité de rang peut avoir lieu sans égard à la qualité de la «garantie» qui est en concurrence avec la créance de Sa Majesté. En fait, le par. 224(1.2) transfère simplement à Sa Majesté le droit de propriété sur le bien donné en garantie sans égard aux droits de qui que ce soit qui peuvent être en concurrence avec ce droit de propriété, pourvu que l'on ait satisfait aux exigences du par. 224(1.2): voir, par exemple, *Alberta (Treasury Branches)*, précité. Pour une discussion générale de ces deux méthodes d'analyse distinctes qui servent à déterminer l'ordre de priorité entre des garanties non consensuelles (comme les fiducies légales) et des garanties consensuelles, voir Wood et Wylie, «Non-Consensual Security Interests in Personal Property», *loc. cit.*, aux pp. 1072 à 1083.

44 En l'espèce, il devient donc nécessaire de qualifier soit de privilège flottant, soit de privilège fixe et spécifique, le droit de la banque sur les biens figurant dans l'inventaire de Sparrow.

45 La distinction fondamentale entre un privilège fixe et un privilège flottant a été exposée par lord Macnaghten dans *Illingworth c. Houldsworth*, [1904] A.C. 355 (H.L.), à la p. 358:

[TRADUCTION] Je crois qu'un privilège spécifique grève, sans plus, certains biens déterminés ou qui peuvent être déterminés; un privilège flottant, par contre, d'une nature mobile et changeante, reste suspendu et flotte, pour ainsi dire, au-dessus des biens qu'il est destiné à grever, jusqu'à ce qu'un événement ou un acte le fasse fixer sur l'objet du privilège qui est à sa portée.

1997 CanLII 377 (SCC)

The "event ... or ... act" to which Lord Macnaghten refers to as causing the floating interest to "settle and fasten" is described in the modern authorities as "crystallization". Generally speaking, crystallization occurs upon the default of the debtor. Once the floating interest has been said to crystallize, that interest is transformed into a fixed and specific charge over the inventory. See Wood, "The Floating Charge in Canada", *supra*, at pp. 204-8.

L'«événement ou [...] acte» qui, selon lord Macnaghten, fait en sorte que le droit flottant «[se] fix[e]» constitue selon la jurisprudence contemporaine de la «cristallisation». En général, la cristallisation survient dès que le débiteur est en défaut. Une fois que l'on a dit que le droit flottant s'est cristallisé, ce droit se transforme en un privilège fixe et spécifique sur les biens figurant dans l'inventaire. Voir Wood, «The Floating Charge in Canada», *loc. cit.*, aux pp. 204 à 208.

1997 CanLII 377 (SCC)

46 The critical significance of the characterization of an interest as being fixed or floating, of course, is that it describes the extent to which a creditor can be said to have a proprietary interest in the collateral. In particular, during the period in which a charge over inventory is floating, the creditor possesses no legal title to that collateral. For this reason, if a statutory trust or lien attaches during this time, it will attach to the debtor's interest and take priority over a subsequently crystallized floating charge. However, if a security interest can be characterized as a fixed and specific charge, it will take priority over a subsequent statutory lien or charge; in such a case, all that the lien can attach to is the debtor's equity of redemption in the collateral: *Avco*, *supra*, at p. 706. This correlative relationship between fixed charges and legal ownership was articulated by this Court in *Dauphin Plains*, *supra*, at p. 1199, where Pigeon J. stated:

L'importance cruciale de qualifier un droit de fixe ou de flottant réside, évidemment, dans le fait que cette qualification décrit la mesure dans laquelle on peut dire qu'un créancier possède un droit de propriété sur le bien donné en garantie. Plus particulièrement, pendant la période où un privilège sur les biens figurant dans un inventaire est flottant, le créancier ne possède aucun droit de propriété sur ces biens donnés en garantie. C'est pour cette raison que, si une fiducie ou un privilège légal grève ces biens pendant cette période, cette fiducie ou ce privilège légal grèvera le droit du débiteur et aura priorité de rang sur le privilège flottant subséquemment cristallisé. Cependant, si une garantie est qualifiée de privilège fixe et spécifique, elle aura priorité de rang sur un privilège légal subséquent; dans ce cas, tout ce que le privilège peut grever, c'est le droit de rachat que le débiteur possède sur le bien donné en garantie: *Avco*, précité, à la p. 706. Cette corrélation entre privilèges fixes et propriété légale a été exposée par notre Cour dans l'arrêt *Dauphin Plains*, précité, à la p. 1199, où le juge Pigeon a affirmé:

It should first be observed that, for reasons similar to those on which the decision in the *Avco* case, *supra*, was based, the claim for Pension Plan and Unemployment Insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. From the moment such charge was created, the assets subject thereto, were no longer the property of the debtor except subject to that charge. [Emphasis added.]

Il faut d'abord faire remarquer que, pour des raisons analogues à celles qui motivent l'arrêt *Avco*, précité, la réclamation des déductions au titre du Régime de pensions et de l'assurance-chômage ne peut affecter le produit de la réalisation de biens grevés d'un privilège fixe et spécifique. À partir de la création de cette charge, l'actif qui en est grevé n'est plus la propriété du débiteur qu'à charge de ce privilège. [Je souligne.]

See also *Avco*, *supra*.

Voir aussi l'arrêt *Avco*, précité.

47 There has been much debate as to whether it is appropriate to characterize a security interest over inventory which permits the debtor to sell that inventory in the ordinary course of business as a

Il y a eu de longs débats quant à savoir s'il est exact de qualifier de privilège flottant une garantie sur les biens figurant dans un inventaire, qui permet au débiteur de vendre ces biens dans le cours

floating charge. The debate centres around the ability to characterize a security interest as fixed, in the presence of a licence given to the debtor to sell the collateral, where such an arrangement involves "no final and irrevocable appropriation of property to the creditor": *FBDB*, *supra*, at p. 33. McLachlin J.A. (as she then was) in *FBDB*, *supra*, fully considered the conflicting authorities on this point and concluded at pp. 37-38 and 40:

> In short, the answer to the question of whether the courts have recognized a fixed charge subject to a licence to sell in the ordinary course of business is no, with the exception of the line of cases confirming the right of a chattel mortgagor to sell mortgaged stock in the ordinary course of business.
>
> . . .
>
> If a charge conferred on the debtor the right to deal with the goods in the ordinary course of business then, regardless of what the parties chose to call it, it was regarded as floating, with the result that third party interests acquired prior to crystallization of the charge had priority over the chargeholder.

Adopting this "either-or" doctrine, McLachlin J.A. chose to characterize the security agreement in *FBDB*, which permitted the debtor to sell the secured collateral in the ordinary course of the debtor's business, as a floating charge.

normal des affaires. La question tourne autour de la capacité de qualifier de fixe une garantie lorsque le débiteur est autorisé à vendre le bien donné en garantie, sans que cela ne comporte [TRADUCTION] «aucun transfert irrévocable et définitif de la propriété au créancier»: *FBDB*, précité, à la p. 33. Dans cet arrêt, le juge McLachlin (maintenant juge de notre Cour), a examiné au complet les précédents contradictoires sur cette question et a conclu, aux pp. 37, 38 et 40:

> [TRADUCTION] En bref, la réponse à la question de savoir si les tribunaux ont reconnu l'existence d'un privilège fixe assujetti à la permission de vendre dans le cours normal des affaires est négative, à l'exception du courant de jurisprudence qui confirme le droit du débiteur d'une hypothèque mobilière de vendre, dans le cours normal des affaires, les stocks hypothéqués.
>
> . . .
>
> Si un privilège accordait au débiteur le droit d'aliéner les biens dans le cours normal des affaires, alors, indépendamment de la façon dont les parties avaient convenu de l'appeler, ce privilège était considéré comme flottant, de sorte que les droits acquis par un tiers avant la cristallisation du privilège avaient priorité sur le détenteur du privilège.

Adoptant cette règle du «soit l'un, soit l'autre», le juge McLachlin a choisi, dans *FBDB*, de qualifier de privilège flottant la convention de garantie qui permettait au débiteur de vendre, dans le cours normal de ses affaires, les biens donnés en garantie.

48

I note also that this Court very recently referred to the decision of McLachlin J.A. in *FBDB*, *supra*, with approval: *Alberta (Treasury Branches)*, *supra*. While the issue in that case was different from that in *FBDB*, the comments of Cory J. can, I think, be taken as affirming the "either-or" doctrine as applied in *FBDB*.

Je constate aussi que notre Cour a mentionné tout dernièrement, en les approuvant, les motifs du juge McLachlin dans l'arrêt *FBDB*, précité: *Alberta (Treasury Branches)*, précité. Bien que, dans ce dernier arrêt, la question en litige ait été différente de celle soulevée dans *FBDB*, les commentaires du juge Cory peuvent, à mon sens, être interprétés comme confirmant la règle du «soit l'un, soit l'autre» appliquée dans *FBDB*.

49

The relevance of the "either-or" doctrine to the present case, of course, lies in the fact that Sparrow had been granted by the bank, both expressly and impliedly, a licence to sell the inventory over which the bank held a security interest. It therefore

La pertinence de la règle du «soit l'un, soit l'autre» en l'espèce, tient évidemment au fait que Sparrow avait reçu de la banque, tant expressément qu'implicitement, la permission de vendre les biens figurant dans son inventaire, sur lesquels la

1997 CanLII 377 (SCC)

could be argued that such a licence renders the interest of the bank in the nature of a floating charge, an interest which must yield to a statutory trust which attaches prior to the charge's crystallization.

50 I do not find it necessary to comment on *FBDB* to the extent that that decision suggests that in the present case the interests of the bank should be characterized as a floating charge. It should be noted that the decision of McLachlin J.A. in the *FBDB* case predated the enactment of personal property security legislation in British Columbia, and so does not speak to the state of the law in a *PPSA* jurisdiction. Nor did that case deal with any other statutory enactment, such as the *Bank Act*, which could affect the characterization of the security agreement there at issue. For these reasons, I consider the comments of McLachlin J.A. in *FBDB* to be directed to the common law position with regard to the characterization of fixed and floating charges. Whatever those common law principles may be, they cannot be taken to alter the effect that legislation may have on the characterization of security interests. As it is my view that the Alberta *PPSA* and the *Bank Act* are determinative of the characterization of the bank's GSA and BAS, respectively, I do not need to address the common law view articulated in *FBDB*.

51 I turn now to consider each of the bank's security interests.

(i) <u>The General Security Agreement (GSA)</u>

52 Counsel for the appellant, Her Majesty, argued in his factum that the bank's GSA is to be considered in the nature of a floating charge. In support of this proposition, counsel advances the decision of the Ontario Court of Appeal in *Re Urman* (1983), 44 O.R. (2d) 248. In that case, involving a general assignment of book debts perfected under the Ontario *Personal Property Security Act*, the security interest was characterized as a floating charge.

banque détenait une garantie. On pourrait donc soutenir que cette permission fait en sorte que le droit de la banque tient d'un privilège flottant, lequel droit doit céder le pas à une fiducie légale qui grevait les biens avant la cristallisation du privilège.

Je ne juge pas nécessaire de commenter l'arrêt *FBDB* dans la mesure où il laisse entendre qu'en l'espèce les droits de la banque devraient être qualifiés de privilège flottant. Il y a lieu de souligner que les motifs du juge McLachlin, dans *FBDB*, ont précédé l'adoption de la loi sur les sûretés mobilières en Colombie-Britannique et qu'ils ne témoignent donc pas de l'état du droit dans un ressort régi par une telle loi. Dans cet arrêt, il n'était pas question non plus d'une autre loi, comme la *Loi sur les banques*, qui pouvait affecter la qualification de la convention de garantie en cause. Pour ces motifs, je considère que les commentaires du juge McLachlin, dans *FBDB*, se rapportaient à l'état de la common law concernant la qualification des privilèges fixes et des privilèges flottant. Quels que puissent être ces principes de common law, on ne peut pas considérer qu'ils modifient l'effet que ces lois peuvent avoir sur la qualification des garanties. Étant donné que je suis d'avis que la *PPSA* de l'Alberta et la *Loi sur les banques* sont déterminantes pour ce qui est de qualifier, respectivement, la CGG et la GLB de la banque, je n'ai pas à examiner le point de vue de common law exprimé dans *FBDB*.

Je passe maintenant à l'examen de chacune des garanties de la banque.

(i) <u>La convention de garantie générale (CGG)</u>

L'avocat de l'appelante, Sa Majesté, allègue dans son mémoire que la CGG de la banque doit être considérée comme tenant d'un privilège flottant. À l'appui de cet argument, il invoque l'arrêt de la Cour d'appel de l'Ontario *Re Urman* (1983), 44 O.R. (2d) 248. Dans cette affaire, où il était question d'une cession générale de créances comptables fondée sur la *Personal Property Security Act* de l'Ontario, la garantie a été qualifiée de privilège flottant.

1997 CanLII 377 (SCC)

For the reasons which follow, I cannot accept this submission. In my view, the general security agreement in this case, which was subject to the Alberta personal property security legislation, must be characterized as a fixed and specific charge subject to a licence to sell the inventory.

It is of course true that the *PPSA* does not govern the priority competition between a statutory trust and a security interest. Subsection 4(a) explicitly removes statutory trusts such as the one created by s. 227 *ITA* from the province of the Alberta *PPSA*:

4 Except as otherwise provided in this Act, this Act does not apply to the following:

(a) a lien, charge or other interest given by an Act or rule of law in force in Alberta;

However, this does not mean that the *PPSA* does not affect the characterization of a charge executed in a jurisdiction which is subject to such an Act. To the contrary, the effect of personal property security legislation has been said to have "fundamentally changed the characterization of security interests": Wood and Wylie, "Non-Consensual Security Interests in Personal Property", *supra*, at p. 1082. In particular, while pre-*PPSA*, a security agreement purporting to create a floating charge could be said to remain unattached to the collateral until crystallization, s. 12(1) of the Alberta *PPSA* manifestly alters this situation. That subsection reads:

12(1) A security interest, including a security interest in the nature of a floating charge, attaches when

(a) value is given,

(b) the debtor has rights in the collateral, and

(c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10,

53 Pour les motifs qui suivent, je ne puis être d'accord. À mon avis, la convention de garantie générale conclue en l'espèce, qui était régie par la loi sur les sûretés mobilières de l'Alberta, doit être qualifiée de privilège fixe et spécifique assujetti à une permission de vendre les biens figurant dans l'inventaire.

54 Il est vrai, bien sûr, que la *PPSA* ne s'applique pas pour déterminer l'ordre de priorité entre une fiducie légale et une garantie. L'alinéa 4a) soustrait explicitement à l'application de la *PPSA* de l'Alberta les fiducies légales comme celle créée par l'art. 227 *LIR*:

[TRADUCTION]

4 Sauf disposition contraire de la présente loi, la présente loi ne s'applique pas à:

a) un privilège ou autre droit conféré par une loi ou une règle de droit en vigueur en Alberta;

Cependant, cela ne veut pas dire que la *PPSA* n'influe pas sur la qualification d'un privilège consenti dans un ressort assujetti à une telle loi. Au contraire, on a affirmé que la *PPSA* avait eu pour effet de [TRADUCTION] «changer fondamentalement la qualification des garanties»: Wood et Wylie, «Non-Consensual Security Interests in Personal Property», *loc. cit.*, à la p. 1082. Plus particulièrement, alors qu'avant l'adoption de la *PPSA* on pouvait dire qu'une convention de garantie ayant pour effet de créer un privilège flottant ne s'appliquait pas aux biens donnés en garantie tant qu'il n'y avait pas eu cristallisation, le par. 12(1) de la *PPSA* de l'Alberta modifie manifestement cette situation. Ce paragraphe se lit ainsi:

[TRADUCTION]

12(1) Une garantie, y compris celle qui tient d'un privilège flottant, grève un bien lorsque:

a) une contrepartie est fournie,

b) le débiteur a des droits sur le bien donné en garantie,

c) sauf aux fins de l'exécution des droits entre les parties à la convention de garantie, la garantie devient réalisable au sens de l'article 10,

1997 CanLII 377 (SCC)

unless the parties specifically agree in writing to postpone the time for attachment, in which case the security interest attaches at the time specified in the agreement.

The relevant portion of s. 10 for our purposes states:

10(1) Subject to subsection (2), a security interest is enforceable against a third party only where

(a) the collateral is in the possession of the secured party, or

(b) the debtor has signed a security agreement that contains

. . .

(ii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property . . . .

Generally speaking, therefore, absent an express intention to the contrary, a security interest in all present and after-acquired personal property will attach when that agreement is executed by the parties. Once attachment has occurred, in my view, the GSA then becomes in law a fixed and specific charge over the collateral.

55 I find support in this conclusion as to the effect of personal property security legislation upon security interests from the fact that the academic literature is unanimous on this point. For example, Professor Jacob S. Ziegel in his article "Symposium: Recent and Prospective Developments in the Personal Property Security Law Area" (1985), 10 *Can. Bus. L.J.* 131, commented as follows, at p. 152:

It is of the first importance to determine whether a security interest under the PPSA retains any of the common law characteristics of a floating charge and if so which. My own view is that once a security interest has attached under the PPSA it has no "floating" attributes even though the security agreement, expressly or impliedly, gives the debtor considerable powers to dispose of the collateral in the course of his business. In brief, the PPSA only recognizes specific or fixed security interests although admittedly the collateral itself may often change its character because of the express or

Toutefois, si les parties conviennent expressément par écrit que la garantie ne grèvera le bien que plus tard, la garantie ne le grèvera qu'au moment convenu.

Aux fins du présent pourvoi, les parties pertinentes de l'art. 10 sont les suivantes:

[TRADUCTION]

10(1) Sous réserve du paragraphe (2), une garantie n'est opposable à une tierce partie que

a) si le bien donné en garantie est en la possession du créancier garanti, ou

b) si le débiteur a signé une convention de garantie qui contient

. . .

(ii) une stipulation qu'une garantie est accordée sur tous les biens meubles actuels du débiteur et sur ceux qu'il acquerra après la date de la convention . . .

De façon générale, par conséquent, en l'absence d'intention contraire explicite, une garantie accordée sur tous les biens meubles actuels et sur ceux acquis après la date de la convention grèvera ces biens dès la conclusion de la convention par les parties. À mon avis, dès que la garantie grève un bien, la CGG devient alors, en droit, un privilège fixe et spécifique sur le bien donné en garantie.

La conclusion que je tire quant à l'effet des lois en matière de sûretés mobilières sur les garanties s'appuie sur le fait que la doctrine est unanime sur ce point. Par exemple, le professeur Jacob S. Ziegel, dans son article intitulé «Symposium: Recent and Prospective Developments in the Personal Property Security Law Area» (1985), 10 *Can. Bus. L.J.* 131, fait le commentaire suivant, à la p. 152:

[TRADUCTION] Il est très important de déterminer si une garantie accordée en vertu de la PPSA conserve l'une ou l'autre des caractéristiques que la common law attribue au privilège flottant et, dans l'affirmative, lesquelles. Je suis d'avis que, une fois qu'une garantie grève un bien en vertu de la PPSA, elle ne peut être qualifiée de «flottante», même si la convention de garantie accorde, expressément ou implicitement, au débiteur de vastes pouvoirs d'aliéner, dans le cours de ses affaires, le bien donné en garantie. Bref, la PPSA reconnaît seulement l'existence de garanties fixes ou spécifiques, bien que,

1997 CanLII 377 (SCC)

implied powers of disposition given the debtor. [Emphasis added.]

This opinion is echoed by Professor Wood in his recent article "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada* v. *Sparrow Electric Corp.*", *supra*, at p. 433:

Under pre-PPSA law, a plausible argument could be made that a security interest in the form of a fixed charge combined with a licence to deal is, in effect nothing more than a floating charge. However, this argument [is] untenable in the cases involving PPSA security interests . . . .

Similarly, Professor Ronald C. C. Cuming, in "Commercial Law — Floating Charges and Fixed Charges of After-Acquired Property: *The Queen in the Right of British Columbia* v. *Federal Business Development Bank*" (1988), 67 *Can. Bar Rev.* 506, at pp. 510-11, opined:

In effect, [PPS] legislation treats all charges, including floating securities, as fixed charges. The legislatures that have enacted Personal Property Security Acts have implicitly declared that, as a matter of public policy, there is nothing objectionable to having a fixed charge on stock-in-trade of a debtor coupled with a licence to deal with the collateral in the ordinary course of business. [Emphasis added.]

At p. 519, the learned author concludes "there can be no such thing as a floating charge under a Personal Property Security Act".

Applying this principle to the case at bar, the GSA held by the respondent bank must certainly be characterized as a fixed and specific charge. It attached at the time the agreement was executed, February 25, 1992. More specifically, however, because of the permission granted by the bank which allowed Sparrow to sell the encumbered inventory, the GSA is in the nature of a fixed charge with a licence to deal with the inventory.

de l'aveu général, les attributs du bien donné en garantie puissent souvent changer en raison des pouvoirs d'aliénation exprès ou implicites conférés au débiteur. [Je souligne.]

Le professeur Wood reprend cette opinion dans son article récent «Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada* v. *Sparrow Electric Corp.*», *loc. cit.*, à la p. 433:

[TRADUCTION] Avant l'adoption de la PPSA, il était plausible d'avancer qu'une garantie sous forme de privilège fixe assorti d'une permission d'aliéner n'était, en fait, rien de plus qu'un privilège flottant. Cependant, cet argument ne tient plus dans les cas où il est question d'une garantie accordée en vertu de la PPSA . . .

De même, le professeur Ronald C. C. Cuming, dans «Commercial Law — Floating Charges and Fixed Charges of After-Acquired Property: *The Queen in the Right of British Columbia* v. *Federal Business Development Bank*» (1988), 67 *R. du B. can.* 506, aux pp. 510 et 511, opine:

[TRADUCTION] En fait, les lois [sur les sûretés mobilières] considèrent tous les privilèges, y compris les garanties flottantes, comme des privilèges fixes. Les législatures qui ont adopté des lois sur les sûretés mobilières ont implicitement déclaré que, pour des motifs d'ordre public, il n'y a rien de répréhensible à ce qu'un privilège fixe grève les stocks d'un débiteur et que ce privilège soit assorti d'une permission d'aliéner, dans le cours normal des affaires, les biens donnés en garantie. [Je souligne.]

À la page 519, l'auteur conclut qu'[TRADUCTION] «il ne saurait y avoir de privilège flottant sous le régime d'une loi sur les sûretés mobilières».

56

Si on applique ce principe à la présente affaire, la CGG de la banque intimée doit certainement être qualifiée de privilège fixe et spécifique. Elle a grevé les biens en cause dès la conclusion de la convention, le 25 février 1992. Plus précisément, toutefois, en raison de la permission de vendre les biens d'inventaire grevés, que la banque a accordée à Sparrow, la CGG tient d'un privilège fixe assorti d'une permission d'aliéner les biens figurant dans l'inventaire.

1997 CanLII 377 (SCC)

(ii) Bank Act Security (BAS)

57 The appellant has further submitted that the respondent bank's BAS is in the nature of a floating charge over the inventory. Several lower court decisions have been relied upon in support of this proposition: *Abraham*, *supra* (under appeal); *Armstrong*, *supra*; and *North Sky Trading Inc. (Bankrupt), Re* (1994), 158 A.R. 117 (Q.B.) (under appeal).

58 The earliest authority to comment upon the nature of BAS is the decision of this Court in *Royal Bank of Canada v. Workmen's Compensation Board of Nova Scotia*, [1936] S.C.R. 560. That case involved a priority competition between security under s. 88 of the *Bank Act*, R.S.C. 1927, c. 12, the predecessor of s. 427, and a lien created by s. 79(2) of *The Workmen's Compensation Act*, R.S.N.S. 1923, c. 129. In his concurring judgment, Davis J. observed the effect of s. 88 security as follows, at p. 567:

> . . . the security [does] not operate to transfer absolutely the ownership in the goods but . . . the transaction [is] essentially a mortgage transaction and subject to the general law of mortgages except where the statute has otherwise expressly provided . . . . Section 88 set up by the *Bank Act* enables manufacturers, who desire to obtain large loans from their bankers in order to carry on their industrial activities, to give to the bank a special and convenient form of security for the bank's protection in the large banking transactions necessary in the carrying on of industry throughout the country. Until the moneys are repaid, the bank is the legal owner of the goods but sale before default is prohibited and provision is made for the manufacturer regaining title upon repayment. To say that Parliament did not use language to expressly provide that the bank shall have a first lien on the goods is beside the mark. The bank acquires ownership in the goods by the statute. [Emphasis added.]

59 More recently, this Court had occasion to consider the attributes of *Bank Act* security in *Hall*, *supra*. In that case, La Forest J. underlined this Court's previous ruling in *Workmen's Compensation Board of Nova Scotia*, *supra*, that BAS gives

(ii) La garantie de la Loi sur les banques (GLB)

L'appelante a fait valoir, en outre, que la GLB de la banque intimée tient d'un privilège flottant sur les biens figurant dans l'inventaire. Elle invoque, à l'appui de cet argument, plusieurs décisions de tribunaux d'instance inférieure: *Abraham*, précitée (en appel), *Armstrong*, précitée, et *North Sky Trading Inc. (Bankrupt), Re* (1994), 158 A.R. 117 (B.R.) (en appel).

L'arrêt *Royal Bank of Canada c. Workmen's Compensation Board of Nova Scotia*, [1936] R.C.S. 560 est le plus ancien précédent à commenter la nature d'une GLB. Il y était question de la concurrence, quant à l'ordre de priorité, entre une garantie fondée sur l'art. 88 de la *Loi des banques*, S.R.C. 1927, ch. 12, qui a précédé l'art. 427, et un privilège créé par le par. 79(2) de *The Workmen's Compensation Act*, R.S.N.S. 1923, ch. 129. Dans ses motifs concordants, le juge Davis souligne ainsi l'effet de l'art. 88 (à la p. 567):

> [TRADUCTION] . . . la garantie n'[a] pas pour effet de transférer de façon absolue le droit de propriété sur les biens mais [. . .] l'opération est essentiellement une opération hypothécaire assujettie à la common law applicable de façon générale aux hypothèques, sauf disposition contraire expresse de la Loi [. . .] L'article 88 de la *Loi sur les banques* permet aux fabricants qui désirent obtenir des prêts importants de leurs banques en vue d'exercer leurs activités industrielles de donner à la banque une forme de sûreté particulière et commode pour protéger celle-ci à l'égard des opérations bancaires importantes nécessaires à l'activité industrielle partout au pays. Jusqu'à ce que les sommes soient remboursées, la banque est le propriétaire en droit des marchandises, mais ne peut les vendre que s'il y a défaut de paiement et sous réserve du droit du fabricant de reprendre son titre après remboursement. Affirmer que le Parlement n'a pas utilisé des termes exprès pour prévoir que la banque détient un privilège de premier rang sur les marchandises n'a rien à voir avec la question. La banque acquiert le titre de propriété des marchandises en vertu de la Loi. [Je souligne.]

Plus récemment, notre Cour a examiné les attributs d'une garantie de la *Loi sur les banques* dans l'arrêt *Hall*, précité. Dans cet arrêt, le juge La Forest a souligné l'arrêt *Workmen's Compensation Board of Nova Scotia*, précité, dans lequel notre

1997 CanLII 377 (SCC)

to the lender legal title in the collateral. At pp. 133-34, La Forest J. stated:

> By section 178(2) [now s. 427(2)], a bank may take security in property owned by the borrower at the time of the loan transaction, and any property acquired during the pendency of the security agreement. The rights and powers of the bank with respect to the secured property are set out in s. 178(2)(*c*). By the terms of s. 178(2)(*c*), these rights and powers are stated to be "the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which such property was described". These powers are defined, in turn, in s. 186 [now s. 435] of the Act where it is specified that any warehouse receipt or bill acquired by a bank as security for the payment of a debt, vests in the bank all the right and title to goods, wares and merchandise covered by the holder or owner thereof.
>
> The nature of the rights and powers vested in the bank by the delivery of the document giving the security interest has been the object of some debate. Argument has centred on whether the security interest should be likened to a pledge or bailment, or whether it is more in the nature of a chattel mortgage. I find the most precise description of this interest to be that given by Professor Moull in his article "Security Under Sections 177 and 178 of the Bank Act" (1986), 65 *Can. Bar Rev.* 242, at p. 251. Professor Moull, correctly in my view, stresses that the effect of the interest is to vest title to the property in question in the bank when the security interest is taken out. He states, at p. 251:
>
>> The result, then, is that a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower. The bank's interest attaches to the assigned property when the security is given or the property is acquired by the borrower and remains attached until released by the bank, despite changes in the attributes or composition of the assigned property. The borrower retains an equitable right of redemption, of course, but the bank effectively acquires legal title to whatever rights the borrower holds in the assigned property from time to time. [Emphasis added.]

Cour a décidé qu'une GLB confère au prêteur la propriété du bien donné en garantie. Aux pages 133 et 134, le juge La Forest affirme:

> En vertu du par. 178(2) [maintenant le par. 427(2)], une banque peut obtenir une garantie portant sur des biens appartenant à l'emprunteur au moment de l'emprunt et sur tous les biens acquis pendant la durée du contrat de sûreté. Les droits de la banque à l'égard des biens visés par la sûreté sont énoncés à l'al. 178(2)*c*). Selon les termes de l'al. 178(2)*c*), ces droits sont «les mêmes droits que si la banque avait acquis un récépissé d'entrepôt ou un connaissement visant ces biens». Ces droits sont à leur tour définis à l'art. 186 [maintenant l'art. 435] de la Loi où il est dit que tout récépissé d'entrepôt ou connaissement acquis par une banque à titre de garantie du paiement d'une dette confère à la banque tous les droit et titre de propriété sur les effets, denrées ou marchandises que le détenteur ou propriétaire avait sur ceux-ci.
>
> La nature des droits conférés à la banque par la remise du document accordant la sûreté a fait l'objet de certaines discussions. Les débats ont porté sur la question de savoir si la sûreté devrait être comparée à un gage ou à un dépôt en garantie, ou si elle tient davantage d'une hypothèque mobilière. J'estime que la description la plus précise de cette sûreté est celle que donne le professeur Moull dans son article intitulé «Security Under Sections 177 and 178 of the Bank Act» (1986), 65 *R. du B. can.* 242, à la p. 251. Le professeur Moull souligne, à juste titre à mon avis, que l'effet de la sûreté est de conférer à la banque le titre de propriété sur le bien en question lorsque la sûreté est réalisée. Il affirme, à la p. 251:
>
>> [TRADUCTION] Il en résulte donc que la banque qui prend une sûreté en vertu de l'art. 178 acquiert effectivement les droits que l'emprunteur avait dans les biens actuels et acquis après coup qu'il a cédés à la banque. Le droit de la banque grève les biens cédés dès que la sûreté est consentie ou dès que l'emprunteur acquiert les biens et ceux-ci demeurent grevés jusqu'à ce que la banque accorde mainlevée, malgré les changements apportés aux attributs ou aux éléments des biens cédés. L'emprunteur conserve évidemment un droit de rachat en *equity*, mais la banque devient effectivement titulaire de tous les droits que l'emprunteur avait sur les biens cédés. [Je souligne.]

It follows from the comments of this Court regarding the ownership rights in inventory conferred by the *Bank Act* that security taken under that Act must be considered to be in the nature of a fixed and specific charge. As stated above, the

60 Suivant les commentaires de notre Cour concernant les droits de propriété que la *Loi sur les banques* confère sur les biens figurant dans un inventaire, une garantie consentie en vertu de cette loi doit être considérée comme tenant d'un privi-

1997 CanLII 377 (SCC)

concept of the fixed charge is correlative to the notion of a creditor's having legal proprietary rights in the collateral. I add that this view has been adopted by academic literature in this area: R. J. Wood, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *supra*, at p. 433; and William D. Moull, "Security Under Sections 177 and 178 of the Bank Act" (1986), 65 *Can. Bar Rev.* 242. I find this following passage, at p. 251, from the article written by Professor Moull which was cited with approval by this Court in *Hall*, *supra*, particularly persuasive:

> Because of its scope and flexibility, some commentators have suggested that section 178 [now 427] security is in the nature of a floating charge. This can be misleading, however. Because the bank effectively acquires legal title, section 178 security is really in the nature of a fixed charge on the present and after-acquired property of the borrower assigned to the bank. One attribute that section 178 security may be said to share with a floating charge is its application to all property of a specified class held by the borrower from time to time. But while a floating charge may apply to all property of a specified kind held by the borrower from time to time, it does not affix itself specifically upon any particular item of property until it crystallizes upon default by the borrower. Conversely, a section 178 security is a fixed charge on each item of assigned property held from time to time whether or not the loan is in default. This gives a bank significantly greater rights than it would hold under a floating charge debenture on inventory.

61 For these reasons, I consider the security interest of the bank in the form of BAS to be in the nature of a fixed and specific charge with a licence to sell the inventory.

(iii) Summary — Fixed and Specific Charge Over Inventory

62 It would seem appropriate at this point, before leaving the present discussion, to comment briefly upon this novel and perhaps abstract notion of possessing a fixed charge over all of the present and

lège fixe et spécifique. Comme je l'ai déjà dit, le concept du privilège fixe correspond à la notion d'un créancier qui a les droits de propriété sur le bien donné en garantie. J'ajoute que ce point de vue a été adopté par des auteurs de doctrine en la matière: R. J. Wood, «Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*», *loc. cit.*, à la p. 433, et William D. Moull, «Security Under Sections 177 and 178 of the Bank Act» (1986), 65 *R. du B. can.* 242. Je juge particulièrement convaincant l'extrait suivant de la p. 251 de l'article du professeur Moull, que notre Cour a mentionné, en l'approuvant, dans *Hall*, précité:

> [TRADUCTION] Certains commentateurs ont laissé entendre qu'en raison de sa portée et de sa souplesse la garantie prévue par l'art. 178 [maintenant l'art. 427] tient d'un privilège flottant. Cela peut toutefois être trompeur. Parce que la banque acquiert effectivement le droit de propriété, la garantie consentie en vertu de l'art. 178 tient vraiment d'un privilège fixe sur les biens actuels et acquis après coup que l'emprunteur a cédés à la banque. On peut affirmer qu'une garantie consentie en vertu de l'art. 178 partage un attribut avec un privilège flottant du fait qu'elle s'applique à l'ensemble des biens d'une catégorie donnée que l'emprunteur détient. Mais, alors qu'un privilège flottant peut s'appliquer à tous les biens d'une catégorie donnée que l'emprunteur détient, il ne grève pas spécifiquement l'un de ces biens tant qu'il ne s'est pas cristallisé à la suite du défaut de l'emprunteur. À l'inverse, la garantie consentie en vertu de l'art. 178 est un privilège fixe qui s'applique à chacun des biens cédés, peu importe que l'emprunteur soit en défaut ou non. Cela confère à la banque des droits beaucoup plus grands que s'il s'agissait d'une obligation à charge flottante s'appliquant aux biens de l'inventaire.

Pour ces motifs, je considère que la garantie que la banque détient sous forme de GLB tient d'un privilège fixe et spécifique assorti d'une permission de vendre les biens figurant dans l'inventaire.

(iii) Résumé — Privilège fixe et spécifique applicable aux biens figurant dans un inventaire

À ce stade, il semblerait approprié, avant de clore cette partie de l'analyse, de commenter brièvement cette notion nouvelle et peut-être abstraite de la possession d'un privilège fixe sur tous les

1997 CanLII 377 (SCC)

future inventory of a debtor. To begin with, I note that traditional definitions of the fixed charge, as for example the one I previously quoted above from *Illingworth*, *supra*, emphasize the ability to "settle and fasten" upon ascertainable and defined property as being an integral attribute to this particular form of charge. This type of attachment to tangible and ascertainable property, of course, is impossible to achieve in the case of an assignment of inventory, where that collateral is changing constantly. In short, the traditional concept of the fixed charge seems to be at odds with the notion of having a proprietary right over collateral such as after-acquired inventory which, by definition, is not yet in existence at the time the security agreement is executed.

biens actuels et futurs de l'inventaire d'un débiteur. Pour commencer, je souligne que les définitions traditionnelles du privilège fixe comme, par exemple, celle tirée de l'arrêt *Illingworth*, précité, que j'ai citée plus haut, insistent sur le fait que la capacité de «se fixer» sur des biens déterminables et définis est un attribut essentiel de cette forme particulière de privilège. Cette façon de grever des biens tangibles et déterminables est évidemment impossible dans le cas d'une cession de biens figurant dans un inventaire, où les biens donnés en garantie changent constamment. Bref, le concept traditionnel du privilège fixe semble incompatible avec l'idée de possession d'un droit de propriété sur des biens donnés en garantie tels que les biens d'inventaire acquis après coup qui, par définition, n'existent pas encore au moment où la convention de garantie est conclue.

1997 CanLII 377 (SCC)

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In my view, however, a fixed charge over all present and future inventory represents a proprietary interest over a dynamic collective of present and future assets. To this extent, as stated above, this form of security interest challenges our traditional conception of a fixed charge; to the same extent, in my opinion, our conception of this form of charge must change to meet the modern realities of commercial law, and in particular the legislative provisions which have been brought to bear in this appeal.

Je suis cependant d'avis qu'un privilège fixe sur tous les biens présents et futurs d'un inventaire représente un droit de propriété sur un ensemble dynamique d'éléments d'actif présents et futurs. Dans cette mesure, comme je l'ai déjà dit, cette forme de garantie met en question notre conception traditionnelle d'un privilège fixe; de même, j'estime que notre conception de cette forme de privilège doit évoluer en fonction des réalités contemporaines du droit commercial et, en particulier, des dispositions législatives qui ont été invoquées en l'espèce.

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In effect, the fixed and specific charge gives to the secured creditor the title (subject, of course, to the debtor's equitable right of redemption) to the present inventory of the debtor, as well as the after-acquired inventory of the debtor. In this way, the secured creditor becomes the legal owner of inventory as it comes into possession of the debtor. I note that the Alberta *PPSA* contains a specific provision securing a creditor's proprietary right to after-acquired property in this way:

En effet, le privilège fixe et spécifique confère au créancier garanti (sous réserve, évidemment, du droit de rachat que le débiteur possède en *equity*) le droit de propriété sur les biens actuels de l'inventaire du débiteur, de même que sur les biens de l'inventaire que ce dernier acquiert après coup. Le créancier garanti devient ainsi légalement propriétaire des biens de l'inventaire au fur et à mesure qu'ils entrent en la possession du débiteur. Je remarque que la *PPSA* de l'Alberta contient une disposition particulière qui garantit ainsi le droit de propriété du créancier sur les biens acquis après coup:

13(1) Except as provided in subsection (2), where a security agreement provides for a security interest in after-acquired property, the security interest attaches in

[TRADUCTION] **13**(1) Sous réserve du paragraphe (2), lorsqu'une convention de garantie prévoit une garantie s'appliquant à des biens qui seront acquis ultérieure-

accordance with section 12, without the need for specific appropriation. [Emphasis added.]

Professors Cuming and Wood, in their published annotation of the Alberta *PPSA*, observe that by virtue of this subsection "the security interest in after-acquired property has equal status with a security interest in collateral in existence at the time the security agreement is executed": Cuming and Wood, *Alberta Personal Property Security Act Handbook* (2nd ed. 1993), at p. 121 (emphasis added). Similarly, the BAS has the effect of presently attaching the secured creditor's interest to the after-acquired inventory of the debtor. In *Hall*, *supra*, La Forest J. approved of Professor Moull's description of the effect of the relevant provisions of the *Bank Act*, at p. 134, which is particularly apposite to the present discussion:

> The result, then, is that a bank taking security under section 178 [now s. 427] effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower. The bank's interest attaches to the assigned property when the security is given or the property is acquired by the borrower and remains attached until released by the bank, despite changes in the attributes or composition of the assigned property. The borrower retains an equitable right of redemption, of course, but the bank effectively acquires legal title to whatever rights the borrower holds in the assigned property from time to time. [Emphasis added.]

65 It follows from these observations that where, as here, a secured creditor holds a fixed charge over a debtor's inventory, that charge will have the effect of ensuring the creditor has legal title to any and all inventory subject to the charge at any given point in time. This, of course, is subject to the caveat (not operative in this case) that no outstanding statutory payroll deductions had in fact been made prior to the attachment of the fixed charge. Thus, in the present case, the inventory which was subject to the liquidation sale belonged in law to the respondent bank: both under its GSA and its BAS the bank held a fixed charge over Sparrow's inventory. As such, all that Her Majesty's beneficial interest could attach to, before its sale, was

ment, la garantie grève ces biens conformément à l'article 12, sans qu'une affectation précise soit nécessaire. [Je souligne.]

Dans le commentaire de la *PPSA* de l'Alberta qu'ils ont publié, les professeurs Cuming et Wood font observer qu'en vertu de ce paragraphe [TRADUCTION] «la garantie s'appliquant aux biens acquis après coup a le même statut qu'une garantie relative aux biens existant au moment de la conclusion de la convention»: Cuming et Wood, *Alberta Personal Property Security Act Handbook* (2e éd. 1993), à la p. 121 (je souligne). De même, la GLB fait en sorte que la garantie du créancier grève immédiatement les biens d'inventaire acquis après coup par le débiteur. À la page 134 de l'arrêt *Hall*, précité, le juge La Forest approuve la description par le professeur Moull de l'effet des dispositions pertinentes de la *Loi sur les banques*, description qui est particulièrement appropriée dans la présente analyse:

> [TRADUCTION] Il en résulte donc que la banque qui prend une sûreté en vertu de l'art. 178 [maintenant l'art. 427] acquiert effectivement les droits que l'emprunteur avait dans les biens actuels et acquis après coup qu'il a cédés à la banque. Le droit de la banque grève les biens cédés dès que la sûreté est consentie ou dès que l'emprunteur acquiert les biens et ceux-ci demeurent grevés jusqu'à ce que la banque accorde mainlevée, malgré les changements apportés aux attributs ou aux éléments des biens cédés. L'emprunteur conserve évidemment un droit de rachat en *equity*, mais la banque devient effectivement titulaire de tous les droits que l'emprunteur avait sur les biens cédés. [Je souligne.]

Il découle de ces observations que, lorsque, comme en l'espèce, un créancier garanti détient un privilège fixe sur les biens figurant dans l'inventaire d'un débiteur, ce privilège aura en tout temps pour effet d'assurer que le créancier possède un droit de propriété sur tous les biens d'inventaire assujettis au privilège. Il en est ainsi, bien sûr, à la condition (non applicable en l'espèce) qu'aucune retenue sur la paye n'ait été effectuée, sans être versée, avant l'application du privilège fixe. Par conséquent, les biens figurant dans l'inventaire qui ont fait l'objet d'une vente de liquidation, en l'espèce, appartenaient en droit à la banque intimée: la banque détenait, tant en vertu de sa CGG que de sa GLB, un privilège fixe sur les biens de l'inventaire

1997 CanLII 377 (SCC)

Sparrow's equity of redemption in the property: *Avco, supra*; *C.I.B.C. v. Klymchuk* (1990), 74 Alta. L.R. (2d) 232 (C.A.), at p. 240.

de Sparrow. C'est pourquoi tout ce à quoi le droit que Sa Majesté possédait à titre bénéficiaire pouvait s'appliquer avant la vente était le droit de rachat que Sparrow détenait en *equity* sur les biens: *Avco*, précité; *C.I.B.C. c. Klymchuk* (1990), 74 Alta. L.R. (2d) 232 (C.A.), à la p. 240.

But this of course does not end the matter. While it is true that the bank held legal title in the inventory which is the subject of the dispute in this case, it is also true that at the time the deductions were made the bank had given its permission to Sparrow to sell this inventory in the course of its business. The GSA contained an express licence to this effect; and the BAS impliedly contained such a licence. In this way, the bank had consented, contractually, to the divestment of their interest in the collateral taken in inventory and the usage of the proceeds of that collateral for certain purposes. The critical issue which falls to be decided is, then, what is the scope of this contractual licence? In particular, if this bank's consent included the right to sell the inventory in order to pay wages, then that consent by necessity included the right to sell inventory to remit payroll deductions. In such a situation, for the following reasons, Her Majesty's interest would be able to attach to the proceeds of the inventory, and in this way take priority over the bank's interest.

66 Toutefois, il va sans dire que cela ne règle pas la question. Bien qu'il soit vrai que la banque détenait le droit de propriété sur les biens de l'inventaire qui font l'objet du litige en l'espèce, il est également vrai qu'au moment où les retenues ont été faites la banque avait donné à Sparrow la permission de vendre ces biens dans le cours de ses affaires. Une permission à cet égard était accordée expressément dans la CGG et implicitement dans la GLB. De cette façon, la banque avait consenti, par contrat, à se dépouiller de son droit sur les biens de l'inventaire donnés en garantie et à ce que le produit de la vente de ces biens soit utilisé à certaines fins. La question cruciale est donc celle de la portée de cette permission contractuelle. En particulier, si ce consentement de la banque comprenait le droit de vendre les biens de l'inventaire pour payer les salaires, alors ce consentement comprenait nécessairement le droit de vendre ces mêmes biens pour verser les retenues sur la paye. Pour les motifs qui suivent, le droit de Sa Majesté pourrait alors s'appliquer au produit de la vente des biens figurant dans l'inventaire et, ainsi, avoir priorité sur le droit de la banque.

As stated previously, at para. 41, it is my opinion that the licence theory may operate, in the context of the statutory scheme at issue in the present appeal, as an exception to the general rule that at the time of "liquidation, assignment, receivership or bankruptcy" Her Majesty's interest cannot attach to property which is at that time the property of a secured creditor. More specifically, where it can be said that at the time the deductions were made a secured creditor had consented to the use of its collateral in order to pay the statutory deductions which are the object of a deemed trust, it may also be said that that creditor has bound itself by the statutory requirements relating to those deductions. Here, therefore, if it can be said that at the time the wage deductions at issue were made the

67 Comme je l'ai déjà indiqué au par. 41, je suis d'avis que, dans le contexte du régime législatif en cause dans le présent pourvoi, la thèse de la permission peut constituer exception à la règle générale voulant qu'au moment de la «liquidation, cession, mise sous séquestre ou faillite», le droit de Sa Majesté ne puisse pas grever des biens qui sont la propriété d'un créancier garanti. Plus précisément, si l'on peut affirmer qu'au moment où les retenues ont été effectuées le créancier garanti avait consenti à ce que les biens qui lui ont été donnés en garantie servent à verser les retenues exigées par la loi qui font l'objet de la fiducie réputée, on peut également affirmer que le créancier s'est assujetti aux obligations légales relatives à ces retenues. Par conséquent, si on peut affirmer, en l'espèce, qu'au

1997 CanLII 377 (SCC)

bank had permitted the sale of inventory in order to pay wages, and thus wage deductions, it will be possible for s. 227(5) to attach to the bank's inventory existent at the time of receivership. With regard to this approach to the licence theory, see *FBDB*, *supra*, at pp. 40-41, *Roynat*, *supra*, at pp. 649-50, and *G.M. Homes Inc.*, *supra*, at pp. 252-54.

moment où les retenues sur la paye qui sont en cause ont été effectuées, la banque avait permis la vente des biens figurant dans l'inventaire pour payer les salaires et, ainsi, les retenues sur la paye, le par. 227(5) pourra s'appliquer aux biens qui figuraient dans l'inventaire de la banque au moment de la mise sous séquestre. En ce qui concerne cette façon d'aborder la thèse de la permission, voir *FBDB*, précité, aux pp. 40 et 41, *Roynat*, précité, aux pp. 649 et 650, et *G.M. Homes Inc.*, précité, aux pp. 252 à 254.

1997 CanLII 377 (SCC)

68 In short, where the bank has consented to the reduction in the value of its security in order to pay statutory deductions at the time those deductions are made, they have to the same extent, by virtue of s. 227(5), consented to the reduction in their security at the time of receivership. The critical question which falls to be decided in this case, then, is what was the scope of the bank's consent to sell inventory at the time the deductions were made?

Bref, dans le cas où la banque a consenti à la diminution de la valeur de sa garantie pour payer les retenues légales sur la paye au moment où elles seraient effectuées, elle a du même coup consenti, en vertu du par. 227(5), à la réduction de sa garantie au moment de la mise sous séquestre. Alors, la question cruciale à trancher en l'espèce est de savoir quelle était la portée du consentement de la banque à la vente des biens figurant dans l'inventaire au moment où les retenues ont été effectuées.

(D) *Whether on the Facts the Licence to Sell Included the Right to Use the Proceeds to Pay Wages*?

(D) *D'après les faits, la permission de vendre incluait-elle le droit d'utiliser le produit de la vente pour payer les salaires*?

69 I underline at the outset that the critical factor in the "licence to sell" argument is the permission which must be found to have been granted with respect to the usage of the proceeds of the disputed collateral. Thus, while licences may often be mouthed in terms of a "right to sell in the ordinary course of business", it must not be forgotten that it is permission with respect to the usage of proceeds, and not necessarily the circumstances of sale, which is the proper focus of the inquiry.

Je souligne, au départ, que le facteur déterminant dans l'argument de la «permission de vendre» est la conclusion que cette permission a été accordée quant à l'utilisation du produit de la vente des biens en litige donnés en garantie. Ainsi, bien que les permissions soient souvent données sous la forme d'un «droit de vendre dans le cours normal des affaires», il ne faut pas oublier que c'est la permission quant à l'utilisation du produit, et non pas nécessairement les circonstances de la vente, qui doit être au centre de l'examen.

70 When interpreting the contractual provisions which gave Sparrow the right to sell the encumbered inventory, it is necessary to look at the words of the contract, the nature of the transaction which the parties entered into, and all of the surrounding circumstances.

En interprétant les dispositions contractuelles qui accordent à Sparrow le droit de vendre les biens de l'inventaire donnés en garantie, il faut examiner les termes du contrat, la nature de l'opération conclue par les parties et toutes les circonstances de l'affaire.

71 The express provisions of the GSA establishes that Sparrow was granted a licence to sell the

D'après les dispositions expresses de la CGG, Sparrow a obtenu la permission de vendre les biens

encumbered inventory. In particular, the licence stated that:

> . . . until default, Debtor may, in the ordinary course of Debtor's business, sell or lease inventory and, subject to Clause 7 hereof, use Money available to Debtor. [Emphasis added.]

Therefore, Sparrow was permitted to sell its inventory in the ordinary course of its business and "use" the proceeds generated therefrom. The critical question is what "us[age]" this licence to sell in the "ordinary course of . . . business" contemplated. In this connection, I find two of the express covenants in Sparrow's contractual arrangements to be salient. Paragraph 4(e) of the GSA required Sparrow:

> (e) to pay all taxes, rates, levies, assessments and other charges of every nature which may be lawfully levied, assessed or imposed against or in respect of Debtor or Collateral as and when the same become due and payable; [Emphasis added.]

In addition, in the Credit Facilities Agreement, Sparrow covenanted to the bank as follows:

> (3) it will promptly pay when due all business, income and other taxes properly levied on its operations and property and remit all statutory employee deductions when due; [Emphasis added.]

Looking at these express provisions of the contractual arrangements between Sparrow and the bank, I conclude that the payment of payroll deductions would be a usage to which the bank contemplated Sparrow would use the proceeds of inventory sold in the "ordinary course of . . . business". My conclusion in this respect is buttressed when the nature of the dealings between Sparrow and the bank, and all the surrounding circumstances, are observed.

The bank was Sparrow's primary lender; it held a security interest in most, if not all, of Sparrow's assets. In particular, the bank held various security interests in Sparrow's inventory. It was of course in the bank's best interest that Sparrow function as

de l'inventaire donnés en garantie. Plus particulièrement, il était précisé que:

> [TRADUCTION] . . . à moins d'être en défaut, le débiteur [peut], dans le cours normal de ses affaires, vendre ou louer les biens figurant dans l'inventaire et, sous réserve de la clause 7 des présentes, utiliser les sommes d'argent dont il dispose. [Je souligne.]

Par conséquent, Sparrow avait la permission de vendre les biens de l'inventaire dans le cours normal de ses affaires et d'«utiliser» le produit de cette vente. La question cruciale est de savoir quelle «utilis[ation]» était envisagée par cette permission de vendre «dans le cours normal de[s] affaires». À ce propos, je considère que deux clauses explicites des arrangements contractuels de Sparrow ressortent. Aux termes de l'al. 4e) de la CGG, Sparrow est tenue:

> e) de payer tous les impôts, tarifs, redevances, cotisations et autres sommes de toute nature qui peuvent être légalement perçues, cotisées ou imposées à l'égard du débiteur ou d'un bien donné en garantie, lorsque ces sommes sont dues et exigibles; [Je souligne.]

De plus, dans la convention de crédit, Sparrow a pris l'engagement suivant envers la banque:

> (3) elle paiera promptement, lorsqu'ils seront dus, toutes les taxes d'affaires, impôts sur le revenu et autres taxes perçues à bon droit sur ses affaires et ses biens et versera toutes les retenues légales sur le salaire des employés, lorsqu'elles seront dues; [Je souligne.]

72 Compte tenu de ces dispositions explicites des arrangements contractuels entre Sparrow et la banque, je conclus que le versement des retenues sur la paye serait une utilisation que, suivant ce que la banque a envisagé, Sparrow ferait du produit de la vente des biens de l'inventaire, effectuée «dans le cours normal de[s] affaires». Ma conclusion à cet égard est étayée par la nature des opérations survenues entre Sparrow et la banque, et par toutes les circonstances de l'affaire.

73 La banque était le prêteur principal de Sparrow, elle détenait une garantie sur la plupart, sinon la totalité, des éléments d'actif de Sparrow. Plus particulièrement, la banque détenait diverses garanties sur les biens figurant dans l'inventaire de Sparrow.

1997 CanLII 377 (SCC)

a viable economic unit. To do so, Sparrow was required to sell its services as an electrical contractor and, necessarily, sell its inventory. From the sales of the inventory, Sparrow could generate revenues to, *inter alia*, pay its outstanding operating debts. If it failed to do so, Sparrow could be petitioned into bankruptcy, with the result that Sparrow could no longer generate the profits necessary to pay its loan obligations to the bank in the long term. One of Sparrow's ongoing obligations, its costs of doing business, was the paying of wages. In order to stay in business, and operate as a profitable business enterprise, Sparrow would have to pay its employees. This is a necessary requirement of continuing in business. It would be reasonable that the bank expect, taking into consideration all the circumstances of this arrangement, that revenue from the sale of inventory would be used to pay wages.

74 From these observations, I consider the licence to sell inventory in the ordinary course of business in this case necessarily included a licence to sell inventory to pay wages, and remit wage deductions, in the course of its business. Where, as here, the secured party has security over the majority of the assets of the debtor, the security interest over the inventory must permit the debtor to sell the inventory and put it to the general use of its business, including towards the payment of wages. Indeed, the express terms of the licence intimates this, providing Sparrow could, "in the ordinary course of . . . business, . . . use Money available". The scope of the licence can thus be ascertained either from the express terms of the security agreement, or from the nature of the agreement and the conduct of the parties. To be clear, however, the scope of the licence in this case flows not merely from a right to sell inventory *per se*. Instead, it is the licence to sell inventory in the "ordinary course of [Sparrow's] business . . . and use [the proceeds]" which renders it of such a quality as to include a right to use the proceeds to pay wages. As Professor Wood has correctly observed in "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Elec-*

Il était évidemment dans l'intérêt de la banque que Sparrow fonctionne comme une entité économiquement rentable. À cette fin, Sparrow devait vendre ses services comme entrepreneur électricien et, nécessairement, vendre les biens de son inventaire. Ces ventes permettraient à Sparrow de tirer des revenus qui serviraient notamment à payer ses dettes de fonctionnement. Si elle ne le faisait pas, Sparrow pourrait faire l'objet d'une pétition en faillite, de sorte qu'elle ne pourrait plus à long terme générer les profits nécessaires au paiement de ses emprunts à la banque. L'une des obligations que Sparrow devait remplir, comme dépense d'affaires, était le paiement des salaires. Pour rester en affaires et fonctionner comme une entreprise rentable, Sparrow devrait payer ses employés. C'est là une condition nécessaire pour rester en affaires. Il serait raisonnable que la banque s'attende, compte tenu de toutes les circonstances de l'arrangement pris, que le produit de la vente des biens figurant dans l'inventaire soit utilisé pour payer les salaires.

Compte tenu de ces observations, je considère que la permission de vendre les biens de l'inventaire dans le cours normal des affaires comprenait nécessairement, en l'espèce, la permission de les vendre pour payer les salaires et verser les retenues sur la paye dans le cours des affaires de Sparrow. Lorsque, comme en l'espèce, le créancier garanti détient une garantie sur la majorité des éléments d'actif du débiteur, la garantie applicable aux biens de l'inventaire doit permettre au débiteur de vendre ces biens et d'utiliser le produit pour les fins générales de son entreprise, y compris pour payer les salaires. En fait, c'est ce qu'indiquent les termes mêmes de la permission qui prévoient que Sparrow pourrait, «dans le cours normal de[s] affaires [. . .] utiliser les sommes d'argent dont [elle] dispose[rait]». La portée de la permission peut donc être déterminée soit à partir des termes mêmes de la convention de garantie, soit à partir de la nature de la convention et de la conduite des parties. Plus précisément, la portée de la permission, en l'espèce, ne découle pas simplement d'un droit comme tel de vendre les biens figurant dans l'inventaire. Il s'agit plutôt d'une permission de vendre les biens de l'inventaire dans le «cours normal de[s] affaires [de Sparrow] [. . .] et [. . .]

1997 CanLII 377 (SCC)

tric Corp.", *supra*, at p. 435, a licence to sell inventory may in certain circumstances be circumscribed so as to not include a right to use the proceeds to pay wages:

The fact that the secured party permits the debtor to sell the inventory does not in itself imply that the secured party permits the debtor to use these proceeds to pay employees. In some cases the secured party will not restrict the debtor's ability to use the proceeds in the ordinary course of business, but this depends entirely on the security arrangement negotiated between the debtor and the secured party. Consider the following scenario:

> SP finances the acquisition of inventory by an automobile dealer (D), and is granted a security interest in the inventory. The wholesale security agreement provides that D may sell the inventory in the ordinary course of business and that upon doing so D must immediately remit the wholesale purchase price of the automobile to SP.

In this scenario, SP clearly does not permit the debtor to use the proceeds of inventory to pay its employees. Indeed, it is common for SP to regularly monitor the debtor to ensure that the debtor is not "out of trust" by failing to remit the proceeds of sale.

In summary, the true test of whether the licence to sell inventory includes the right to pay wages must therefore be a matter of interpreting the contractual arrangement between the parties. The focus is not so much on the circumstances of the selling of inventory, but rather the permitted usage of the proceeds of inventory. As in Professor Wood's example, where the licence has a limited scope, that licence may not include the right to use proceeds to pay wages. However, the expression of a limited use for proceeds of inventory cannot prevail if the arrangement between the parties is such as to allow, in practice, the debtor to use the inventory proceeds in the course of its business. In this respect, I agree with Professor Wood's comments regarding the appropriate test for determining

[d']utiliser [le produit]», qui fait en sorte qu'elle inclut le droit d'utiliser le produit pour payer les salaires. Comme le professeur Wood l'a fait observer à juste titre, dans «Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*», *loc. cit.*, à la p. 435, la permission de vendre les biens d'un inventaire peut, dans certaines circonstances, être limitée de manière à ne pas inclure le droit d'utiliser le produit pour payer des salaires:

[TRADUCTION] Le fait que le créancier garanti permette au débiteur de vendre les biens de l'inventaire n'implique pas en soi que le créancier garanti permet au débiteur d'utiliser le produit de cette vente pour payer les employés. Dans certains cas, le créancier garanti ne limitera pas la capacité du débiteur d'utiliser le produit dans le cours normal des affaires, mais cela dépend entièrement du type de garantie négocié entre le débiteur et le créancier garanti. Examinons l'hypothèse suivante:

> SP finance l'acquisition des biens d'un inventaire par un concessionnaire d'automobiles (D), et obtient une garantie sur ces biens. La convention de garantie de vente en gros prévoit que D peut vendre les biens de l'inventaire dans le cours normal des affaires et qu'après l'avoir fait D doit immédiatement verser à SP le prix d'achat en gros de l'automobile.

Dans cette hypothèse, il est clair que SP ne permet pas au débiteur d'utiliser le produit de la vente des biens de l'inventaire pour payer ses employés. En fait, SP a l'habitude de contrôler régulièrement les opérations du débiteur pour s'assurer que ce dernier ne «trahit pas sa confiance» en omettant de verser le produit de la vente.

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En résumé, le véritable critère pour déterminer si la permission de vendre les biens figurant dans un inventaire inclut le droit de payer les salaires doit donc être une question d'interprétation de l'arrangement contractuel intervenu entre les parties. L'attention ne doit pas tant porter sur les circonstances de la vente des biens de l'inventaire que sur l'utilisation permise du produit de la vente de ces biens. Comme dans l'exemple donné par le professeur Wood, lorsque la permission a une portée limitée, il se peut qu'elle n'inclue pas le droit d'utiliser le produit de la vente pour payer les salaires. Toutefois, l'expression de restrictions quant à l'utilisation du produit de la vente des biens figurant dans l'inventaire ne saurait prévaloir si l'arrangement entre les parties est de nature à

1997 CanLII 377 (SCC)

whether a licence to sell inventory includes permission to pay wages with the proceeds ("Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *supra*, at pp. 435-36):

This is not to say that the analysis should hinge on the existence of a trust proceeds clause or other contractual provision requiring the debtor to remit proceeds. A contractual provision of this type should not govern if the real arrangement between the parties is such that the debtor has the freedom to use the proceeds of inventory in the ordinary course of business.

. . .

To make any sense at all, the licence theory must, at the very least, be restricted to cases where the secured party permits the debtor to pay employees either out of its collateral or out of the proceeds of its collateral. This permission cannot be derived merely from the existence of a licence to sell inventory. The test should be whether the debtor had the freedom to use these funds in the ordinary course of business as opposed to being under an obligation to remit them to the secured party. [Emphasis added.]

76 In the case at bar, the GSA contained an express licence permitting Sparrow to sell inventory in the course of its business and use the proceeds available; the BAS contained an implied licence to this effect. While it is true that the GSA contained a trust proceeds clause, I find that this cannot have the effect of limiting the scope of the licence where the real arrangement between the parties was, as expressly stated, that Sparrow could use the proceeds of inventory in the course of its business. The bank in this case was not a small inventory financier who required Sparrow to immediately remit proceeds of inventory to it. To the contrary, the bank was a large scale lender who permitted Sparrow to use inventory sales to maintain the viability of its enterprise. For these reasons, applying Professor Wood's test, I find that under the licence to "sell ... inventory" "in the

permettre, en pratique, au débiteur d'utiliser le produit de cette vente dans le cours de ses affaires. À cet égard, je suis d'accord avec les commentaires du professeur Wood au sujet du critère approprié pour déterminer si la permission de vendre les biens d'un inventaire inclut la permission d'utiliser le produit de cette vente pour payer des salaires («Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*», *loc. cit.*, aux pp. 435 et 436):

[TRADUCTION] Cela ne veut pas dire que l'analyse devrait dépendre de l'existence d'une clause de produit en fiducie ou d'une autre disposition contractuelle exigeant que le débiteur verse ce produit. Une disposition contractuelle de ce type ne devrait pas s'appliquer si l'arrangement réel entre les parties est tel que le débiteur est libre d'utiliser le produit de la vente des biens de l'inventaire dans le cours normal des affaires.

. . .

Pour avoir du sens, la thèse de la permission doit, à tout le moins, se limiter aux cas où le créancier garanti permet au débiteur de payer les employés soit au moyen des biens donnés en garantie, soit au moyen du produit de la vente de ces biens. Cette permission ne peut pas simplement découler de l'existence d'une permission de vendre les biens de l'inventaire. Le critère devrait consister à déterminer si le débiteur était libre d'utiliser ces fonds dans le cours normal des affaires, au lieu d'être obligé de les verser au créancier garanti. [Je souligne.]

En l'espèce, la CGG accordait expressément à Sparrow la permission de vendre les biens de l'inventaire dans le cours de ses affaires et d'utiliser le produit dont elle disposerait; la GLB comportait implicitement la même permission. Bien qu'il soit vrai que la CGG comportait une clause de produit en fiducie, je considère que cela ne peut pas avoir pour effet de limiter la portée de la permission alors que l'arrangement réel intervenu entre les parties voulait, comme cela a été précisé, que Sparrow puisse utiliser le produit de la vente des biens de l'inventaire dans le cours de ses affaires. Dans cette affaire, la banque n'était pas un petit financier de biens d'inventaire, qui exigeait que Sparrow lui verse immédiatement le produit de la vente des biens de l'inventaire. Au contraire, la banque était un gros bailleur de fonds qui permettait à Sparrow d'utiliser le produit de la vente des biens

1997 CanLII 377 (SCC)

ordinary course of ... business" and "use [the] [m]oneys available" the bank permitted Sparrow to sell inventory to pay wages and, necessarily, payroll deduction obligations.

For all these reasons, through the application of the licence theory, it is my conclusion that the appellant's s. 227(5) deemed trust must take priority over the bank's security interests in the disputed collateral. The trust fund representing the deducted amounts, while without identified subject matter from the date of its inception, is capable of identifying property subject to that trust *ex post facto*. To reiterate, the bank consented to the reduction in its security in inventory in order to pay wage deductions at the time those deductions were made, and s. 227(5) *ITA* has the effect of carrying forward that consent to the time of receivership. By consenting to the payment of wages out of the proceeds of inventory during the course of Sparrow's business, the bank *ipso facto* consented to the statutory scheme under the *ITA* designed to cover unpaid wage deductions. In short, in the present case the licence to deal with inventory proceeds coupled with the statutory scheme in s. 227(4) and (5) *ITA* gives priority to Her Majesty's claims for statutory wage deductions. This result is obtained both in regard to the bank's GSA, and its BAS.

The respondent bank has submitted that this result is necessarily precluded with regard to their BAS by virtue of s. 428(1) of the *Bank Act*, which provides as follows:

428. (1) All the rights and powers of a bank in respect of the property mentioned in or covered by a warehouse receipt or bill of lading acquired and held by the bank, and the rights and powers of the bank in respect of the property covered by a security given to the bank under

de l'inventaire pour maintenir la viabilité de son entreprise. Pour ces motifs, appliquant le critère du professeur Wood, je conclus que, en vertu de la permission de «vendre [. . .] les biens figurant dans l'inventaire» «dans le cours normal de[s] affaires» et d'«utiliser les sommes d'argent dont [elle] dispose[rait]», la banque permettait à Sparrow de vendre les biens de l'inventaire pour payer des salaires et, nécessairement, pour verser des retenues sur la paye.

77 Pour tous ces motifs, en application de la thèse de la permission, je conclus que la fiducie réputée dont bénéficie l'appelante en vertu du par. 227(5) doit avoir priorité de rang sur les garanties que la banque détient sur les biens en litige donnés en garantie. Le fonds en fiducie constitué des retenues effectuées, bien que sans objet identifié au moment de sa constitution, est capable de viser après coup les biens faisant l'objet de cette fiducie. Encore une fois, la banque a consenti à la diminution de sa garantie sur les biens de l'inventaire pour payer les retenues sur la paye au moment où elles ont été effectuées, et le par. 227(5) *LIR* a pour effet de reporter ce consentement jusqu'au moment de la mise sous séquestre. En consentant à ce que Sparrow paie les salaires au moyen du produit de la vente des biens de l'inventaire dans le cours de ses affaires, la banque consentait par le fait même au régime légal de recouvrement des retenues sur la paye non versées, établi par la *LIR*. Bref, en l'espèce, la permission d'aliéner le produit de la vente des biens figurant dans l'inventaire, conjuguée au régime légal des par. 227(4) et (5) *LIR*, accorde priorité de rang aux demandes de Sa Majesté relatives aux retenues légales sur la paye. Cela vaut tant à l'égard de la CGG de la banque que de sa GLB.

78 La banque intimée a fait valoir que ce résultat est nécessairement écarté en ce qui concerne sa GLB, en raison du par. 428(1) de la *Loi sur les banques*, qui prévoit ceci:

428. (1) Tous les droits de la banque sur les biens mentionnés ou visés dans un récépissé d'entrepôt ou un connaissement qu'elle a acquis ou détient, ainsi que ses droits sur les biens affectés à une garantie reçue en vertu de l'article 427, et qui équivalent aux droits découlant

1997 CanLII 377 (SCC)

section 427 that are the same as if the bank had acquired a warehouse receipt or bill of lading in which that property was described, have, subject to subsection 427(4) and subsections (3) to (6) of this section, priority over all rights subsequently acquired in, on or in respect of that property, and also over the claim of any unpaid vendor. [Emphasis added.]

d'un récépissé d'entrepôt ou un connaissement visant ces biens priment, sous réserve du paragraphe 427(4) et des paragraphes (3) à (6) du présent article, tous les droits subséquemment acquis sur ces biens, ainsi que la créance de tout vendeur impayé. [Je souligne.]

I cannot agree with this submission. It is true that s. 428(1) secures the respondent bank's proprietary right to the disputed collateral. However, for the reasons I have expressed, the fact remains that the bank has consented to the divestment of this interest. Such a waiver of priority, in my view, renders s. 428(1) of no assistance to the respondent bank.

Je ne puis souscrire à cet argument. Il est vrai que le par. 428(1) garantit le droit de propriété de la banque intimée sur les biens en litige donnés en garantie. Toutefois, pour les motifs que j'ai exposés, il reste que la banque a accepté d'être dépouillée de ce droit. À mon avis, une telle renonciation à la priorité de rang fait en sorte que le par. 428(1) n'est d'aucun secours à la banque intimée.

1997 CanLII 377 (SCC)

79 I add as a final matter that in addition to providing certainty in disputes between consensual and non-consensual security interests, the licence theory has the virtue of achieving fairness in commercial law. Here, the respondent bank had permitted Sparrow to sell its inventory in the course of its business in order to, among other things, pay wages and wage deductions. To this extent, therefore, the bank permitted the reduction in the value of its security interest in Sparrow's inventory, during the ordinary course of Sparrow's business. Implicit in the bank's consent is the assumption that in so doing, Sparrow would generate profits from the conversion of inventory into revenues; this economic process, as I noted above, ensures that interest payments owing to the bank would be paid to them on a sustainable basis. In short, the bank benefitted in a general sense from Sparrow's carrying on its business operations, an endeavour which required Sparrow to pay wages and wage deductions. More specifically, however, when Sparrow stopped paying its wage deductions, as required, the bank could be said to benefit from the artificial increase in Sparrow's working capital, allowing an extension of the life of Sparrow's business.

J'ajoute, comme dernier point, qu'en plus d'offrir un élément de certitude dans les litiges opposant des garanties consensuelles et des garanties non consensuelles, la thèse de la permission permet d'assurer l'équité en droit commercial. En l'espèce, la banque intimée avait permis à Sparrow de vendre les biens de son inventaire dans le cours de ses affaires afin, notamment, de payer les salaires et les retenues sur la paye. Dans cette mesure, la banque a donc permis que la valeur de la garantie qu'elle détenait sur les biens de l'inventaire de Sparrow soit réduite dans le cours normal des affaires de cette dernière. Ce consentement reposait sur l'expectative implicite de la banque que Sparrow réaliserait des profits en convertissant des biens de son inventaire en recettes; ce processus économique, comme je l'ai déjà noté, garantissait que les paiements d'intérêts dus à la banque seraient effectués de façon continue. Bref, la banque profitait, d'une manière générale, de la poursuite des affaires de Sparrow qui obligeaient cette dernière à payer des salaires et des retenues sur la paye. Plus précisément, toutefois, lorsque Sparrow a cessé d'effectuer les versements requis des retenues sur la paye, on pouvait affirmer que la banque a profité de l'augmentation artificielle du fonds de roulement de Sparrow qui a permis à cette dernière de rester en affaires plus longtemps.

80 Now, when Sparrow's business is no longer a viable enterprise, the bank says that it is entitled to the very payments which allowed Sparrow, in part

Maintenant que Sparrow n'est plus une entreprise viable, la banque affirme qu'elle a droit aux sommes mêmes qui, du moins en partie, ont per-

at least, to stay in business longer than was legally economical. In essence, the bank is willing to accept the benefits of Sparrow's non-payment of statutory deductions, and can be said to have reasonably permitted the use of its collateral to pay these deductions at the time they should have lawfully been paid, but refuses to accept the burden of Sparrow's unlawful action at the time of its receivership. In my view, it should be the policy of the law that the respondent bank be held accountable for Sparrow's outstanding statutory obligations. The licence theory, as I have developed it, ensures that in appropriate circumstances this result will obtain. In this way, in my opinion the licence theory is grounded not only in legal principles, but also in sound policy.

mis à Sparrow de rester en affaires plus longtemps qu'il n'était économiquement possible de le faire sur le plan légal. La banque est essentiellement disposée à accepter les bénéfices du non-versement par Sparrow des retenues légales sur la paye, et l'on peut dire qu'elle a raisonnablement permis que les biens qui lui avaient été donnés en garantie soient utilisés pour verser ces retenues au moment où elles devaient l'être légalement, mais qu'elle refuse d'assumer le fardeau de l'acte illégal accompli par Sparrow au moment de sa mise sous séquestre. À mon avis, ce devrait être une politique de la loi que la banque intimée soit tenue responsable des obligations légales auxquelles Sparrow a manqué. La thèse de la permission, comme je l'ai expliqué, garantit ce résultat dans les circonstances appropriées. J'estime ainsi que la thèse de la permission repose non seulement sur des principes juridiques, mais aussi sur une politique saine.

1997 CanLII 377 (SCC)

81 Since writing the foregoing, I have had the benefit of reading the careful reasons of my colleague, Mr. Justice Iacobucci. With deference however, I do not share his views or his concerns.

Depuis que j'ai rédigé ce qui précède, j'ai pris connaissance des motifs soigneusement étayés de mon collègue le juge Iacobucci. En toute déférence, cependant, je ne partage ni son opinion ni ses préoccupations.

82 I note that Iacobucci J., in his reasons, has taken me to have adopted the licence theory in extremely broad terms. Specifically, when summarizing the conceptual basis of my reasoning, he states at para. 91:

> Consequently, says the [licence] theory, the bank's claim to the inventory must give way to any debts incurred in the ordinary course of business. [Emphasis added.]

Similarly, Iacobucci J. writes at para. 97:

> The satisfaction of any legitimate debt or obligation, whenever incurred, is arguably "in the ordinary course of business". Certainly, the payment of creditors is a permissible "use" of the proceeds of a sale of inventory. Following my colleague's reasoning, this would mean that every subsequent claim should prevail over the respondent's general security agreement, because every rival claim might have been satisfied out of the proceeds

Je remarque que le juge Iacobucci considère, dans ses motifs, que j'ai adopté la thèse de la permission de manière extrêmement générale. Plus précisément, lorsqu'il résume le fondement conceptuel de mon raisonnement, il affirme (au par. 91):

> Donc, selon cette thèse [de la permission], les droits que la banque peut faire valoir sur les biens figurant dans l'inventaire doivent céder le pas aux dettes contractées dans le cours normal des affaires. [Je souligne.]

De même, le juge Iacobucci écrit (au par. 97):

> On peut soutenir que c'est «dans le cours normal des affaires» que l'on s'acquitte d'une dette ou d'une obligation légitime, quel que soit le moment où elle a pris naissance. Le paiement des créanciers est sûrement une «utilis[ation]» permise du produit de la vente des biens figurant dans un inventaire. Selon le raisonnement de mon collègue, cela signifierait que toute créance ultérieure devrait avoir préséance sur la convention de garantie générale de l'intimée, parce qu'il se pourrait que chacune des créances concurrentes ait été acquittée

of a hypothetical sale of the inventory. [Emphasis added.]

83 With respect, as he acknowledges, my reasons do not go this far. It is not the consent to payment of wage deductions from the proceeds of inventory *simpliciter* which drives me to the conclusion that Her Majesty's interest must prevail. This is a necessary, but not sufficient, condition. In addition, however, what is significant to the outcome of this case is that the bank has consented to payment of wages including deductions, out of inventory which, at the time of the deductions, are by statute deemed to be taken out of the estate of the debtor (see ss. 153(3) and 227(4) *ITA*). Section 227(5) carries that consent forward to the time of liquidation, assignment, receivership or bankruptcy, to realize Her Majesty's claim out of the bank's inventory.

84 Therefore, the unique nature of the statutory provisions applicable to wage deductions, and the bank's consent thereto, are integral to the success of the s. 227(5) claim in the case at bar. In this way, the licence theory, as I have employed it, is circumscribed.

85 It must be stressed that the issue relates to wages actually paid to employees — not a simple obligation to pay wages — a portion of which has been deducted from the amount remitted to the employee and must be remitted to Her Majesty. Pending such remittance, the amount deducted is deemed under s. 227(4) to be held in trust for Her Majesty. By virtue of these *ITA* provisions, and unlike ordinary debts and obligations, unpaid wage deductions are, in law, performed obligations. The consent by the bank to the payment of wages out of the proceeds of the sale of inventory must be taken to cover the wages paid according to law including that portion which has been deducted from the remittance to the employee, pursuant to the *ITA*, in order that it be remitted to Her Majesty. While the value of the bank's security in the inventory may be thereby reduced, this is by virtue of specific statutory requirements under well-defined

sur le produit d'une vente hypothétique des biens figurant dans l'inventaire. [Je souligne.]

En toute déférence, comme il le reconnaît, mes motifs ne vont pas aussi loin. Ce n'est pas le consentement même au paiement de retenues sur la paye sur le produit des biens figurant dans l'inventaire qui m'amène à conclure que c'est l'intérêt de Sa Majesté qui doit prévaloir. C'est une condition nécessaire, mais non suffisante. De plus, cependant, ce qui est important pour l'issue du présent pourvoi, c'est que la banque a consenti au paiement de salaires comportant des retenues, sur des biens figurant dans l'inventaire qui, au moment des retenues, sont réputés par la loi être retranchés du patrimoine du débiteur (voir les par. 153(3) et 227(4) *LIR*). Le paragraphe 227(5) reporte ce consentement au moment de la liquidation, cession, mise sous séquestre ou faillite, de manière à réaliser la créance de Sa Majesté sur les biens figurant dans l'inventaire de la banque.

Par conséquent, la nature exceptionnelle des dispositions législatives applicables aux retenues sur la paye, et le consentement de la banque aux retenues, contribuent au succès de la demande fondée sur le par. 227(5) en l'espèce. De cette façon, la thèse de la permission, à laquelle j'ai eu recours, est circonscrite.

Il faut souligner que la question concerne les salaires réellement payés à des employés — non pas une simple obligation de payer des salaires — dont une partie a été déduite du montant versé à l'employé et doit être remise à Sa Majesté. Avant cette remise, le montant déduit est réputé, en vertu du par. 227(4), être détenu en fiducie pour Sa Majesté. En vertu de ces dispositions de la *LIR*, et contrairement aux dettes et obligations ordinaires, les retenues sur la paye non versées sont, en droit, des obligations exécutées. Le consentement de la banque au paiement des salaires sur le produit de la vente de biens figurant dans l'inventaire doit être considéré comme visant les salaires payés conformément à la loi, y compris la partie qui, conformément à la *LIR*, a été déduite du montant versé à l'employé, en vue d'être remise à Sa Majesté. Bien que la valeur de la garantie de la banque sur les biens figurant dans l'inventaire

rules limited in their application to actual payment of wages. These requirements are well known and are encompassed by the bank's consent to the payment of wages in the ordinary course of business and do not open the door to uncertainty as to the value of security. Any risk to the bank's security is part of the very risk involved in consenting to the payment of wages. This does not open the door to any uncertainty as to the value of the bank's security arising from unperformed obligations incurred by the debtor in the ordinary course of business.

puisse être ainsi réduite, cette possibilité découle d'exigences légales particulières qui reposent sur des règles bien définies dont l'application est limitée au paiement réel de salaires. Ces exigences sont bien connues et sont visées par le consentement de la banque au paiement de salaires dans le cours normal des affaires, et elles n'ouvrent pas la porte à l'incertitude quant à la valeur de la garantie. Tout risque auquel est exposée la garantie de la banque fait partie du risque même qu'entraîne le consentement au paiement de salaires. Cela n'ouvre la porte à aucune incertitude quant à la valeur de la garantie de la banque, qui résulterait de l'omission d'exécuter des obligations contractées par le débiteur dans le cours normal des affaires.

1997 CanLII 377 (SCC)

86

For these reasons, I cannot agree with the premise underlying Iacobucci J.'s reasons, namely, that the licence theory as I have employed it is inimical to the integrity of commercial law. It does not have the extensive application suggested by my colleague; it does not create uncertainty in commercial transactions. Instead, the licence theory operates narrowly, in conjunction with unique statutory provisions, so as to actualize legally performed obligations when they, in fact, exist.

Pour ces motifs, je ne peux pas accepter la prémisse sur laquelle reposent les motifs du juge Iacobucci, à savoir que la thèse de la permission, que j'ai utilisée, compromet l'intégrité du droit commercial. Elle n'a pas l'application étendue que décrit mon collègue; elle ne crée pas d'incertitude dans les opérations commerciales. Au contraire, la thèse de la permission s'applique de manière restreinte, de concert avec des dispositions législatives exceptionnelles, de façon à actualiser des obligations légalement exécutées lorsqu'elles existent réellement.

VI — Conclusion

87

It is possible to summarize my conclusions in this case into the following five propositions:

1. Priorities between statutory trusts and consensual security interests are resolved by determining which interest has an attached interest in the disputed collateral at the time the statutory trust becomes operative.
2. The s. 227(5) *ITA* deemed trust attaches to any property of the debtor which exists upon liquidation, assignment, bankruptcy or receivership.
3. For example, if deductions are made prior to the attachment of a fixed charge over collateral, the s. 227(5) deemed trust will engage to retroactively attach Her Majesty's beneficial interest to that collateral. The fixed charge over that collateral will thereafter be subject to Her

VI — Conclusion

Il est possible de résumer mes conclusions en l'espèce au moyen des cinq propositions suivantes:

1. On résout la question de la priorité de rang entre des fiducies légales et des garanties consensuelles en déterminant quel droit grève les biens en litige donnés en garantie, au moment où la fiducie légale devient opérante.
2. La fiducie réputée du par. 227(5) *LIR* grève tous les biens du débiteur qui existent au moment de la liquidation, cession, faillite ou mise sous séquestre.
3. Par exemple, si des retenues sont effectuées avant qu'un privilège fixe grève les biens donnés en garantie, la fiducie réputée du par. 227(5) fera en sorte que le droit que Sa Majesté possède à titre bénéficiaire grèvera rétroactivement ces biens. Le privilège fixe applicable à

Majesty's pre-existing claims for unremitted payroll deductions.

4. Otherwise, if a security interest is in the nature of a fixed and specific charge, that interest gives the holder legal title to the collateral, such that a subsequent competing statutory trust will not be able to attach its interest. In such a case, all the statutory trust can attach to is the equity of redemption in the collateral.

5. However, as an exception to propositions 2 and 4, where the holder of a fixed security interest permits the debtor to sell the collateral, this may provide an opportunity for the statutory trust to attach. Whether this actually occurs depends entirely on the facts of each case. The test is whether, at the time the deductions occurred, the debtor had the right to sell the collateral and use the proceeds to pay the obligation to which the statutory trust is related.

ces biens sera, par la suite, assujetti aux créances préexistantes de Sa Majesté relatives aux retenues sur la paye non versées.

4. Sous cette réserve, si une garantie tient d'un privilège fixe et spécifique, elle confère à son détenteur le droit de propriété sur les biens donnés en garantie, de sorte qu'une fiducie légale concurrente subséquente ne pourra pas s'y appliquer. Dans ce cas, tout ce que la fiducie légale peut grever est le droit de rachat que l'*equity* reconnaît relativement aux biens donnés en garantie.

5. Cependant, à titre d'exception aux deuxième et quatrième propositions, si le détenteur d'une garantie fixe permet au débiteur de vendre les biens donnés en garantie, cela peut donner ouverture à l'application de la fiducie légale. Cette éventualité dépend entièrement des faits de chaque affaire. Le critère applicable consiste à déterminer si, au moment où les retenues ont été effectuées, le débiteur avait le droit de vendre les biens donnés en garantie et d'utiliser le produit de cette vente pour exécuter l'obligation liée à la fiducie légale.

88 I have found that, on the facts of this case, the licence invoked to sell inventory included the permission to use its proceeds to pay wages or wage deductions. The test in proposition 5 has therefore been made out. Accordingly, I would allow the appeal with costs.

J'ai conclu que, d'après les faits de la présente affaire, la permission, qui a été invoquée, de vendre les biens de l'inventaire incluait la permission d'utiliser le produit de la vente pour payer des salaires ou verser des retenues sur la paye. On a donc satisfait au critère de la cinquième proposition. Par conséquent, je serais d'avis d'accueillir le pourvoi avec dépens.

The judgment of Sopinka, McLachlin, Iacobucci and Major JJ. was delivered by

Version française du jugement des juges Sopinka, McLachlin, Iacobucci et Major rendu par

89 IACOBUCCI J. — I have read the lucid reasons of my colleague, Justice Gonthier, and although I agree with much of his reasoning, I cannot, with respect, accept the conclusion that he reaches. In particular, I do not accept that the deemed trust that arises in favour of the Crown by operation of s. 227(4) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (hereinafter "*ITA*"), takes priority over the security interests that the respondent has under the *Bank Act*, S.C. 1991, c. 46, and the *Personal Property Security Act*, S.A. 1988, c. P-4.05 (here-

LE JUGE IACOBUCCI — J'ai pris connaissance des motifs limpides de mon collègue le juge Gonthier et, bien que je souscrive à la majeure partie de son raisonnement, je ne puis, en toute déférence, accepter la conclusion qu'il tire. En particulier, je n'accepte pas que la fiducie réputée, qui prend naissance en faveur de Sa Majesté en vertu du par. 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. (1985), ch. 1 (5e suppl.) (ci-après «*LIR*»), a priorité de rang sur les garanties ou sûretés que l'intimée possède en vertu de la *Loi sur les*

1997 CanLII 377 (SCC)

inafter "*PPSA*"). Even conceding that the latter interests are subject to a licence to sell, the licence is not nearly so broad as to encompass the satisfaction of income tax obligations. As I will discuss below, a licence to sell inventory authorizes at most only the satisfaction of obligations that are immediately incidental to an actual sale of the inventory.

banques, L.C. 1991, ch. 46, et de la *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (ci-après «*PPSA*»). Même en admettant que ces dernières garanties sont assujetties à une permission de vendre, cette permission est loin d'avoir une portée assez large pour englober l'exécution d'obligations fiscales. Comme nous le verrons plus loin, la permission de vendre des biens figurant dans un inventaire permet tout au plus d'exécuter les obligations directement rattachées à la vente réelle de ces biens.

1997 CanLII 377 (SCC)

90

Because my only disagreement with my colleague is in his application of the licence-to-sell approach to this case, I do not propose to discuss the facts or background that he has so ably described or to dwell on any other part of his reasons. I need not say anything more about the character of the respondent's security interests than that they are fixed and specific.

Vu que mon désaccord avec mon collègue ne concerne que l'utilisation qu'il fait, en l'espèce, de la méthode de la permission de vendre, je ne compte pas analyser les faits ou l'historique de l'affaire qu'il a si bien exposés, ni m'attarder à toute autre partie de ses motifs. Je n'ai pas à ajouter quoi que ce soit au sujet de la nature des garanties de l'intimée, si ce n'est qu'elles sont fixes et spécifiques.

91

My colleague disposes of this appeal on the basis of the so-called "licence theory". Briefly, the licence theory holds that a bank's security interest in a debtor's inventory, though it be fixed and specific, is subject nevertheless to a licence in the debtor to deal with that inventory in the ordinary course of business. Consequently, says the theory, the bank's claim to the inventory must give way to any debts incurred in the ordinary course of business. The leading articulation of the licence theory appears in McLachlin J.A.'s (as she then was) reasons in *R. in Right of B.C. v. F.B.D.B.*, [1988] 1 W.W.R. 1 (B.C.C.A.) (hereinafter "*FBDB*"), at p. 40.

Mon collègue statue sur le présent pourvoi en se fondant sur ce qu'on est convenu d'appeler la «thèse de la permission». En bref, cette thèse veut que, bien que la garantie qu'une banque possède sur les biens figurant dans l'inventaire d'un débiteur soit fixe et spécifique, elle soit néanmoins assujettie à la permission qu'a le débiteur d'aliéner ces biens dans le cours normal de ses affaires. Donc, selon cette thèse, les droits que la banque peut faire valoir sur les biens figurant dans l'inventaire doivent céder le pas aux dettes contractées dans le cours normal des affaires. La principale formulation de la thèse de la permission se trouve dans les motifs du juge McLachlin dans *R. in Right of B.C. c. F.B.D.B.*, [1988] 1 W.W.R. 1 (C.A.C.-B.) (ci-après «*FBDB*»), à la p. 40.

92

The theoretical basis of the licence theory seems to be that a creditor who has granted a licence to sell inventory has thereby consented to the subjection of his security interest to other obligations that may arise "in the ordinary course of business". My colleague says this in his reasons, at para. 68:

Le fondement théorique de cette thèse semble être qu'un créancier qui a accordé la permission de vendre les biens figurant dans un inventaire a, de ce fait, consenti à ce que sa garantie soit assujettie à d'autres obligations pouvant prendre naissance «dans le cours normal des affaires». Mon collègue écrit, au par. 68 de ses motifs:

In short, where the bank has consented to the reduction in the value of its security in order to pay statutory

Bref, dans le cas où la banque a consenti à la diminution de la valeur de sa garantie pour payer les retenues

deductions at the time those deductions are made, they have to the same extent, by virtue of s. 227(5) [*ITA*], consented to the reduction in their security at the time of receivership.

This is sensible, because it is only if the licence is understood as a kind of tacit lessening of the creditor's security interest that the appellant's cause is advanced. Certainly the actual operation of the licence is not relevant, because in this case the inventory in question was never actually sold pursuant to the licence. Rather, the receiver sold it by court order. If the licence is to have anything to do with the disposition of this appeal, it must be by virtue of the evidence it affords of the respondent's intention to take less than an entire security interest in the inventory.

93 In my view, the licence affords no such evidence. My colleague seems to think that the potential sale of the inventory amounts to an actual limitation of the security interest. For my part, I do not see what the one thing has to do with the other. There is a great difference between saying, on the one hand, that if a debtor sells inventory and applies the proceeds to a debt to a third party, then the third party takes the proceeds free of any security interest and saying, on the other hand, that because a third party could take the proceeds free of any security interest, no security interest exists in the proceeds as against that third party. A licence to sell inventory in the ordinary course of business is a condition of the former kind. The consequent (defeasance of the security interest) follows only if the antecedent (sale of the inventory and application of proceeds to an obligation to a third party) is satisfied. In other words, the security interest in the inventory disappears only if the debtor actually sells the inventory and applies the proceeds to a debt to a third party.

légales sur la paye au moment où elles seraient effectuées, elle a du même coup consenti, en vertu du par. 227(5) [*LIR*], à la réduction de sa garantie au moment de la mise sous séquestre.

Cela est sensé car seule la perception de la permission comme une sorte de réduction tacite de la garantie du créancier servira la cause de l'appelante. Certes, la question de la mise à exécution de la permission n'est pas pertinente étant donné qu'en l'espèce les biens figurant dans l'inventaire n'ont jamais été vendus conformément à la permission donnée. C'est plutôt le séquestre qui les a vendus conformément à une ordonnance judiciaire. Si la permission doit jouer un rôle dans la décision à rendre au sujet du présent pourvoi, ce doit être en raison de la preuve qu'elle fournit de l'intention de l'intimée d'accepter moins qu'une garantie intégrale sur les biens de l'inventaire.

À mon sens, la permission ne prouve rien de tel. Mon collègue semble croire que la vente potentielle des biens figurant dans l'inventaire équivaut à une restriction réelle de la garantie. Pour ma part, je ne vois aucun lien entre les deux. Il existe une différence considérable entre affirmer, d'une part, que si un débiteur vend des biens de son inventaire et en utilise le produit pour rembourser une dette envers un tiers, ce tiers accepte alors ce produit libre de toute garantie, et affirmer, d'autre part, que puisqu'un tiers pourrait accepter le produit de la vente libre de toute garantie, le produit n'est grevé d'aucune garantie opposable à ce tiers. La permission de vendre les biens figurant dans un inventaire dans le cours normal des affaires est une condition du premier genre. La conséquence (l'extinction de la garantie) ne s'ensuit que si la condition préalable (la vente des biens figurant dans l'inventaire et l'utilisation du produit en découlant pour exécuter une obligation envers un tiers) est remplie. Autrement dit, la garantie sur les biens figurant dans l'inventaire ne disparaît que si le débiteur vend réellement ces biens et utilise le produit de la vente pour rembourser une dette envers un tiers.

1997 CanLII 377 (SCC)

That this is so is suggested by s. 28(1) *PPSA*, which provides:

28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest

(a) continues in the collateral, unless the secured party expressly or impliedly authorized the dealing, and

(b) extends to the proceeds,

but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

In accordance with this provision, the result of a sale of inventory is to give the purchaser an unencumbered interest in the inventory and the licensor a continuing security interest in the proceeds of the sale. It is only if the debtor subsequently uses the proceeds to satisfy an obligation to a third party that the proceeds will be removed from the scope of the licensor's security interest in them. Accordingly, what a security agreement with a licence to sell creates is a defeasible interest; but the event of defeasance is the actual sale of the inventory and the actual application of the proceeds against an obligation to a third party.

I recognize that the operation of s. 28(1) *PPSA* is not necessarily inconsistent with the broad interpretation of the licence to sell that my colleague advances. However, it seems to me that this is an appropriate case for the invocation of the maxim *expressio unius est exclusio alterius*. The statute prescribes certain consequences for the security interest that follow a dealing with inventory. In particular, the statute contemplates defeasance of the interest if the debtor actually sells the inventory and applies the proceeds to an obligation to a third party. Significantly, the statute does not contemplate a defeasance on the happening of any other event. In my view, the statute occupies the field and crowds out other possible interpretations

94 C'est ce que laisse entendre le par. 28(1) *PPSA*, qui se lit ainsi:

[TRADUCTION]

28(1) Sous réserve des dispositions de la présente loi, la garantie sur des biens qui sont aliénés ou qui donnent par ailleurs lieu à un produit:

a) continue de grever les biens, sauf si le créancier garanti a expressément ou implicitement autorisé l'aliénation;

b) grève aussi le produit.

Cependant, lorsque le créancier garanti réalise une garantie sur les biens grevés et sur le produit, le montant visé par la garantie sur les biens et le produit se limite à la valeur marchande des biens grevés à la date de l'aliénation.

Conformément à cette disposition, la vente des biens figurant dans un inventaire a pour effet de conférer à l'acquéreur un droit libre de toute charge sur ces biens, et à la partie qui a donné la permission de vendre, une garantie permanente sur le produit de la vente. Ce n'est que si le débiteur utilise ensuite le produit pour s'acquitter d'une obligation envers un tiers que ce produit sera soustrait à la garantie que la partie qui a donné la permission de vendre possède sur celui-ci. Par conséquent, la convention de garantie assortie d'une permission de vendre crée un droit défectible, mais l'événement qui provoque l'extinction du droit est la vente réelle des biens figurant dans l'inventaire, suivie de l'utilisation réelle du produit en découlant pour exécuter une obligation envers un tiers.

95 Je reconnais que l'application du par. 28(1) *PPSA* n'est pas nécessairement incompatible avec l'interprétation large de la permission de vendre, que propose mon collègue. Il me semble toutefois qu'il convient, en l'espèce, d'invoquer la maxime *expressio unius est exclusio alterius*. La Loi prévoit que l'aliénation de biens figurant dans un inventaire a certaines conséquences sur la garantie. Elle prévoit, notamment, l'extinction de la garantie si le débiteur vend réellement ces biens et utilise le produit de la vente pour exécuter une obligation envers un tiers. Fait révélateur, la Loi ne prévoit pas d'autres événements susceptibles d'entraîner l'extinction. À mon avis, la Loi est exhaustive et exclut toute autre interprétation de la permission

1997 CanLII 377 (SCC)

of the licence, including the one that Gonthier J. favours.

96 Because in this case there was no actual sale of the inventory in question, let alone any disposition of the proceeds, the licence can have had no effect on the respondent's security interest. What the debtor might have done with the licence does not matter.

97 If it were otherwise, the licence to sell inventory would entirely eviscercate the respondent's general security agreement. The satisfaction of any legitimate debt or obligation, whenever incurred, is arguably "in the ordinary course of business". Certainly the payment of creditors is a permissible "use" of the proceeds of a sale of inventory. Following my colleague's reasoning, this would mean that every subsequent claim should prevail over the respondent's general security agreement, because every rival claim might have been satisfied out of the proceeds of a hypothetical sale of the inventory. Moreover, the priority rules of the *PPSA*, whose general policy is to assign priority to the earliest registered security interest, would be turned on their head. Presuming that every charge against inventory is subject to a licence to sell — a presumption that accords with the interest of creditors in ensuring the debtor's continued vitality — the last security interest would take priority over all earlier ones, because only the last interest would not be subject to some charge arising in the ordinary course of business. In answer to this objection, it might be said that as between two *PPSA* securities, the rules in the Act should be applied to determine priority. However, such an answer would not be consistent with the licence theory, which supposes that the original security interest in the inventory ends where obligations incurred in the ordinary course of business begin. The subsequent interest would prevail because the earlier interest would disappear before it.

de vendre, y compris celle que préconise le juge Gonthier.

Vu qu'il n'y a eu, en l'espèce, aucune vente des biens figurant dans l'inventaire en question, et encore moins utilisation du produit, la permission n'a pu avoir aucun effet sur la garantie de l'intimée. Il n'importe pas de savoir ce que le débiteur aurait pu faire de la permission.

S'il en était autrement, la permission de vendre les biens d'un inventaire ferait perdre tout son sens à la convention de garantie générale de l'intimée. On peut soutenir que c'est «dans le cours normal des affaires» que l'on s'acquitte d'une dette ou d'une obligation légitime, quel que soit le moment où elle a pris naissance. Le paiement des créanciers est sûrement une «utilisation» permise du produit de la vente des biens figurant dans un inventaire. Selon le raisonnement de mon collègue, cela signifierait que toute créance ultérieure devrait avoir préséance sur la convention de garantie générale de l'intimée, parce qu'il se pourrait que chacune des créances concurrentes ait été acquittée sur le produit d'une vente hypothétique des biens figurant dans l'inventaire. De plus, il y aurait renversement des règles en matière de priorité établies par la *PPSA*, qui a pour politique générale d'accorder la priorité à la première garantie enregistrée. À supposer que tout privilège grevant les biens figurant dans un inventaire soit assujetti à une permission de vendre — une hypothèse compatible avec le droit des créanciers de veiller au maintien de la vitalité de leurs débiteurs —, la dernière garantie aurait priorité sur toutes les garanties antérieures parce que seule la dernière ne serait pas assujettie à un privilège qui prend naissance dans le cours normal des affaires. On pourrait répondre à cette objection que les règles de la *PPSA* devraient s'appliquer pour déterminer laquelle de deux garanties consenties en vertu de cette loi a priorité de rang. Toutefois, cette réponse ne serait pas compatible avec la thèse de la permission, qui suppose que la garantie initiale sur les biens figurant dans un inventaire prend fin là où commencent des obligations contractées dans le cours normal des affaires. La garantie subséquente l'emporterait parce que la précédente s'effacerait devant elle.

1997 CanLII 377 (SCC)

It is open to my colleague to distinguish the fact situation in this appeal from the hypothetical priority contests I have mentioned on the ground that the Crown's interest in the inventory is unlike other charges against inventory in that it depends on the fictional device of deeming. What makes this case different, it might be said, is that the *ITA* deems to have been done what could have been done. On this understanding, it does not matter that the inventory was not actually sold and the proceeds were not actually remitted to the Receiver General, because s. 227(4) and (5) *ITA* deem these things to have been done. But in my view, this answer cannot succeed because the inventory was not an unencumbered asset at the moment the taxes came due. It was subject to the respondent's security interest and therefore was legally the respondent's and not attachable by the deemed trust. As Gonthier J. himself says (at para. 39):

> ... [s. 227(4)] does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor.

The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is <u>first</u> determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer.

Indeed, Gonthier J. does seize on the peculiar nature of the deemed trust as a possible ground for distinguishing the Crown's interest from rival interests. However, his argument differs from the one I have outlined to the extent that it emphasizes

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Il est loisible à mon collègue de distinguer la situation de fait en l'espèce d'avec les luttes hypothétiques pour obtenir la priorité de rang, que j'ai mentionnées, parce que le droit que Sa Majesté possède sur les biens figurant dans l'inventaire diffère des autres privilèges dont ils sont grevés du fait qu'il repose sur l'instrument fictif de la présomption. Ce qui distingue la présente affaire, pourrait-on affirmer, est le fait que la *LIR* présume que ce qui aurait pu être accompli a été accompli. Suivant cette interprétation, il importe peu, que les biens figurant dans l'inventaire n'aient pas été réellement vendus et que le produit n'ait pas été réellement versé au receveur général, parce que les par. 227(4) et (5) *LIR* présument que ces actes ont été accomplis. Mais à mon avis, cette réponse ne saurait être retenue parce que les biens figurant dans l'inventaire n'étaient pas un actif libre de toute charge au moment où l'impôt est devenu exigible. Ils étaient assujettis à la garantie de l'intimée et appartenaient donc légalement à cette dernière et ne pouvaient être visés par la fiducie réputée. Comme le juge Gonthier le dit lui-même (au par. 39):

> ... [le paragraphe 227(4)] ne permet pas à Sa Majesté de faire valoir son droit à titre bénéficiaire sur un bien qui, au moment de la liquidation, cession, mise sous séquestre ou faillite, appartient à quelqu'un d'autre que le débiteur fiscal.

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La présomption n'est donc pas un moyen de supprimer une garantie existante. Elle permet plutôt de retourner en arrière pour chercher un élément d'actif qui, au moment où l'impôt est devenu exigible, n'était pas assujetti à une garantie opposée. Bref, la disposition en matière de fiducie réputée ne peut s'appliquer que s'il est <u>préalablement</u> déterminé qu'il existe des éléments d'actifs libres de toute charge qui peuvent faire l'objet d'une fiducie réputée. La présomption suit la réponse à la question de la garantie mobilière; elle ne détermine pas cette réponse.

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En fait, le juge Gonthier considère que la nature particulière de la fiducie réputée peut justifier l'établissement d'une distinction entre le droit de Sa Majesté et les droits opposés. Toutefois, son argument diffère de celui que j'ai exposé dans la

1997 CanLII 377 (SCC)

the deemed performance of the obligation to the Crown. It appears to be my colleague's position that the licence to sell represents a reduction in the value of the security interest only with respect to performed obligations but not with respect to unperformed ones. In his view, this represents a sufficient check on the licence theory. I agree that, if the distinction between performed and unperformed obligations were maintainable, then the likelihood of the licence consuming the security interest would be greatly reduced. However, in my view, the distinction cannot be maintained. As Gonthier J. says more than once in his reasons, the licence theory rests on the consent of the parties. But the parties to this case consented to the sale of inventory "in the ordinary course of Debtor's business". The language is unqualified. No distinction is drawn between performed and unperformed obligations. The only performance that is contemplated in the licence is the actual sale of the inventory and the application of the proceeds to a debt. And, as I have already argued, the deeming mechanism does not furnish the needed actual sale. Accordingly, I conclude that if the words of the licence are to be given their due as an *indicium* of the parties' intent, then there can be no distinction between performed and unperformed obligations.

mesure où il met l'accent sur l'exécution réputée de l'obligation qui existe envers Sa Majesté. Mon collègue semble considérer que la permission de vendre ne contribue à réduire la valeur de la garantie qu'à l'égard des obligations exécutées et non à l'égard des obligations inexécutées. À son avis, cela représente un obstacle suffisant à la thèse de la permission. Je conviens que, si la distinction entre les obligations exécutées et les obligations inexécutées pouvait être maintenue, la probabilité que la permission anéantisse la garantie serait alors considérablement réduite. J'estime cependant que cette distinction ne saurait être maintenue. Comme le juge Gonthier l'affirme à plus d'une reprise dans ses motifs, la thèse de la permission repose sur le consentement des parties. Toutefois, les parties en l'espèce ont consenti à ce que les biens figurant dans l'inventaire soient vendus [TRADUCTION] «dans le cours normal de[s] affaires [du débiteur]». Les termes utilisés sont formels. Aucune distinction n'est établie entre les obligations exécutées et les obligations inexécutées. La seule exécution prévue par la permission est la vente réelle des biens figurant dans l'inventaire et l'utilisation du produit de cette vente pour rembourser une dette. Comme je l'ai déjà affirmé, le mécanisme de la présomption ne satisfait pas à l'exigence de vente réelle. Je conclus donc que si l'on veut rendre justice au libellé de la permission en tant qu'indice de l'intention des parties, il ne saurait y avoir de distinction entre les obligations exécutées et les obligations inexécutées.

1997 CanLII 377 (SCC)

101 My colleague places great emphasis on the fact that the debtor covenanted, in the general security agreement, "to pay all taxes, rates, levies, assessments and other charges of every nature which may be lawfully levied, assessed or imposed against or in respect of Debtor or Collateral as and when the same become due and payable". But this covenant is not part of the licence. And in any event, it is merely a covenant to obey the law. It adds nothing to s. 153(1) *ITA*. Furthermore, it does not prescribe the outcome of a priority contest. What is more, the covenant to pay taxes is only one of several in the agreement. Another covenant provides that the debtor shall "carry on and conduct the business of Debtor in a proper and effi-

Mon collègue attache beaucoup d'importance au fait que le débiteur s'est engagé, dans la convention de garantie générale, à [TRADUCTION] «payer tous les impôts, tarifs, redevances, cotisations et autres sommes de toute nature qui peuvent être légalement perçues, cotisées ou imposées à l'égard du débiteur ou d'un bien donné en garantie, lorsque ces sommes sont dues et exigibles». Toutefois, cet engagement qui, du reste, n'est qu'un engagement à respecter la loi, ne fait pas partie de la permission donnée. Il n'ajoute rien au par. 153(1) *LIR*. Il ne prescrit pas non plus l'issue d'une lutte pour obtenir la priorité de rang. Qui plus est, l'engagement à payer des impôts n'est qu'un seul parmi plusieurs engagements contenus dans la con-

cient manner". Presumably the debtor might incur subsequent debts in the course of carrying on and conducting its business. Gonthier J. advances no principle that might permit the settlement of priority disputes as between the Crown and subsequent lenders. In the event of a dispute, both would have the benefit of the licence to sell inventory and of express covenants, so that some other criterion would have to be found to determine which takes priority. Here, as before, the prospect of a reversal of the ordinary priority rules is immediate and troubling.

vention. Un autre engagement veut que le débiteur [TRADUCTION] «exploite [son] entreprise [. . .] d'une manière appropriée et efficiente». Le débiteur pourrait vraisemblablement contracter des dettes subséquentes en exploitant son entreprise. Le juge Gonthier n'énonce aucun principe qui pourrait permettre de régler les luttes que Sa Majesté et des prêteurs subséquents se feraient pour obtenir la priorité de rang. En cas de conflit, chacun d'eux bénéficierait de la permission de vendre les biens figurant dans l'inventaire ainsi que d'engagements explicites, de sorte qu'il faudrait trouver un autre critère pour déterminer qui a priorité. Ici, comme auparavant, la perspective d'un renversement des règles ordinaires en matière de priorité est immédiate et inquiétante.

1997 CanLII 377 (SCC)

102

My colleague also relies on comments made in *FBDB*. In that case, the British Columbia Court of Appeal said, after having disposed of the appeal on another ground, that a licence to sell inventory carries with it a requirement that the licencee should satisfy obligations incurred in "dealing with the stock in the ordinary course of business": *FBDB*, *supra*, at p. 40. Because the obligation to set aside provincial sales taxes is a "legal incident" of the sale of inventory, a lien for unpaid sales taxes comes within the scope of the licence and so is excepted from any security interest that is subject to it: *idem*.

Mon collègue s'appuie également sur des commentaires formulés dans l'arrêt *FBDB*. Dans cette affaire, la Cour d'appel de la Colombie-Britannique a affirmé, après s'être fondée sur un autre motif pour statuer sur l'appel, qu'une permission de vendre les biens figurant dans un inventaire est assortie de l'exigence que le bénéficiaire de l'autorisation s'acquitte des obligations contractées en [TRADUCTION] «aliénant les stocks dans le cours normal des affaires»: *FBDB*, précité, à la p. 40. Parce que l'obligation de mettre de côté le montant de la taxe de vente provinciale constitue une «particularité juridique» de la vente de biens figurant dans un inventaire, un privilège pour taxe de vente impayée est visé par la permission et, partant, exempté de toute garantie qui y est assujettie: *idem*.

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As I understand the comments in *FBDB*, a licence to sell inventory permits the satisfaction of obligations out of the proceeds only to the extent of the "legal incidents" of the sale. In itself, this greatly limits the scope of the theory. Because the payment of wages, except perhaps to the sales agent, is not a "legal incident" of the sale of inventory, deduction of income taxes from wages does not come within the scope of the licence. This

Si je comprends bien les commentaires formulés dans *FBDB*, la permission de vendre les biens figurant dans un inventaire autorise l'exécution d'obligations sur le produit de cette vente dans la mesure seulement où celles-ci constituent des «particularités juridiques» de la vente. La portée de la thèse de la permission de vendre s'en trouve donc considérablement limitée. Étant donné que le versement d'un salaire n'est pas une «particularité juridique» de la vente de biens figurant dans un inventaire, sauf peut-être pour les agents de vente, la retenue d'impôt sur le revenu effectuée sur un salaire n'est pas visée par la permission. Ce facteur

alone would appear sufficient to distinguish *FBDB* from the instant appeal.

paraîtrait, à lui seul, suffisant pour distinguer l'affaire *FBDB* d'avec le présent pourvoi.

104 However, I think that on closer examination it turns out that *FBDB* does not even depend on a licence theory, or at least does not depend on a licence theory of the kind advanced by my colleague. I say this because his reasons posit a charge that arises against the value of the inventory as a result of the operation of the licence. But the sales taxes that were at issue in *FBDB* were not against the value of the inventory. Rather, they were superadded to the underlying value, which is to say that they were calculated on the basis of the sale price of the inventory. Thus, the sales taxes that attend a sale of inventory represent something over and above the value of the inventory. Because a bank's charge is against the inventory, it does not extend so far as the sales taxes generated by a sale of inventory. But income taxes are not like sales taxes in that they are not as directly related to sales of inventory as sales taxes are. To the extent that income taxes have anything to do with the proceeds of a sale of inventory, they are payable out of the monies received for the value of the inventory. A bank's charge against the inventory is therefore adequate to defeat subsequent claims for the payment of income taxes. For this reason, McLachlin J.'s reasoning in *FBDB* is not contrary to what I am advancing herein.

Je crois cependant qu'un examen plus approfondi de l'arrêt *FBDB* permet de constater qu'il ne repose même pas sur une thèse de la permission, ou du moins pas sur une thèse de la permission comme celle avancée par mon collègue. J'affirme cela parce qu'il envisage, dans ses motifs, un privilège grevant la valeur des biens qui figurent dans l'inventaire par suite de la mise à exécution de la permission. Mais la taxe de vente qui était en cause dans *FBDB* ne grevait pas la valeur des biens figurant dans l'inventaire. Elle était plutôt surajoutée à la valeur sous-jacente, en ce sens qu'elle était calculée à partir du prix de vente de ces biens. Ainsi, la taxe de vente applicable à la vente des biens figurant dans un inventaire est quelque chose qui s'ajoute à la valeur de ces biens. Parce que le privilège d'une banque grève les biens figurant dans un inventaire, il n'a pas une portée aussi large que la taxe de vente générée par la vente de ces biens. Toutefois, l'impôt sur le revenu diffère de la taxe de vente du fait qu'il n'est pas lié aussi directement à la vente des biens figurant dans un inventaire que l'est la taxe de vente. Dans la mesure où il existe un lien entre l'impôt sur le revenu et le produit de la vente des biens figurant dans un inventaire, l'impôt est payable sur les sommes équivalant à la valeur de ces biens qui ont été vendus. Le privilège d'une banque sur les biens figurant dans un inventaire est donc suffisant pour faire échouer les réclamations subséquentes au titre de l'impôt sur le revenu. C'est pourquoi le raisonnement du juge McLachlin dans *FBDB* n'est pas contraire à ce que j'avance ici.

1997 CanLII 377 (SCC)

105 I should also mention that in 1988, when the *FBDB* case was decided, British Columbia's *Personal Property Security Act*, S.B.C. 1989, c. 36, was not in force. As a consequence, the British Columbia Court of Appeal did not have to contend with the legislative considerations that we face in this appeal. In particular, there was at the time no equivalent in British Columbia law to s. 28(1) of Alberta's *PPSA*. The Court of Appeal therefore had greater latitude than we have to interpret a licence to sell as a tacit consent to a reduction of

Je tiens également à mentionner que, lorsque l'arrêt *FBDB* a été rendu en 1988, la *Personal Property Security Act* de la Colombie-Britannique, S.B.C. 1989, ch. 36, n'était pas en vigueur. La Cour d'appel de la Colombie-Britannique n'est donc pas aux prises avec les facteurs législatifs auxquels nous devons faire face en l'espèce. En particulier, les lois de la Colombie-Britannique ne comportaient, à l'époque, aucune disposition équivalente au par. 28(1) de la *PPSA* de l'Alberta. La Cour d'appel jouissait donc d'une plus grande

the security interest in the inventory. It seems to me that as a result of the enactment of the *PPSA*, something more than an unadorned licence to sell is needed to justify the conclusion that a creditor intended to abridge considerably its security interest in inventory.

And so I conclude that the licence to sell inventory is not an exception to the respondent's fixed and specific charge against the debtor's inventory. To hold otherwise would be to eviscerate the respondent's security interest. This is not to say, however, that Parliament could not legislate otherwise. Parliament has shown that it knows how to assert priority over rival security interests. See *Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R.*, [1996] 1 S.C.R. 963, at p. 975. All that is needed to overtake a fixed and specific charge is clear language to that effect.

Though I consider the above legal arguments sufficient to dispose of this appeal, I observe that policy considerations also tell in favour of the conclusion I have reached.

In this respect, the first thing to notice is that the security agreement that the debtor and the respondent had in this case is an example of a very common and important financing device. To a considerable extent, commerce in our country depends on the vitality of such agreements. As several leading academics have observed, the amounts at stake run into the billions of dollars each year. And though not every creditor seeks security, the incentives to do so are powerful. See Jacob S. Ziegel, Benjamin Geva and R. C. C. Cuming, *Commercial and Consumer Transactions* (Rev. 2nd ed. 1990), at pp. 957-60. Accordingly, tinkering with security interests is a dangerous business. The risks of judicial innovation in this neighbourhood of the law are considerable.

lattitude que nous pour interpréter la permission de vendre comme un consentement tacite à la réduction de la garantie sur les biens figurant dans l'inventaire. Il me semble que, par suite de l'adoption de la *PPSA*, il faut plus qu'une simple permission de vendre pour justifier la conclusion qu'un créancier a voulu réduire considérablement la garantie qu'il possède sur les biens figurant dans un inventaire.

106 C'est ainsi que je conclus que la permission de vendre les biens figurant dans l'inventaire du débiteur n'est pas une exception au privilège fixe et spécifique que l'intimée détient sur ces biens. Conclure le contraire ferait perdre tout son sens à la garantie de l'intimée. Cela ne veut pas dire, toutefois, que le législateur fédéral ne pourrait pas légiférer autrement. Celui-ci a montré qu'il sait comment revendiquer la priorité de rang sur des garanties opposées. Voir *Alberta (Treasury Branches) c. M.R.N.; Banque Toronto-Dominion c. M.R.N.*, [1996] 1 R.C.S. 963, à la p. 975. Tout ce qui est nécessaire pour devancer un privilège fixe et spécifique est un langage clair en ce sens.

107 Bien que je considère que les arguments juridiques susmentionnés sont suffisants pour trancher le présent pourvoi, je constate que des considérations de principe militent également en faveur de la conclusion à laquelle je suis parvenu.

108 À cet égard, la première chose à noter est que la convention de garantie liant le débiteur et l'intimée en l'espèce est un exemple de mécanisme de financement très courant et important. Le commerce, dans notre pays, dépend en grande partie de la vitalité de ces conventions. Comme plusieurs auteurs importants l'ont fait remarquer, les sommes en jeu s'élèvent à des milliards de dollars chaque année, et même si les créanciers ne demandent pas tous des garanties, des facteurs puissants les incitent à le faire. Voir Jacob S. Ziegel, Benjamin Geva et R. C. C. Cuming, *Commercial and Consumer Transactions* (2e éd. rév. 1990), aux pp. 957 à 960. Il est donc dangereux de remanier des garanties. L'innovation judiciaire dans ce domaine du droit comporte des risques considérables.

1997 CanLII 377 (SCC)

109 Chief among these is the risk that attends legal uncertainty. If the legal rule is not clear, then inventory financiers will have to provide against the risk that their security interest might be defeated by some rival claim. The danger is particularly acute where as here, the language is as broad as "in the ordinary course of business". In this regard, I agree with what Professor Roderick J. Wood said in his article ("Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*" (1995), 10 *B.F.L.R.* 429, at p. 429) that my colleague cites:

> . . . there is little controversy with the proposition that a priority rule should be capable of producing reasonably predictable results. An unclear priority rule imposes a number of social costs. It means that creditors must plan their affairs against less certain outcomes. Uncertain rules generate more litigation than clear rules. Over time an uncertain rule is sometimes transformed into a clear rule through the process of judicial interpretation. However, this is a piecemeal approach which often occurs at a glacial pace.

Parmi ceux-ci, le plus important est le risque qui découle de l'incertitude juridique. Si la règle de droit n'est pas claire, les financiers de biens figurant dans un inventaire devront se prémunir contre le risque qu'une réclamation opposée fasse obstacle à leur garantie. Le danger est d'autant plus grave lorsque, comme c'est le cas en l'espèce, on utilise une expression aussi générale que «dans le cours normal des affaires». À cet égard, je souscris aux propos que le professeur Roderick J. Wood tient dans son article intitulé «Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*» (1995), 10 *B.F.L.R.* 429, à la p. 429, que mentionne mon collègue:

> [TRADUCTION] . . . la proposition selon laquelle une règle en matière de priorité doit être susceptible de produire des résultats raisonnablement prévisibles est peu controversée. Une règle obscure en matière de priorité engendre un certain nombre de coûts sociaux. Elle force les créanciers à planifier leurs affaires en fonction de résultats moins sûrs. Les règles obscures génèrent plus de litiges que les règles claires. Une règle obscure finit parfois par devenir une règle claire grâce au processus d'interprétation judiciaire. Cependant, il s'agit là d'un processus fragmentaire qui est souvent très lent.

110 Indeed, the consequences of my colleague's approach might be more dire than even Professor Wood supposes. For, as I have observed, almost any subsequent financial arrangement might be in the ordinary course of business. Accordingly, the possibility is real that my colleague's proposed rule would effectively obliterate the *PPSA* charge against inventory. As insurance against this outcome, the costs of financing would presumably increase. I agree that if Parliament mandated this outcome, the courts must perforce accept it. However, judges should not rush to embrace such a weighty consequence unless the statutory language requiring them to do so is unequivocal.

En fait, les conséquences de la méthode adoptée par mon collègue pourraient être encore plus terribles que ne le suppose le professeur Wood, du fait que, comme je l'ai signalé, presque tous les arrangements financiers subséquents pourraient être pris dans le cours normal des affaires. Il se peut donc réellement que la règle proposée par mon collègue réduise à néant le privilège constitué, en vertu de la *PPSA* sur les biens figurant dans un inventaire. Il faudrait probablement augmenter les coûts du financement pour se prémunir contre ce résultat. Je conviens que si le législateur prescrivait un tel résultat, les tribunaux devraient forcément l'accepter. Cependant, les juges ne devraient pas s'empresser de souscrire à une conséquence aussi grave à moins que le législateur ne les oblige clairement à le faire.

111 Moreover, and for reasons I have already given, there is every likelihood that a broad interpretation of the licence theory would do violence to the *PPSA*. The Act clearly contemplates that inventory

De plus, pour les raisons que j'ai déjà exposées, il est fort probable qu'une interprétation large de la thèse de la permission contreviendrait à la *PPSA*. La Loi prévoit clairement que le financement des

1997 CanLII 377 (SCC)

financing will be an important commercial device. But allowing the mere potential operation of a licence to sell to defeat a security interest in inventory would deprive the interest of all efficacy. It would not be any sort of security against subsequent obligations.

Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation.

It remains to make a few remarks by way of conclusion. Because I believe that the respondent's general security agreement gave it a fixed and specific charge against the debtor's inventory, and because I conclude that the licence to sell that inventory does not derogate from the respondent's security interest, I conclude that this appeal should be dismissed. I do not need to decide whether the *Bank Act* security would have priority over the deemed trust as well; though given that the licence to sell inventory under the *Bank Act* security is only implied, I do not see how the Crown could have a greater claim under the *Bank Act* than it has under the *PPSA*.

Therefore I would dismiss the appeal with costs.

Appeal dismissed with costs, LA FOREST, GONTHIER *and* CORY JJ. *dissenting.*

biens figurant dans un inventaire est un outil commercial important. Toutefois, permettre que la simple mise à exécution potentielle d'une permission de vendre fasse obstacle à une garantie sur les biens figurant dans un inventaire dépouillerait cette garantie de toute efficacité. Ce ne serait plus une garantie contre des obligations subséquentes.

112 Finalement, je tiens à souligner qu'il est loisible au législateur d'intervenir et d'accorder la priorité absolue à la fiducie réputée. Le paragraphe 224(1.2) *LIR* illustre clairement comment cela pourrait se faire. Cette disposition attribue à Sa Majesté certaines sommes «malgré toute autre garantie au titre de ce[s] somme[s]», et prévoit qu'elles «doi[vent] être payée[s] au receveur général par priorité sur toute autre garantie au titre de ce[s] somme[s]». Pour obtenir le résultat souhaité, il suffit d'utiliser des termes aussi clairs. En l'absence de pareils termes, l'innovation judiciaire n'est pas souhaitable parce qu'il s'agit d'une question qui regorge de considérations de principe et parce qu'une prescription du législateur est plus susceptible d'être claire qu'une règle dont les limites précises ne seront établies que par suite d'une longue et coûteuse série de poursuites.

113 Il reste à formuler quelques remarques en guise de conclusion. Parce que je crois que la convention de garantie générale de l'intimée lui a conféré un privilège fixe et spécifique sur les biens figurant dans l'inventaire du débiteur, et parce que je conclus que la permission de vendre ces biens ne diminue pas la garantie de l'intimée, je suis d'avis qu'il y a lieu de rejeter le présent pourvoi. Je n'ai pas à décider si la garantie de la *Loi sur les banques* aurait aussi priorité sur la fiducie réputée, même si, compte tenu du fait que la permission de vendre des biens figurant dans l'inventaire, sous le régime de cette dernière garantie, n'est qu'implicite, je ne vois pas comment Sa Majesté pourrait détenir un droit plus important en vertu de la *Loi sur les banques* qu'en vertu de la *PPSA*.

114 Par conséquent, je rejetterais le pourvoi avec dépens.

Pourvoi rejeté avec dépens, les juges LA FOREST, GONTHIER *et* CORY *sont dissidents.*

1997 CanLII 377 (SCC)

Solicitor for the appellant: The Attorney General of Canada, Ottawa.

Solicitors for the respondent: Milner, Fenerty, Edmonton.

Procureur de l'appelante: Le procureur général du Canada, Ottawa.

Procureurs de l'intimée: Milner, Fenerty, Edmonton.

1997 CanLII 377 (SCC)

Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley *Appellants*

v.

Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans *Respondents*

and between

Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans *Appellants*

v.

Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley *Respondents*

INDEXED AS: SCHMIDT *v.* AIR PRODUCTS CANADA LTD.

File Nos.: 23047, 23057.

1993: December 1; 1994: June 9.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Pensions — Trusts — Contracts — Pension fund — Surplus — Entitlement to surplus in defined benefit pension plans — One plan incorporating a trust fund and not contemplating the reversion of surplus assets to the company — Second plan originally defined contribution plan but converted to defined benefit plan — Second plan making no reference to the existence of a trust and specifically contemplating the reversion of surplus assets to the company — Whether employer entitled to surplus — Whether employer entitled to contribution holiday in situation where pension fund in surplus — Employment Pension Plans Act, S.A. 1986, c. E-10.05, ss. 42(2), 58(a), (b), (c) — Regulations to the Employ-

Air Products Canada Ltd., William M. Mercer Limited, La Confédération, Compagnie d'assurance-vie et T. J. Westley *Appelants*

c.

Gunter Schmidt personnellement et pour le compte des bénéficiaires des régimes de retraite de Stearns Catalytic Ltd. *Intimés*

et entre

Gunter Schmidt personnellement et pour le compte des bénéficiaires des régimes de retraite de Stearns Catalytic Ltd. *Appelants*

c.

Air Products Canada Ltd., William M. Mercer Limited, La Confédération, Compagnie d'assurance-vie et T. J. Westley *Intimés*

RÉPERTORIÉ: SCHMIDT *c.* AIR PRODUCTS CANADA LTD.

Nos du greffe: 23047, 23057.

1993: 1er décembre; 1994: 9 juin.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Pensions — Fiducies — Contrats — Caisse de retraite — Surplus — Droit au surplus accumulé dans les régimes à prestations déterminées — Régime comportant une caisse en fiducie et ne prévoyant pas la remise de l'actif excédentaire à la compagnie — Second régime étant au départ un régime à cotisations déterminées, mais converti en un régime à prestations déterminées — Second régime ne faisant aucune mention de l'existence d'une fiducie et prévoyant expressément la remise de l'actif excédentaire à la compagnie — L'employeur a-t-il droit au surplus? — L'employeur a-t-il droit à une période d'exonération de cotisations lorsque la caisse de retraite accuse un surplus? — Employment

1994 CanLII 104 (SCC)

ment Pension Plans Act, Alta. Reg. 364/86, s. 34(9)(b)(i), (ii), (iii), (iv).

Stearns-Roger Canada Ltd. (Stearns) and Catalytic Enterprises Ltd. (Catalytic) merged and eventually became Air Products Canada Ltd. Both companies had defined benefit pension plans for their employees, and both plans were in surplus. Their pension plans and funds were amalgamated and evolved into two virtually identical Air Products Plans, one of which forms the subject of the appeal and cross-appeal; the senior management plan will be affected by the result.

In 1959, Catalytic instituted a contributory money-purchase plan incorporating a trust fund administered by a trustee. By 1966, the plan had been amended to become a contributory defined benefits plan. No provision existed as to the treatment of surplus funds until the plan was further amended in 1978 to give the employer a purported discretion as to the distribution of any surplus which might remain upon the termination of the pension plan.

The first Stearns plan, created in 1970, was a contributory defined benefits plan until 1977, when it was amended to provide that employee contributions were to be of a voluntary nature only. All relevant versions of the Stearns plan gave the employer a discretion as to the distribution of any surplus which might remain upon the termination of the pension plan.

The amalgamated plan was a contributory defined benefits plan. The plan gave the company a discretion as to the distribution of surplus upon termination and provided for the automatic reversion to the company of any surplus remaining once benefits paid to a member had reached the maximum level specified in the plan. For several years the company transferred no assets to the fund but rather met its contributions from the actuarially determined surplus existing in the pension fund.

The Air Products pension plan was terminated following the sale of most of the company's assets. Actuarial calculations established that a substantial surplus would remain in the plan after all benefits had been paid. Both Air Products, and Gunter Schmidt, on behalf of the Air Products employees, applied to the Alberta Court of Queen's Bench for a declaration of entitlement to the surplus funds. Schmidt also sought a declaration that Air Products be required to repay the amount of

Pension Plans Act, S.A. 1986, ch. E-10.05, art. 42(2), 58a), b), c) — Regulations to the Employment Pension Plans Act, Alta. Reg. 364/86, art. 34(9)b)(i), (ii), (iii), (iv).

Stearns-Roger Canada Ltd. (Stearns) et Catalytic Enterprises Ltd. (Catalytic) ont fusionné pour finalement devenir Air Products Canada Ltd. Les régimes à prestations déterminées dont bénéficiaient les employés des deux compagnies accusaient un surplus. Leurs régimes et caisses de retraite ont été combinés pour être ensuite divisés en deux régimes quasi identiques d'Air Products, dont l'un fait l'objet des pourvois principal et incident; leur issue aura une incidence sur le régime des cadres supérieurs.

En 1959, Catalytic a mis sur pied un régime contributif à formule d'achat qui comportait une caisse en fiducie gérée par un fiduciaire. En 1966, le régime a été converti en un régime contributif à prestations déterminées. On n'a prévu le traitement des sommes excédentaires que lorsqu'en 1978 le régime a été modifié de nouveau pour que l'employeur soit investi d'un pouvoir discrétionnaire quant à la répartition de tout surplus accumulé à la cessation du régime de retraite.

Le premier régime de Stearns, créé en 1970, était un régime contributif à prestations déterminées jusqu'à ce qu'il soit modifié, en 1977, de manière à prévoir que les cotisations des employés seraient volontaires uniquement. Toutes les versions pertinentes du régime de Stearns conféraient à l'employeur un pouvoir discrétionnaire quant à la répartition de tout surplus accumulé à la cessation du régime de retraite.

Le régime combiné était un régime contributif à prestations déterminées. Selon ses modalités, la compagnie était investie d'un pouvoir discrétionnaire quant à la répartition de surplus à la cessation du régime et se voyait remettre automatiquement tout surplus qui restait une fois que les prestations versées à un participant avaient atteint le montant maximal prévu au régime. Pendant plusieurs années, la compagnie n'a transféré aucun actif à la caisse, prélevant plutôt ses cotisations sur le surplus actuariel de la caisse elle-même.

On a mis fin au régime de retraite d'Air Products après que la plupart des biens de la compagnie eurent été vendus. Selon les calculs actuariels, le régime accuserait un surplus important une fois qu'on aurait versé toutes les prestations. Air Products et Gunter Schmidt, pour le compte des employés d'Air Products, ont demandé à la Cour du Banc de la Reine de l'Alberta de rendre un jugement déclaratoire sur le droit aux sommes excédentaires. Schmidt a également demandé un juge-

1994 CanLII 104 (SCC)

fund surplus it had used to take a contribution holiday. The Court of Queen's Bench found that the portion of the surplus derived from the Catalytic fund was to be paid out to the employees, and that Air Products was not entitled to take a contribution holiday utilising any part of the Catalytic surplus. The surplus traceable to the Stearns fund was found to belong to Air Products. An appeal by the company to the Alberta Court of Appeal in respect of the Catalytic surplus and the contribution holiday and a cross-appeal by the former Stearns employees in respect of the Stearns surplus were both dismissed.

ment déclaratoire enjoignant à Air Products de rembourser le surplus de caisse dont elle s'était servi pour s'accorder une période d'exonération de cotisations. La Cour du Banc de la Reine a conclu que la partie du surplus qui provenait de la caisse de Catalytic devait être versée aux employés, et qu'Air Products ne pouvait s'accorder une période d'exonération de cotisations en utilisant une partie du surplus de Catalytic. On a conclu que le surplus qui pouvait être attribué à la caisse de Stearns appartenait à Air Products. La Cour d'appel de l'Alberta a rejeté l'appel interjeté par la compagnie relativement au surplus de Catalytic et à la période d'exonération de cotisations, de même que l'appel incident interjeté par les anciens employés de Stearns relativement au surplus de cette dernière.

At issue here is the question of entitlement to surplus monies remaining in an employee pension fund once the fund has been wound up and all benefits either paid or provision made for their payment. There is a further related issue as to whether or when employers may refrain from contributing to ongoing pension plans which are in "surplus". Both the appeal and cross-appeal are the same as before the Court of Appeal. The former Catalytic employees are the respondents on the appeal and the former Stearns employees are the appellants on the cross-appeal.

En l'espèce, il s'agit de savoir qui a droit au surplus qui reste une fois qu'est liquidée une caisse de retraite d'employés et qu'on a versé toutes les prestations ou encore pourvu à leur versement. Se pose aussi l'autre question connexe de savoir si les employeurs peuvent s'abstenir de cotiser aux régimes de retraite existants qui accusent un surplus et, le cas échéant, dans quels cas. Les pourvois principal et incident formés sont identiques aux appels principal et incident interjetés devant la Cour d'appel. Les anciens employés de Catalytic sont les intimés dans le pourvoi principal, et ceux de Stearns, les appelants dans le pourvoi incident.

Held (Sopinka and McLachlin JJ. dissenting in part): The appeal by Air Products Canada Ltd. (File No. 23047) with respect to entitlement to any surplus traceable to the Catalytic fund should be dismissed and its appeal with respect to its entitlement to take a contribution holiday is allowed.

Arrêt (les juges Sopinka et McLachlin sont dissidents en partie): Le pourvoi formé par Air Products Canada Ltd. (nº de greffe 23047) relativement au droit à tout surplus pouvant être attribué à la caisse de Catalytic est rejeté et son pourvoi relatif au droit de s'accorder une période d'exonération de cotisations est accueilli.

Held: The cross-appeal by Gunter Schmidt in his personal capacity and on behalf of the beneficiaries of the Stearns pension plans (File No. 23057) should be dismissed with respect to the entitlement of Air Products Canada Ltd. to all surplus remaining in the pension fund derived from the Stearns plan and to its entitlement to take a contribution holiday.

Arrêt: Le pourvoi incident formé par Gunter Schmidt personnellement et pour le compte des bénéficiaires des régimes de retraite de Stearns (nº de greffe 23057) est rejeté relativement au droit d'Air Products Canada Ltd. à tout surplus de la caisse de retraite provenant du régime de Stearns et à son droit de s'accorder une période d'exonération de cotisations.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: Absent legislation to the contrary, a court must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. First it must determine, using ordinary principles of trust law, if the pension fund is impressed with a trust. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries. If the pension fund, or any part

Les juges La Forest, L'Heureux-Dubé, Gonthier, Cory et Iacobucci: En l'absence d'une loi contraire, les tribunaux doivent se prononcer sur des revendications opposées du droit à un surplus de caisse de retraite en effectuant une analyse minutieuse du régime de retraite et des structures de financement créées en application de ce régime. Ils doivent d'abord déterminer, conformément aux principes ordinaires du droit des fiducies, si la caisse de retraite est assujettie à une fiducie. Il existera une fiducie dans tous les cas où il y a eu déclaration de

1994 CanLII 104 (SCC)

of it, is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying principles which pertain to the interpretation of contracts.

Different considerations apply if the fund is impressed with a trust. The trust is not a trust for a purpose, but a classic trust governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail. The trust will in most cases extend to an ongoing or actual surplus as well as to that part of the pension fund needed to provide employee benefits. An employer may explicitly limit the operation of the trust so that it does not apply to surplus and, as a settlor of the trust, may reserve a power to revoke the trust. In order to be effective, the latter power must be clearly reserved at the time the trust is created. A power to revoke the trust or any part of it cannot be implied from a general, unlimited power of amendment.

Funds remaining in a pension trust following termination and payment of all defined benefits may be subject to a resulting trust. Before a resulting trust can arise, all of the trust's objectives must have been fully satisfied. Even when this is the case, the employer cannot claim the benefit of a resulting trust when the terms of the plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's, but also the employees', intentions which must be considered. Both are settlors of the trust.

An employer's right to take a contribution holiday must also be determined on a case-by-case basis. It can be excluded either explicitly or implicitly in circumstances where a plan mandates a formula for calculating employer contributions which removes actuarial discretion. Contribution holidays may also be permitted by the terms of the plan. When the plan is silent on the issue, the right to take a contribution holiday is not objectionable so long as actuaries continue to accept the application of existing surplus to current service costs as standard practice. These principles apply whether or not the pension fund is subject to a trust. Because no money is withdrawn from the fund by the employer, the taking of a contribution holiday represents neither an encroach-

fiducie expresse ou implicite et où des biens en fiducie ont été confiés à un fiduciaire qui les détient pour des bénéficiaires donnés. Si la totalité ou une partie de la caisse de retraite n'est pas assujettie à une fiducie, il faut alors résoudre toutes les questions relatives aux prestations de retraite dues ou au droit à un surplus en appliquant les principes d'interprétation des contrats.

Si la caisse est assujettie à une fiducie, différentes considérations entrent en jeu. Il s'agit non pas d'une fiducie à une fin, mais d'une fiducie classique régie par l'*equity* et, dans la mesure où les principes d'*equity* applicables sont incompatibles avec les dispositions du régime, l'*equity* doit prévaloir. La fiducie s'étendra, dans la plupart des cas, au surplus existant ou réel de même qu'à la partie de la caisse de retraite qui est nécessaire pour verser les prestations aux employés. Un employeur peut expressément limiter l'application de la fiducie de façon à ce qu'elle ne s'applique pas à un surplus et, en tant que constituant de la fiducie, il peut se réserver le pouvoir de la révoquer. Pour être valide, ce dernier pouvoir doit être clairement réservé au moment où la fiducie est créée. Le pouvoir de révoquer une fiducie ou une partie de celle-ci ne saurait s'inférer d'un pouvoir de modification général et illimité.

Les sommes qui restent dans une caisse de retraite en fiducie à la cessation du régime et après le paiement de toutes les prestations déterminées peuvent faire l'objet d'une fiducie par déduction. Pour qu'une fiducie par déduction naisse, tous les objets de la fiducie doivent avoir été pleinement atteints. Même alors, l'employeur ne peut se prévaloir d'une fiducie par déduction lorsque les modalités du régime démontrent l'intention de se départir complètement de tout l'argent versé dans la caisse de retraite. Dans les régimes contributifs, ce ne sont pas uniquement les intentions de l'employeur qui comptent, mais également celles des employés. Ils sont, dans les deux cas, les constituants de la fiducie.

Le droit d'un employeur de s'accorder une période d'exonération de cotisations doit également être déterminé en fonction de chaque cas. Ce droit peut être exclu explicitement ou implicitement dans les cas où le régime prescrit une formule de calcul des cotisations de l'employeur qui retire toute discrétion à l'actuaire. Les périodes d'exonération de cotisations peuvent également être autorisées par les modalités du régime. Lorsque le régime est silencieux sur la question, le droit de s'accorder une période d'exonération de cotisations ne peut être contesté dans la mesure où les actuaires continuent d'accepter comme pratique normale l'affectation d'un surplus existant aux coûts des services courants. Ces principes s'appliquent peu importe que la caisse de retraite

1994 CanLII 104 (SCC)

ment upon the trust nor a reduction of accrued benefits. These general considerations are, of course, subject to applicable legislation.

The Catalytic plan and the trust agreement constituted a clear declaration of an intention to create a trust. The subject matter of the trust was defined and the beneficiaries were identified in the trust agreement by reference back to the plan. This classic trust established for the benefit of a defined group of persons was never terminated and so continues to exist. The parties contemplated that the trust would continue if a different trustee were named. The trust therefore was not terminated when, in 1974, the company transferred control of its pension fund to Confederation Life Insurance Company. Further, the fact that the 1978 version of the Catalytic plan removed all reference to a trust could not have the effect of terminating the trust. Nor could any of the provisions of the 1984 investment contract entered into by Stearns Catalytic and Confederation Life have that effect.

The trust fund was comprised of all contributions made by both the company and the employees, together with any earnings of those monies. The fact that the 1959 plan was a defined contribution plan under which no surplus could arise does not affect this definition of the trust fund. The company could only claim the surplus remaining on termination by virtue of a resulting trust, or by validly revoking the trust. The purposes of the trust were not fully satisfied by the payment of all defined benefits. One of the objects of the trust was to use any money contained in the fund for the benefit of the employees. The benefits to which employees were entitled under the 1959 plan were not restricted to only those contributions made by the company on their behalf. Therefore, the trust objects could never be exhausted so long as some money remained in the fund and some eligible employees could be found. A resulting trust could not arise here. Air Products was only entitled to the surplus if it could have revoked the trust upon termination of the pension plan in 1988.

Both the trust agreement and all versions of the plan make some provision for what was to occur on termination of the plan. Although the company reserved a general amending power subject to the provisos that no amendments could reduce accrued benefits or allow the trust fund to be used in any way other than for the

soit ou non assujettie à une fiducie. Aucune somme n'étant retirée de la caisse par l'employeur, la période d'exonération de cotisations ne constitue pas un empiétement sur la fiducie ni une réduction des prestations acquises. Ces considérations générales sont évidemment sujettes à la loi applicable.

Le régime de Catalytic et l'acte de fiducie reflètent clairement l'intention de créer une fiducie dont les biens y assujettis sont définis et les bénéficiaires désignés dans l'acte de fiducie par renvoi au régime. Cette fiducie classique, établie pour le bénéfice d'un groupe donné et à laquelle il n'a pas été mis fin, continue donc d'exister. Les parties avaient prévu que la fiducie subsisterait si un fiduciaire différent était nommé. Par conséquent, la fiducie n'a pas cessé d'exister lorsqu'en 1974 la compagnie a cédé le contrôle de sa caisse de retraite à La Confédération, Compagnie d'assurance-vie. En outre, le fait que la version de 1978 du régime de Catalytic ait supprimé tout renvoi à une fiducie ne pouvait avoir pour effet d'éteindre celle-ci. Les dispositions du contrat de placement de 1984 conclu entre Stearns Catalytic et La Confédération ne pouvaient pas non plus avoir cet effet.

Le fonds en fiducie se composait de toutes les cotisations versées par la compagnie et par les employés, de même que des gains en découlant. Le fait que le régime de 1959 ait été un régime à cotisations déterminées, en vertu duquel aucun surplus ne pouvait être accumulé, ne change rien à la définition du fonds en fiducie. La compagnie ne pouvait revendiquer le surplus accumulé à la cessation qu'en vertu d'une fiducie par déduction ou en révoquant valablement la fiducie. Les objets de la fiducie n'ont pas été pleinement réalisés par le paiement de toutes les prestations déterminées. L'un d'eux consistait à utiliser toute somme contenue dans la caisse pour le bénéfice des employés. Les prestations auxquelles les employés avaient droit en vertu du régime de 1959 n'étaient pas limitées aux cotisations versées par la compagnie pour leur compte. C'est pourquoi les objets de la fiducie ne pouvaient pas être épuisés tant qu'il restait de l'argent dans la caisse et que des employés y avaient droit. Il ne pouvait y avoir de fiducie par déduction en l'espèce. Air Products n'aurait eu droit au surplus que si elle avait pu révoquer la fiducie à la cessation du régime de retraite en 1988.

L'acte de fiducie et toutes les versions du régime pourvoient à ce qui doit se produire à la cessation du régime. Bien que la compagnie se soit réservé un pouvoir général de modifier, à la condition qu'aucune modification ne puisse réduire les prestations acquises ou permettre que le fonds en fiducie soit utilisé à d'autres

1994 CanLII 104 (SCC)

employees' exclusive benefit, the company did not clearly reserve a power to revoke the trust. Such a power could not be implied under the broad general amendment power. Therefore, the 1978 amendment purporting to give the company the power to distribute surplus to itself, as well as the reversion clause of the 1983 plan, were invalid. Both represented attempts to revoke partially the 1959 trust in favour of the employees. Neither was within the scope of the control which the company reserved to itself at that time.

The relevant plan provisions which governed the taking of a contribution holiday were those contained in the 1983 Air Products plan. The wording of the plan implicitly authorized an actuary to consider the surplus when calculating the company's annual funding obligation. Since the plan allowed the company to take contribution holidays, it did not need to repay the actuarial surplus taken into account in the years when it made no contributions into the plan.

The first Stearns plan differed in two significant ways from the original Catalytic plan: it made no reference to the existence of a trust and it specifically contemplated the reversion of surplus assets to the company. A trust was never created notwithstanding the facts that the alleged subject matter of the trust, the pension fund, was defined under the two Stearns plans, that the employees were identified as those entitled to receive the fund monies and that the exclusive benefit and non-diversion clauses relied upon by the employees were consistent with the existence of a trust. Several other clauses were equally consistent with the non-existence of trust and clearly identified the plan as a contract to receive defined benefits. No intention to create a trust was apparent on the face of the documents.

A brochure distributed by the company to its employees in 1972 did not form a binding part of the pension plan documents and its influence on entitlement of plan surplus in 1988 was doubtful since it specifically stated that the plan would be subject to amendment from time to time. The statement contained in the brochure to the effect that the company intended to pay any remaining surplus to the employees could not in the circumstances of this case form the basis for an estoppel preventing the company from now claiming the surplus for itself. Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which

fins que le bénéfice exclusif des employés, la compagnie ne s'est pas clairement réservé le pouvoir de révoquer la fiducie. Un tel pouvoir ne saurait s'inférer du pouvoir général de modifier. En conséquence, la modification de 1978 qui avait pour effet de conférer à la compagnie le pouvoir de s'approprier le surplus, de même que la disposition en matière de réversion dans le régime de 1983, étaient invalides. Elles représentaient toutes les deux une tentative de révoquer partiellement la fiducie établie en 1959 en faveur des employés. Le contrôle que s'est réservé la compagnie à cette époque ne comprenait ni l'une ni l'autre.

Les dispositions pertinentes qui régissaient les périodes d'exonération de cotisations étaient contenues dans le régime de 1983 d'Air Products. Le texte du régime autorisait implicitement l'actuaire à tenir compte d'un surplus actuariel pour calculer la cotisation annuelle obligatoire de la compagnie. Puisque le régime autorisait la compagnie à s'accorder des périodes d'exonération de cotisations, celle-ci n'avait pas à rembourser le surplus actuariel dont il avait été tenu compte pendant les années où elle n'a versé aucune cotisation au régime.

Le premier régime de Stearns différait sur deux points importants du régime initial de Catalytic: il ne mentionnait pas l'existence d'une fiducie et il envisageait explicitement le retour de l'actif excédentaire à la compagnie. Aucune fiducie n'a jamais été créée, nonobstant le fait que le bien en fiducie allégué, soit la caisse de retraite, était précisé dans les deux régimes de Stearns, que les employés étaient décrits comme ceux qui avaient droit à l'argent de la caisse et que les dispositions relatives au bénéfice exclusif et à l'interdiction d'utiliser à d'autres fins, invoquées par les employés, étaient compatibles avec l'existence d'une fiducie. Plusieurs autres dispositions étaient également compatibles avec l'inexistence d'une fiducie et décrivaient nettement le régime comme un contrat de réception de prestations déterminées. Aucune intention de créer une fiducie n'était apparente à la lecture des documents.

Une brochure que la compagnie a distribuée à ses employés en 1972 ne formait pas une partie obligatoire des documents du régime de retraite et il est douteux qu'elle ait pu influer sur le droit à un surplus de régime en 1988, étant donné particulièrement qu'elle précisait que le régime ferait, à l'occasion, l'objet de modifications. La déclaration qu'on trouve dans la brochure, selon laquelle la compagnie avait l'intention de verser aux employés tout surplus accumulé, ne saurait, dans les circonstances de la présente affaire, justifier une fin de non-recevoir empêchant la compagnie de réclamer aujourd'hui le surplus pour elle-même. Les documents

1994 CanLII 104 (SCC)

the rights of employers and employees participating in a pension plan must be determined. Whether they do so depends on the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees.

Since no trust was ever created under the Stearns plan and since the 1972 brochure was without legal effect, the issue of entitlement to the plan surplus had to be decided on the basis of an interpretation of the plan's provisions. The 1983 amendment of the pension plan was within the limits of the power of amendment because it did not reduce any "then existing" interest of the employees as the employees had no interest in the surplus remaining upon termination until the company exercised its discretion to give them an interest. The amendment did not violate the restriction that no amendments were to have the effect of diverting any part of the fund to purposes other than for the exclusive benefit of the participants, former participants, joint annuitants, beneficiaries, or estates. Although the 1970 plan did not deal with the issue, the reversion of surplus to the company was not inconsistent with the non-diversion and exclusive benefit clauses. The prohibition on diversion of funds and the exclusive benefit clause applied from the outset only in respect of the defined benefits to which the employees were contractually entitled. They did not apply to the distribution of a plan surplus.

The company is entitled according to the plan's terms to any surplus remaining in the pension fund which can be traced to the former Stearns plans. It was also entitled to take a contribution holiday. The application of an actuarial surplus to current service funding obligations was permitted under the terms of the Air Products plan, and did not have the effect of reducing any benefits which had accrued to the employees.

The results in these appeals demonstrate the need for legislation. It is unfair that there should be a different result for these two groups of employees based only on a finding that a trust exists in one case but not the other. A legislative scheme should be set up to provide for the

qui ne sont pas considérés normalement comme ayant un effet juridique peuvent néanmoins faire partie de la structure juridique dans laquelle les droits des employeurs et des employés cotisant à un régime de retraite doivent être déterminés. La question de savoir s'ils en font partie dépend du texte des documents, des circonstances dans lesquelles ils ont été rédigés et de l'incidence qu'ils ont eu sur les parties, particulièrement sur les employés.

Étant donné qu'aucune fiducie n'a été créée dans le cadre du régime de Stearns et que la brochure de 1972 n'avait aucun effet juridique, la réponse à la question de savoir qui a droit au surplus du régime passait par l'interprétation des dispositions de ce régime. La modification apportée en 1983 au régime de retraite était conforme au pouvoir de modification du fait qu'elle ne réduisait aucun droit «alors existant» des employés, puisque ces derniers n'avaient aucun droit au surplus accumulé à la cessation du régime tant et aussi longtemps que la compagnie n'avait pas exercé son pouvoir discrétionnaire de leur en conférer un. La modification n'a pas violé la restriction selon laquelle aucune modification ne devait avoir pour effet d'utiliser une partie de la caisse à d'autres fins que le bénéfice exclusif des participants, anciens participants, rentiers conjoints, ayants droit ou succession. Même si le régime de 1970 ne traitait pas la question, le retour du surplus à la compagnie n'était pas incompatible avec les dispositions relatives à l'interdiction d'utiliser à d'autres fins et au bénéfice exclusif. L'interdiction d'utiliser les fonds à d'autres fins et la disposition relative au bénéfice exclusif se sont appliquées dès le début uniquement à l'égard des prestations déterminées auxquelles les employés avaient droit en vertu d'un contrat. Elles ne s'appliquaient pas à la répartition d'un surplus de régime.

La compagnie a le droit, en vertu des dispositions du régime, à tout surplus accumulé dans la caisse de retraite qui peut être attribué aux anciens régimes de Stearns. Elle avait également le droit de s'accorder une période d'exonération de cotisations. L'utilisation d'un surplus actuariel pour s'acquitter d'obligations en matière de financement des services courants était permise par les termes du régime d'Air Products, et n'avait pas pour effet de réduire les prestations acquises des employés.

Les résultats des présents pourvois démontrent la nécessité de légiférer. Il est injuste d'imposer un résultat différent à ces deux groupes d'employés pour le seul motif que l'on conclut qu'une fiducie existe dans un cas et non dans l'autre. On devrait établir un régime législa-

1994 CanLII 104 (SCC)

equitable distribution of surplus between employees and employers when pension plans are terminated.

Per Sopinka J. (dissenting in part on the appeal (File No. 23047)): The surplus in the Catalytic plan reverts to the employer. The imposition of a trust on all the monies in that plan, did not prevent the trust's being amended. The nature of the rights of amendment depends upon the terms of the plan and of the trust agreement, if any. Nothing in the Catalytic plan precluded the company's exercising the express power of amendment in the plan so as to provide for the return of surplus funds on termination of the plan.

The company from the outset reserved the power to amend the Catalytic plan so as to permit any surplus to be distributed to itself. The trust agreement's amending clause was subject to the plan and both the 1959 and the 1966 versions of the plan reserved broader powers of amendment to the company than did the trust agreement. Both plans provided that the company's power to amend the plan was limited only by the condition that accrued benefits could not be reduced. The right to receive surplus monies in the pension fund was not a benefit which had accrued to the members of the plan when the company amended the plan to permit the surplus to be distributed to itself. Moreover, even if such a right could be said to have accrued at the time of amendment, it is not a benefit contemplated by that provision.

A power of amendment, limited in that it cannot reduce accrued benefits, is not inconsistent with the fundamental purpose of a defined benefits pension trust. It should be given effect if sufficiently explicit to permit a change amounting to a partial revocation in law.

No magic exists in the use of the specific word "revocation". Both the creation of a trust and a limitation on the nature of a trust can be determined from the clear intention of the settlor. The power of amendment can be sufficiently explicit to include a power of revocation and the absence of the word "revocation" does not mean that a settlor's changes clearly having the effect of revocation would be fatally flawed. A formulaic approach

tif qui permette une répartition équitable entre employés et employeurs de tout surplus accumulé à la cessation d'un régime de retraite.

Le juge Sopinka (dissident en partie dans le pourvoi principal (n[o] de greffe 23047)): Le surplus accumulé dans le régime de Catalytic revient à l'employeur. L'assujettissement de tout l'argent dans ce régime à une fiducie n'empêchait pas cette dernière d'être modifiée. La nature des droits de modification dépend, le cas échéant, des modalités du régime et de l'acte de fiducie. Rien dans le régime de Catalytic n'empêchait la compagnie d'exercer le pouvoir de modification qui y était expressément prévu de manière à préciser que toute somme excédentaire lui serait remise à la cessation du régime.

Dès le départ, la compagnie s'est réservé le pouvoir de modifier le régime de Catalytic de façon à permettre que tout surplus lui soit versé. La disposition en matière de modification, contenue dans l'acte de fiducie, était assujettie au régime et les versions de 1959 et de 1966 du régime réservaient toutes deux à la compagnie des pouvoirs de modification plus larges que ceux prévus par l'acte de fiducie. Les deux régimes prévoyaient que le pouvoir de la compagnie de modifier le régime était assujetti à la seule condition que les prestations accumulées ne puissent être réduites. Le droit de recevoir les sommes excédentaires de la caisse de retraite n'était pas une prestation que les participants avaient accumulée au moment où la compagnie a modifié le régime de manière à permettre que le surplus lui soit versé. En outre, même si on pouvait dire qu'ils avaient ce droit à l'époque de la modification, ce n'est pas une prestation envisagée par la disposition en question.

Le pouvoir de modification assujetti à l'interdiction d'y avoir recours pour réduire les prestations accumulées n'est pas incompatible avec l'objectif fondamental d'une fiducie de régime à prestations déterminées. Il devrait avoir effet s'il est suffisamment explicite pour permettre un changement qui, en droit, constitue une révocation partielle.

Il n'y a rien de magique dans l'utilisation du mot précis «révocation». La création d'une fiducie et les restrictions quant à la nature de la fiducie peuvent être déterminées par l'intention manifeste du constituant. Le pouvoir de modification peut être suffisamment explicite pour inclure un pouvoir de révocation, et l'absence du mot «révocation» n'est pas fatale aux modifications apportées par le constituant, qui ont clairement l'effet

1994 CanLII 104 (SCC)

should not be allowed to dislodge the clear intention of the parties.

Neither the company nor the employees foresaw the existence of a surplus when the plan was created and the employees had no reason to expect to receive more than their defined benefits. There was nothing inequitable in allowing the employer to take advantage of the broad amending power to distribute the surplus to itself, so long as it did nothing to reduce the level of benefits provided to the employees.

The tax motivations of the parties to pension plans, while generally of limited relevance in interpreting those plans, here supported a broad interpretation of the amending power. It was reasonable to infer that the Catalytic plan's broad amending power, in 1959 and subsequent versions, was retained in part to deal with changes in income tax legislation, given the plan's express direction that the company's contributions be tax deductible.

Per McLachlin J. (dissenting in part on the appeal (File No. 23047)): The surplus in defined benefit plans (as distinguished from defined contribution plans) should revert to the employer. Apart from the reference in the 1978 restatement which provided that surplus should go to the employer, the documents were silent on the question of surplus. The 1978 stipulation was a valid "amendment" to the original trust documents and ought to stand. Even if the 1978 stipulation were disregarded, however, the surplus would devolve on the employer under the doctrine of resulting trust.

Where a new situation arises and falls within an existing term of the contractual document, the courts must look at the factual context in which the term was drafted and consider whether the new situation can reasonably be said to fall within this clause. If it does not, the court may nevertheless consider if a term covering the new situation can be implied, whether as a matter of fact, law or custom. The courts will not make a new contract or trust to which the parties have not agreed.

Article V in the 1959 trust agreement, which dealt with modification and termination, provided that no part of the fund be diverted to purposes other than for the

d'une révocation. On ne devrait pas permettre qu'une méthode fondée sur une formule aille à l'encontre de l'intention manifeste des parties.

Ni la compagnie ni les employés n'ont prévu l'existence d'un surplus lorsque le régime a été créé, et les employés n'avaient aucune raison de s'attendre à recevoir plus que leurs prestations déterminées. Il n'y avait rien d'injuste à autoriser l'employeur à tirer profit du pouvoir général de modification pour s'attribuer le surplus, en autant qu'il ne faisait rien pour réduire le montant des prestations garanties aux employés.

Les motivations des parties aux régimes de retraite, sur le plan fiscal, dont la pertinence est généralement limitée pour ce qui est d'interpréter ces régimes, appuient en l'espèce une interprétation large du pouvoir de modification. Il était raisonnable de déduire que le maintien du pouvoir général de modification dans le régime de 1959 de Catalytic et ses versions subséquentes visait en partie à répondre aux changements survenus dans la législation fiscale, étant donné que le régime prévoyait expressément que les cotisations versées par la compagnie seraient déductibles.

Le juge McLachlin (dissidente en partie dans le pourvoi principal (nº de greffe 23047)): Le surplus accumulé dans les régimes à prestations déterminées (par opposition aux régimes à cotisations déterminées) revient à l'employeur. À part la disposition de la nouvelle convention de 1978, qui prévoyait qu'un surplus devait revenir à l'employeur, les documents ne disaient rien au sujet de la question du surplus. La stipulation de 1978 constituait une «modification» valide des documents de fiducie initiaux et elle devrait être maintenue. Toutefois, même si on faisait abstraction de la stipulation de 1978, le surplus irait à l'employeur en vertu du principe de la fiducie par déduction.

Lorsqu'une nouvelle situation est visée par une modalité existante du document, les tribunaux doivent examiner le contexte factuel dans lequel cette modalité a été rédigée et déterminer s'il est raisonnablement possible de dire que la nouvelle situation est visée par la modalité en question. Dans la négative, le tribunal peut néanmoins se demander s'il est possible de déduire l'existence d'une modalité applicable à la nouvelle situation, que ce soit sur le plan des faits, du droit ou de la coutume. Les tribunaux ne créeront pas un nouveau contrat ou une nouvelle fiducie n'ayant pas reçu l'adhésion des parties.

L'article V de l'acte de fiducie de 1959, relatif à la modification et à la cessation, prévoyait qu'aucune partie de la caisse ne pouvait être utilisée ou affectée à

1994 CanLII 104 (SCC)

exclusive benefits of those intended to benefit from it. This article was drafted in the context of a defined contribution plan under which no surplus could arise and should therefore not be read as applying to the surplus which arose under the later defined benefit plan. The 1978 provision stipulating that the surplus should go to the employer is valid and determines the issue.

d'autres fins que le bénéfice exclusif des personnes censées en bénéficier. Cet article, rédigé dans le contexte d'un régime à cotisations déterminées, en vertu duquel aucun surplus ne pouvait être accumulé, ne devrait donc pas être interprété comme s'appliquant au surplus accumulé dans le cadre du régime à prestations déterminées subséquent. La disposition de 1978 portant que le surplus devrait revenir à l'employeur est valide et règle la question.

Payment of the surplus to the employer does not constitute revocation of a trust. A trust cannot be revoked without express wording so permitting. The surplus was an unanticipated development never contemplated by the original trust and not addressed by any changes to the trust until 1978. The 1959 trust provisions do not apply to a surplus.

Le versement des sommes excédentaires à l'employeur ne constitue pas une révocation de fiducie. En l'absence de disposition expresse, il est impossible de révoquer une fiducie. Le surplus était imprévu et n'avait jamais été envisagé dans la fiducie initiale, et ce n'est qu'en 1978 que cette question a été réglée au moyen d'une modification de la fiducie. Les dispositions de la fiducie de 1959 ne s'appliquent pas à un surplus.

The trust did not require that the surplus in question be paid to the employees. In 1966, when the possibility of a surplus first arose because of the plan's conversion to a defined benefit plan, the trust provided no guidance as to where a surplus would go in the event of termination. The 1978 amendment made it clear that it was payable to the employer. Therefore, under the terms of the trust, the employer is entitled to the surplus.

La fiducie n'exigeait pas que le surplus en question soit versé aux employés. En 1966, lorsque la possibilité d'un surplus s'est manifestée pour la première fois du fait que le régime a été converti en un régime à prestations déterminées, la fiducie n'indiquait pas ce qu'il adviendrait d'un surplus en cas de cessation du régime. Il est ressorti clairement de la modification de 1978 qu'il était payable à l'employeur. Par conséquent, aux termes de la fiducie, l'employeur a droit aux sommes excédentaires.

Alternatively, if the 1978 amendment as to surplus is invalid, the doctrine of resulting trust requires that the surplus be available to the employer. The employer was responsible for ensuring a fund sufficient to meet all defined benefits owing to employees. Since the employer paid more than required for the purpose of the trust, the residual sum should return to the employer.

Subsidiairement, si la modification de 1978 concernant le surplus est invalide, la règle de la fiducie par déduction exige que l'employeur puisse récupérer le surplus. Ce dernier était chargé de garantir que la caisse serait suffisante pour verser toutes les prestations déterminées qui seraient dues aux employés. Puisque l'employeur a payé plus que ce qui était nécessaire pour réaliser l'objet de la fiducie, la somme restante devrait lui être remise.

Even where employees contribute to a defined benefit plan, that contribution is taken to be fully satisfied by receipt of the defined benefits. The employee accepts this fixed amount in lieu of the greater or lesser amounts he or she might obtain on a defined contribution plan and in doing so exhausts his or her rights under the plan.

Même lorsque les employés cotisent à un régime à prestations déterminées, leurs cotisations sont considérées comme pleinement remboursées grâce à la réception des prestations déterminées. L'employé accepte ce montant fixe au lieu des sommes supérieures ou inférieures qu'il pourrait obtenir dans le cadre d'un régime à cotisations déterminées et, ce faisant, il épuise les droits que lui confère le régime.

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1994 CanLII 104 (SCC)

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By McLachlin J. (dissenting in part on the appeal (File No. 23047))

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Citée par le juge McLachlin (dissidente en partie dans le pourvoi principal (nº de greffe 23047))

Davis c. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563; *In re Courage Group's Pension Schemes*, [1987] 1 W.L.R. 495; *Washington-Baltimore Newspaper Guild Local 35 c. Washington Star Co.*, 555 F.Supp. 257 (1983); *In re C. D. Moyer Co. Trust Fund*, 441 F.Supp. 1128 (1977); *Pollock c. Castrovinci*, 476 F.Supp. 606 (1979); *Wilson c. Bluefield Supply Co.*, 819 F.2d 457 (1987); *Bryant c. International Fruit Products Co.*, 793 F.2d 118 (1986); *Audio Fidelity Corp. c. Pension Benefit Guaranty Corp.*, 624 F.2d 513 (1980); *Maurer c. McMaster University* (1991), 4 O.R. (3d) 139; *Askin c. Ontario Hospital Association* (1991), 2 O.R. (3d) 641; *Re Reevie and Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595; *Murphy c. McSorley*, [1929] R.C.S. 542; *Re Canada Trust Co. and Cantol Ltd.* (1979), 103 D.L.R. (3d) 109.

1994 CanLII 104 (SCC)

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POURVOIS contre un arrêt de la Cour d'appel de l'Alberta (1992), 125 A.R. 224, 14 W.A.C. 224, 89 D.L.R. (4th) 762, 46 E.T.R. 21, qui a rejeté un appel principal et un appel incident interjetés contre une ordonnance du juge en chef Moore de la

1994 CanLII 104 (SCC)

D.L.R. (4th) 230, 37 E.T.R. 64. The appeal by Air Products Canada Ltd. (File No. 23047) with respect to entitlement to any surplus traceable to the Catalytic fund should be dismissed and its appeal with respect to its entitlement to take a contribution holiday is allowed, Sopinka and McLachlin JJ. dissenting in part. The cross-appeal by Gunter Schmidt in his personal capacity and on behalf of the beneficiaries of the Stearns plans (File No. 23057) should be dismissed with respect to the entitlement of Air Products Canada Ltd. to all surplus remaining in the pension fund derived from the Stearns plan and to its entitlement to take a contribution holiday.

Cour du Banc de la Reine en chambre (1990), 104 A.R. 190, 66 D.L.R. (4th) 230, 37 E.T.R. 64. Le pourvoi formé par Air Products Canada Ltd. (n° de greffe 23047) relativement au droit à tout surplus pouvant être attribué à la caisse de Catalytic est rejeté et son pourvoi relatif au droit de s'accorder une période d'exonération de cotisations est accueilli. Les juges Sopinka et McLachlin sont dissidents en partie. Le pourvoi incident formé par Gunter Schmidt personnellement et pour le compte des bénéficiaires des régimes de retraite de Stearns (n° de greffe 23057) est rejeté relativement au droit d'Air Products Canada Ltd. à tout surplus de la caisse de retraite provenant du régime de Stearns et à son droit de s'accorder une période d'exonération de cotisations.

Dennis R. O'Connor, Q.C., Anne Corbett and *Barry L. Glaspell*, for the appellants Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley.

Dennis R. O'Connor, c.r., Anne Corbett et *Barry L. Glaspell*, pour les appelants Air Products Canada Ltd., William M. Mercer Limited, La Confédération, Compagnie d'assurance-vie et T. J. Westley.

Neil C. Wittman, Q.C., and *Kenneth J. Warren*, for the respondents Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans.

Neil C. Wittman, c.r., et *Kenneth J. Warren*, pour les intimés Gunter Schmidt personnellement et pour le compte des bénéficiaires des régimes de retraite de Stearns Catalytic Ltd.

Aleck H. Trawick and *Leslie O'Donoghue*, for the appellants on the cross-appeal Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans.

Aleck H. Trawick et *Leslie O'Donoghue*, pour les appelants dans le pourvoi incident Gunter Schmidt personnellement et pour le compte des bénéficiaires des régimes de retraite de Stearns Catalytic Ltd.

Dennis R. O'Connor, Q.C., for the respondents on the cross-appeal Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley.

Dennis R. O'Connor, c.r., pour les intimés dans le pourvoi incident Air Products Canada Ltd., William M. Mercer Limited, La Confédération, Compagnie d'assurance-vie et T. J. Westley.

The judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. was delivered by

Version française du jugement des juges La Forest, L'Heureux-Dubé, Gonthier, Cory et Iacobucci rendu par

CORY J. — These two cases raise the issue of entitlement to surplus monies remaining in an employee pension fund once the fund has been wound up and all benefits either paid or provision made for their payment. There is a further related issue as to whether or when employers may refrain

LE JUGE CORY — Ces deux pourvois soulèvent la question de savoir qui a droit au surplus qui reste une fois qu'est liquidée une caisse de retraite d'employés et qu'on a versé toutes les prestations ou encore pourvu à leur versement. Se pose aussi l'autre question connexe de savoir si les

1994 CanLII 104 (SCC)

from contributing to ongoing pension plans which are in "surplus".

employeurs peuvent s'abstenir de cotiser aux régimes de retraite existants qui accusent un surplus et, le cas échéant, dans quels cas.

Some Definitions

At the outset it may be helpful to review briefly some of the technical terms which often appear in pension surplus cases. For a detailed explanation reference may be made to: G. Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in *New Developments in Employment Law* (Meredith Memorial Lectures, 1988), 1989; Deborah K. Hanscom, "A Surplus of Uncertainty: The Question of Entitlement After Hockin" (1991), 10 *Est. & Tr. J.* 258, and the articles contained in vol. 2 of the *Task Force on Inflation Protection for Employment Pension Plans, Research Studies* (1988).

Pension surpluses can only arise in "defined benefit" pension plans. In those plans, each employee belonging to the plan is guaranteed specific benefits upon retirement.

An ongoing pension fund is said to have an "existing" or "actuarial" surplus when the estimated value of the assets in the fund exceeds the estimated value of all of the liabilities (i.e., pension benefits owed employees) of the fund. When the calculated fund liabilities exceed the calculated fund assets, the plan is said to be in a state of "unfunded liability". Once the plan is wound up, assets and liabilities can be precisely determined. The fund will then be in a state of "actual" or "real" surplus or liability.

Contribution to a defined benefit plan is made each year on the basis of an actuary's estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out. The actuary's estimate of the present value of future benefits to members of the plan is known as the "current service cost". The obvious difficulties involved in predicting factors such as inflation rates, investment returns and the future employee levels of the company mean that the actuary's task is difficult and to a certain extent speculative. The assumptions made by actu-

a Définitions

Au départ, il peut se révéler utile de revoir brièvement certains termes techniques qui sont fréquemment utilisés en matière de surplus de caisse b de retraite. Pour une explication détaillée, on peut se reporter à G. Nachshen, «Access to Pension Fund Surpluses: The Great Debate», dans *New Developments in Employment Law* (Meredith c Memorial Lectures, 1988), 1989; Deborah K. Hanscom, «A Surplus of Uncertainty: The Question of Entitlement After Hockin» (1991), 10 *Est. & Tr. J.* 258, et les articles contenus dans le vol. 2 du *Task Force on Inflation Protection for Employ*d *ment Pension Plans, Research Studies* (1988).

Seuls les régimes «à prestations déterminées» peuvent accumuler un surplus. Chaque employé y participant est assuré de toucher à sa retraite des e prestations déterminées.

On dit qu'une caisse de retraite accuse un surplus «existant» ou «actuariel» lorsque la valeur estimative de son actif excède la valeur estimative f de tout son passif (c.-à-d. les prestations dues aux employés). Lorsque le passif calculé excède l'actif calculé, on dit du régime qu'il a un «passif non capitalisé». Ce n'est qu'une fois le régime liquidé g qu'il est possible de déterminer précisément l'actif et le passif. La caisse accusera alors un surplus ou un déficit «réel».

h La cotisation à un régime à prestations déterminées est effectuée annuellement, selon une évaluation actuarielle de la somme qui doit être investie aujourd'hui pour pouvoir verser à l'employé, à sa retraite, les prestations prévues. On appelle le i «coût des services courants» le résultat de l'évaluation actuarielle de la valeur actuelle des prestations futures des participants. Les difficultés évidentes à prévoir des variantes comme le taux d'inflation, le rendement des placements et les j futurs niveaux d'emploi de la compagnie rendent la tâche de l'actuaire ardue et, dans une certaine

1994 CanLII 104 (SCC)

aries in respect of these and other factors will have a significant impact upon the determination of current service costs and the calculation of present levels of fund surplus or liability.

Defined benefit plans are to be distinguished from defined contribution (or "money purchase") plans, where set amounts are paid into the pension fund, and the benefits eventually paid equal the amount of the initial contributions plus any return which was obtained on the investment of those funds.

Either type of pension plan may be "contributory" (contributions by both employer and employee are mandatory) or "non-contributory" (only the employer's contributions are mandatory). In a non-contributory defined benefit plan, only the employer is obligated to contribute to the pension fund, although employees may have the option of making voluntary contributions in order to increase the benefits they will receive. In a contributory defined benefit plan, the employees must contribute a set amount, which may vary according to factors such as each employee's length of service and earnings, but is usually a defined percentage of salary. The employer's contribution to the fund is the amount over and above the employee contributions which the actuary determines is needed to cover the current service costs of the plan.

In the 1980s, a unique combination of conservative actuarial estimates and various economic factors caused many pension funds to accumulate large actuarial surpluses. Many employers sought to recapture this surplus by withdrawing excess monies from pension funds as an alternate source of capital, by applying surplus funds to any required contribution to the pension plan (i.e., taking a "contribution holiday"), or by claiming a proprietary right in any excess remaining upon the termination of the plan once all the employee benefits had been provided for. Employee groups have resisted such actions, claiming that the pension plans were established for their benefit, that the employers never intended or expected to recover any contributions made to the fund, and that any

mesure, conjecturale. Les hypothèses formulées par les actuaires au sujet de ces variantes et d'autres facteurs ont une incidence importante sur les coûts des services courants et sur le calcul du surplus ou du passif actuel de la caisse.

Il faut distinguer le régime à prestations déterminées du régime «à cotisations déterminées» (ou «à formule d'achat»), dans lequel des sommes fixes sont versées dans la caisse de retraite et où les prestations éventuellement versées équivalent au montant des cotisations initiales plus le rendement de placement de ces sommes.

Chaque type de régime peut être «contributif» (l'employeur et l'employé doivent y cotiser tous les deux) ou «non contributif» (seul l'employeur est tenu d'y cotiser). Seul l'employeur est tenu de cotiser à la caisse de retraite dans le cas d'un régime non contributif à prestations déterminées, quoiqu'il se puisse que les employés aient le choix d'y cotiser volontairement afin d'accroître leurs prestations futures. Dans le cas d'un régime contributif à prestations déterminées, les employés doivent cotiser une somme déterminée qui peut varier en fonction, notamment, de leur nombre d'années de service et de leur rémunération. Cependant, il s'agit en général d'un pourcentage déterminé de la rémunération. Pour sa part, l'employeur cotise à la caisse la somme qui, en sus des cotisations de l'employé, est, selon l'actuaire, nécessaire pour couvrir les coûts des services courants du régime.

Dans les années 1980, en raison d'une combinaison exceptionnelle d'évaluations actuarielles prudentes et de différents facteurs économiques, de nombreuses caisses de retraite ont accumulé des surplus actuariels considérables. Nombre d'employeurs ont tenté de récupérer ces sommes excédentaires en les retirant des caisses de retraite pour les utiliser comme source supplémentaire de capital, en s'en servant pour effectuer toute cotisation requise au régime de retraite (c'est-à-dire en s'accordant une «période d'exonération de cotisations») ou en revendiquant un droit de propriété sur tout surplus accumulé à la cessation du régime, une fois qu'on a pourvu au versement de toutes les prestations aux employés. Des groupes d'employés se sont opposés à de telles mesures sous prétexte

1994 CanLII 104 (SCC)

surplus accruing because of fortuitous economic circumstances should be paid to them when the plans are terminated.

que les régimes de retraite étaient établis à leur profit, que les employeurs n'avaient jamais voulu ni prévu récupérer les cotisations versées dans la caisse, et que tout surplus accumulé en raison de circonstances économiques imprévues devrait leur être versé à la cessation des régimes.

Factual Background

In 1983, two companies, Stearns-Roger Canada Ltd. ("Stearns") and Catalytic Enterprises Ltd. ("Catalytic") merged to form Stearns Catalytic, which subsequently became Air Products Canada Ltd. At the time of the merger, both Stearns and Catalytic had defined benefit pension plans for their employees, and both plans were in surplus. The pension plans and funds of Stearns and of Catalytic were amalgamated and evolved into two virtually identical Air Products Plans, one for employees of the Construction Division, and one for members of senior management. It is the employees' pension plan (the "Air Products plan") which forms the subject of the appeal and cross-appeal, although the results of the appeals will also affect the senior management plan.

Catalytic first instituted a pension plan for its employees in 1959. This plan was a contributory money-purchase plan which incorporated a trust fund administered by a trustee. By 1966, the plan had been amended to become a contributory defined benefits plan. The Catalytic plan was further amended in 1978.

The first Stearns pension plan relevant to these appeals was created in 1970. It repealed and replaced an earlier defined contribution plan. The 1970 plan was a contributory defined benefits plan until 1977, when it was amended to provide that employee contributions were to be of a voluntary nature only. Pursuant to the plan, Stearns entered into a Group Annuity Policy with the Mutual Life Assurance Company. All relevant versions of the Stearns plan gave the employer a discretion as to the distribution of any surplus which might remain upon the termination of the pension plan. By contrast, no provision was made for the treatment of

Historique des faits

En 1983, Stearns-Roger Canada Ltd. («Stearns») a fusionné avec Catalytic Enterprises Ltd. («Catalytic») pour former Stearns Catalytic qui est, par la suite, devenue Air Products Canada Ltd. À l'époque de la fusion, les régimes à prestations déterminées dont bénéficiaient les employés de Stearns et ceux de Catalytic accusaient un surplus. Les régimes et caisses de retraite de Stearns et de Catalytic ont été combinés pour être ensuite divisés en deux régimes quasi identiques, l'un destiné aux employés de la division de la construction d'Air Products et l'autre, à ses cadres supérieurs. C'est le régime de retraite des employés (le «régime d'Air Products») qui fait l'objet des pourvois principal et incident, quoique leur issue aura une incidence sur le régime des cadres supérieurs également.

C'est en 1959 que Catalytic a mis sur pied le premier régime de retraite à l'intention de ses employés. Il s'agissait d'un régime contributif à formule d'achat qui comportait une caisse en fiducie gérée par un fiduciaire. En 1966, le régime a été converti en un régime contributif à prestations déterminées et il a été modifié de nouveau en 1978.

Chez Stearns, le premier régime de retraite pertinent aux fins des présents pourvois a été créé en 1970. Il abrogeait et remplaçait un régime à cotisations déterminées antérieur. En 1977, on a modifié le régime de 1970, qui était un régime contributif à prestations déterminées, de manière à prévoir que les cotisations des employés seraient volontaires uniquement. Conformément au régime, Stearns a conclu un contrat de rente collective avec La Mutuelle, Compagnie d'assurance sur la vie. Toutes les versions pertinentes du régime de Stearns conféraient à l'employeur un pouvoir discrétionnaire quant à la répartition de tout surplus

1994 CanLII 104 (SCC)

surplus in the Catalytic plans until the 1978 amendment to the plan purported to give the company a similar discretion.

accumulé à la cessation du régime de retraite. Par contre, ce n'est qu'en 1978 qu'une modification a été apportée aux régimes de Catalytic pour que la compagnie soit investie du même pouvoir.

The amalgamated Stearns Catalytic (later Air Products) plan was a contributory defined benefits plan. It was funded by means of an Investment Contract with the Confederation Life Insurance Company. The terms of the plan gave the company a discretion as to the distribution of surplus upon termination and also provided for the automatic reversion to the company of any surplus remaining once benefits paid to a member had reached a maximum level specified in the plan. For the years ending September 30, 1985, September 30, 1986, September 30, 1987 and January 31, 1988, the company transferred no assets to the Confederation Life fund. Rather, the company's contributions to the pension fund were paid from the actuarially determined surplus existing in the pension fund.

Le régime combiné de Stearns Catalytic (par la suite Air Products) était un régime contributif à prestations déterminées, financé au moyen d'un contrat de placement conclu avec La Confédération, Compagnie d'assurance-vie («La Confédération»). Selon les modalités du régime, la compagnie était investie d'un pouvoir discrétionnaire quant à la répartition de surplus à la cessation du régime et se voyait remettre automatiquement tout surplus qui restait une fois que les prestations versées à un participant avaient atteint le montant maximal prévu au régime. Pour les années se terminant le 30 septembre 1985, le 30 septembre 1986, le 30 septembre 1987 et le 31 janvier 1988, la compagnie n'a transféré aucun actif à la caisse de La Confédération. Les cotisations qu'elle a versées dans la caisse de retraite ont été prélevées sur le surplus actuariel de la caisse elle-même.

On January 31, 1988, following the sale of most of the company assets, the Air Products pension plan was terminated. Actuarial calculations established that once provision had been made for payment to the employees of Air Products Canada Ltd. of all benefits to which they were entitled under the terms of their plans, a surplus of $9,179,130 would remain in the employee pension plan.

Le 31 janvier 1988, après que la plupart des biens de la compagnie eurent été vendus, on a mis fin au régime de retraite d'Air Products. Selon les calculs actuariels, le régime de retraite des employés d'Air Products Canada Ltd. accuserait un surplus de 9 179 130 $ une fois qu'on aurait pourvu au versement de toutes les prestations auxquelles ils avaient droit en vertu de leurs régimes.

In February, 1988, first Air Products, and then Gunter Schmidt on behalf of the employees of Air Products, applied to the Alberta Court of Queen's Bench for a declaration of entitlement to the surplus funds. Schmidt, on behalf of himself and the employees, also sought a declaration that Air Products be required to pay $1,465,400 into the pension fund. This sum represented the amount of fund surplus applied by Air Products to its contribution requirements from 1985 to 1988.

En février 1988, Air Products puis Gunter Schmidt, pour le compte des employés d'Air Products, ont demandé à la Cour du Banc de la Reine de l'Alberta de rendre un jugement déclaratoire sur le droit aux sommes excédentaires. Schmidt a également demandé, en son propre nom et en celui des employés, un jugement déclaratoire enjoignant à Air Products de verser 1 465 400 $ dans la caisse de retraite, laquelle somme représentait le surplus de caisse dont Air Products s'était servi pour s'acquitter de ses obligations en matière de cotisation au cours des années 1985 à 1988.

The Chief Justice of the Alberta Court of Queen's Bench (*Stearns Catalytic Pension Plans*

Le juge en chef de la Cour du Banc de la Reine de l'Alberta (*Stearns Catalytic Pension Plans (Re)*

1994 CanLII 104 (SCC)

(Re) (1990), 104 A.R. 190) found that the portion of the surplus which had been derived from the Catalytic fund was to be paid out to the employees, and that Air Products was not entitled to take a contribution holiday utilising any part of the Catalytic surplus. He therefore ordered the company to return $1,465,400 to the pension fund. In respect of the surplus which was traceable to the Stearns fund, the chambers judge held that it belonged to Air Products.

(1990), 104 A.R. 190) a conclu que la partie du surplus qui provenait de la caisse de Catalytic devait être versée aux employés, et qu'Air Products ne pouvait s'accorder une période d'exonération de cotisations en utilisant une partie du surplus de Catalytic. Il a donc ordonné à la compagnie de remettre 1 465 400 $ dans la caisse de retraite. Le juge en chambre a conclu que le surplus qui pouvait être attribué à la caisse de Stearns appartenait à Air Products.

An appeal by the company to the Alberta Court of Appeal in respect of the Catalytic surplus and the contribution holiday and a cross-appeal by the former Stearns employees in respect of the Stearns surplus were both dismissed.

La Cour d'appel de l'Alberta a rejeté l'appel interjeté par la compagnie relativement au surplus de Catalytic et à la période d'exonération de cotisations. Elle a également rejeté l'appel incident interjeté par les anciens employés de Stearns relativement au surplus de cette dernière.

The appeal and the cross-appeal before this Court are the same as before the Court of Appeal. The facts and the plans at issue in the appeal and the cross-appeal are sufficiently different that they must be dealt with separately. In order to avoid confusion, I will not refer to the parties as appellants or respondents but to either "Air Products" or "the company" (appellants on the appeal and respondents on the cross-appeal); and to "the employees" or "the plan members". The former Catalytic employees are the respondents on the appeal and the former Stearns employees are the appellants on the cross-appeal.

Les pourvois principal et incident formés devant notre Cour sont identiques aux appels principal et incident devant la Cour d'appel. Les faits et les régimes en cause dans les pourvois principal et incident diffèrent suffisamment pour être étudiés séparément. Afin d'éviter toute confusion, je ne parlerai ni de parties appelantes ni de parties intimées, mais plutôt d'«Air Products» ou de la «compagnie» (appelante dans le pourvoi principal et intimée dans le pourvoi incident), et des «employés» ou «participants». Les anciens employés de Catalytic sont les intimés dans le pourvoi principal, et ceux de Stearns, les appelants dans le pourvoi incident.

I. Judgments Below

I. Les juridictions inférieures

Alberta Court of Queen's Bench (1990), 104 A.R. 190

Cour du Banc de la Reine de l'Alberta (1990), 104 A.R. 190

The chambers judge noted that two provisions in the 1983 amalgamated pension plan were of particular importance. Under Section 18.05, any surplus remaining in the amalgamated fund following termination of the plan and distribution of all defined benefits was to revert to the company. Section 1 of the plan provided that the benefits provided by the plan were in lieu of any benefits to which employees may have been entitled under any of the previous plans and also that the benefits paid under the 1983 plan "in no event shall be less than the bene-

Le juge en chambre a souligné l'importance particulière de deux dispositions du régime de retraite combiné de 1983. Aux termes de l'art. 18.05, tout surplus qui reste dans la caisse combinée après la cessation du régime et le versement de toutes les prestations déterminées devait revenir à la compagnie. L'article 1 du régime prévoyait, d'une part, que les prestations y prévues tenaient lieu de toute prestation à laquelle les employés pouvaient avoir eu droit en vertu de l'un ou l'autre régime antérieur, et, d'autre part, que les prestations versées

1994 CanLII 104 (SCC)

fits to which they were entitled under these Prior Plans" (at p. 201). It was this phrase which required the court to review the Stearns and the Catalytic plans which had existed prior to 1983.

dans le cadre du régime de 1983 [TRADUCTION] «ne doivent en aucun cas être inférieures aux prestations auxquelles ils avaient droit en vertu de ces régimes antérieurs» (à la p. 201). C'est en raison de cette phrase que la cour a dû examiner les régimes de Stearns et de Catalytic antérieurs à 1983.

Following a careful examination of the history and terms of all the relevant pension plans, Moore C.J. decided that Air Products was entitled to the surplus funds under the Stearns Plan and that the employees were entitled to the surplus funds under the Catalytic plan. He further held that the company was not entitled to apply any actuarial surplus from the Catalytic fund towards its contributions to the pension fund in the period 1985-88, but that the relevant plan provisions did permit the company to use the existing surplus in the Stearns fund to pay its contribution to the pension fund.

Après avoir examiné minutieusement l'historique et les modalités de tous les régimes de retraite pertinents, le juge en chef Moore a décidé qu'Air Products avait droit au surplus accumulé dans le régime de Stearns et que les employés avaient droit au surplus accumulé dans le régime de Catalytic. Il a en outre conclu que la compagnie n'avait pas le droit de se servir de tout surplus actuariel accumulé dans la caisse de retraite de Catalytic pour effectuer ses cotisations au régime de retraite de 1985 à 1988, mais que les dispositions pertinentes du régime permettaient effectivement à la compagnie d'utiliser le surplus existant de la caisse de retraite de Stearns pour cotiser au régime de retraite.

The Chief Justice first considered the Stearns plans. He noted, at pp. 206-207, that Article 14.1 of the 1970 Stearns pension plan, incorporated as Article 14.3 in the 1977 plan, provided:

> Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1(c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company <u>or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine</u>. [Emphasis of the Chief Justice.]

Le Juge en chef a d'abord étudié les régimes de Stearns. Il souligne, aux pp. 206 et 207, que l'art. 14.1 du régime de 1970 de Stearns, devenu l'art. 14.3 du régime de 1977, prévoyait:

> [TRADUCTION] Sous réserve de l'approbation du ministre du Revenu national et du surintendant des régimes de retraite de l'époque, le surplus qui reste après que toutes les prestations visées au présent alinéa 14.1c) sont versées peut être remis à la compagnie <u>ou être utilisé au profit des participants, anciens participants, leurs ayants droit ou succession, de la manière juste que la compagnie peut à sa discrétion déterminer</u>. [Souligné par le Juge en chef.]

In his view the concluding words of this section gave the company a discretion as to the distribution of the surplus. He rejected the employees' suggestion that the 1977 plan was amended to remove this discretion, holding instead that the alleged "1982 amendments" to the plan were never more than a draft version which was not adopted and never registered. The Chief Justice considered that Article 14.3, when read together with Article 13.4 of the 1977 Plan, which permitted funds to be returned to the company with the consent of the

À son avis, la dernière partie de cet article conférait à la compagnie un pouvoir discrétionnaire quant à la répartition du surplus. Le Juge en chef a rejeté l'idée, exprimée par les employés, que le régime de 1977 a été modifié afin de retirer ce pouvoir, préférant conclure que les prétendues «modifications de 1982» n'étaient rien de plus qu'un avant-projet n'ayant jamais été adopté ni enregistré. Le Juge en chef a considéré que, conjugué à l'art. 13.4 du régime de 1977, qui permettait que des fonds soient remis à la compagnie avec

1994 CanLII 104 (SCC)

Minister of National Revenue and the Superintendent of Pensions, modified a more general clause which prohibited any amendment, termination, or diversion of the fund other than for the exclusive benefit of the employees.

Therefore, on a construction of the plan provisions as a whole, Moore C.J. concluded at p. 208:

> From the moment the prior Stearns Plan was terminated in 1969, the company had the right to any surplus as it had from the outset reserved out to itself any surplus. The plan had ended and the company could reserve out the surplus. The company at this point did not enter into a trust agreement but purchased an annuity contract. Insofar as the Stearns Plan is concerned, we are dealing with a defined benefits plan and once all the defined benefits have been satisfied or provided for (as is the case), the balance or any surplus is to be disposed of at the discretion of the company. The plan was not established to create a fund to be divided up among the employees, but rather to provide them with specific pensions on retirement.

He concluded that the Stearns fund was never impressed with a trust, nor could one be implied to any part of the Air Products fund which evolved from the prior Stearns plans. The company's right to control the allocation of surplus was determined in 1970, and the amalgamation of the Stearns and the Catalytic plans did not create any employee entitlement to such surplus.

The Chief Justice next considered the Catalytic plans. The first began in 1959 as a defined contribution plan. Unlike the original Stearns plan, this plan was never terminated. Rather it was amended several times over the following twenty-five years. The 1959 plan included a Trust Agreement entered into between Catalytic and the Canada Trust Company for the administration of the pension fund. It contained a provision prohibiting the company from recovering any sums paid into the fund, and an amendment provision which prohibited any amendment which had the effect of reducing members' benefits. These three features were also present in the 1966 restatement of the Catalytic Plan,

le consentement du ministre du Revenu national et du surintendant des régimes de retraite, l'art. 14.3 avait pour effet de modifier une disposition plus générale interdisant toute modification, cessation ou utilisation de la caisse à d'autres fins que le bénéfice exclusif des employés.

Par conséquent, compte tenu de l'ensemble des dispositions du régime, le juge en chef Moore conclut ceci, à la p. 208:

> [TRADUCTION] À compter de la cessation du régime antérieur de Stearns en 1969, la compagnie avait droit à tout surplus puisqu'elle se l'était réservé depuis le début. Le régime ayant cessé, la compagnie pouvait se réserver le surplus. La compagnie n'a alors conclu aucun acte de fiducie, passant plutôt un contrat de rente. Quant au régime de Stearns, il s'agit d'un régime à prestations déterminées et une fois qu'on a versé toutes ces prestations ou encore pourvu à leur versement (comme en l'espèce), le solde ou tout surplus doit être aliéné à la discrétion de la compagnie. La création du régime ne visait donc pas à établir une caisse qui serait répartie entre les employés, mais plutôt à verser à ces derniers des prestations déterminées à leur retraite.

Il a conclu que la caisse de Stearns n'avait jamais été assujettie à une fiducie et qu'on ne pouvait pas non plus déduire l'existence d'une telle fiducie à l'égard d'une partie de la caisse d'Air Products provenant des régimes antérieurs de Stearns. Le droit de la compagnie de contrôler la répartition d'un surplus a été établi en 1970 et la combinaison des régimes de Stearns et de Catalytic n'a pas conféré aux employés le droit à ce surplus.

Le Juge en chef a ensuite étudié les régimes de Catalytic. Le premier, créé en 1959, était un régime à cotisations déterminées. Contrairement au premier régime de Stearns, on n'a jamais mis fin à ce régime. Il a plutôt été modifié à maintes reprises au cours des vingt-cinq années suivantes. Le régime de 1959 comportait un acte de fiducie conclu entre Catalytic et la Société Canada Trust pour la gestion de la caisse de retraite. Une disposition du régime interdisait à la compagnie de recouvrer toute somme versée dans la caisse, et une autre interdisait toute modification ayant pour effet de réduire les prestations des participants. Ces trois caractéristiques existaient également dans le

1994 CanLII 104 (SCC)

although by then the plan had been changed from a money purchase plan to a defined benefits plan.

Moore C.J. noted that although in 1974 the agreement between Canada Trust and Catalytic was terminated and replaced by an investment contract with Confederation Life, there was no evidence that the trust itself had terminated. He was therefore of the opinion that the trust was still in place in 1978 when Catalytic purported to amend the plan in order to give itself the right to any surplus remaining upon termination.

Moore C.J., at p. 210, felt that in 1959 Catalytic had created a trust,

> [t]he sole object of . . . which . . . was to provide retirement benefits for the employees, not the company. . . . The fund became a trust fund for the benefit of the Catalytic employees.

He was particularly struck, at p. 210, by the wording of the 1959 Trust Agreement:

> It states in clear terms that no amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than for the exclusive benefit of such persons or their estates. This wording cannot be ignored and in my view it overrides any attempt to amend the trust to give the surplus to the company.

Moore C.J. therefore held that the 1978 amendment was invalid. He further relied upon *Re Reevie and Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595, and *C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd.* (1989), 66 O.R. (2d) 535, aff'd (1990), 39 E.T.R. 1, in support of his conclusion that, by virtue of the trust in their favour, the former employees of Catalytic were entitled to their portion of the surplus remaining in the Air Products Fund.

Moore C.J. dealt lastly with the issue of the contribution holidays taken by the company. He observed that, under the provisions of the amalgamated plan, Air Products reserved the right to pay its annual contribution to the fund out of existing surplus. He therefore held that the company could

régime de 1966 de Catalytic, bien qu'à cette époque le régime à formule d'achat soit devenu un régime à prestations déterminées.

Le juge en chef Moore a signalé que, bien que l'entente conclue en 1974 entre Canada Trust et Catalytic ait pris fin pour être remplacée par un contrat de placement conclu avec La Confédération, aucune preuve n'indiquait que la fiducie elle-même avait cessé d'exister. Il était donc d'avis que la fiducie existait toujours en 1978, lorsque Catalytic a voulu modifier le régime pour se conférer le droit à tout surplus restant à la cessation du régime.

Le juge en chef Moore estime, à la p. 210, qu'en 1959 Catalytic avait créé une fiducie qui

> [TRADUCTION] [a]vait pour unique objet d'offrir des prestations de retraite aux employés, et non à la compagnie [. . .] La caisse est devenue assujettie à une fiducie en faveur des employés de Catalytic.

Il est particulièrement frappé, à la p. 210, par le texte de l'acte de fiducie de 1959:

> [TRADUCTION] Il précise clairement qu'aucune modification ne doit autoriser ou permettre l'utilisation ou l'utilisation d'une partie de la caisse à d'autres fins que le bénéfice exclusif de ces personnes ou de leur succession. Ce texte ne saurait être ignoré et, à mon avis, il l'emporte sur toute tentative de modifier la fiducie de façon à remettre le surplus à la compagnie.

Le juge en chef Moore a donc conclu que la modification de 1978 était invalide. Il a en outre invoqué les décisions *Re Reevie and Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595, et *C.A.W., Local 458 c. White Farm Manufacturing Canada Ltd.* (1989), 66 O.R. (2d) 535, conf. par (1990), 39 E.T.R. 1, à l'appui de sa conclusion qu'en vertu de la fiducie créée en leur faveur, les anciens employés de Catalytic avaient droit à leur part du surplus accumulé dans la caisse d'Air Products.

Le juge en chef Moore a finalement examiné la question des périodes d'exonération de cotisations que s'est accordé la compagnie. Il a fait remarquer qu'aux termes du régime combiné Air Products se réservait le droit de se servir du surplus existant pour verser sa cotisation annuelle à la caisse. Par

1994 CanLII 104 (SCC)

validly use this surplus for its contribution obligations in the years 1985-88, but that, as a result of the existence of the trust in favour of the Catalytic employees, the contribution could not have been taken from the Catalytic share of the actuarial surplus.

Alberta Court of Appeal (1992), 125 A.R. 224 (McClung, Foisy and Major JJ.A.)

The Court of Appeal affirmed the judgment of Moore C.J., adding only two brief comments. The former Stearns employees argued again that the Stearns plan had been amended in 1982 so as to give them title to the surplus. The court noted that the chambers judge held that the draft provision the employees relied upon never became part of the plan and found no evidence to suggest that he was wrong in this conclusion.

Secondly, the Court of Appeal dealt with the employees' argument that the company was bound by the terms of an employee benefits brochure issued in 1982 to give the surplus to the employees. Under the heading "Future of the Plan" that brochure provided (p. 227):

> In the event there is a surplus in the fund after all benefits have been paid, it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the Plan at the date of termination.

The chambers judge had noted the existence of this brochure, but did not comment on its legal effect in his judgment.

The Court of Appeal held that the evidence surrounding the brochure was insufficient to alter the plan provisions giving Stearns a discretion as to use of the surplus. The facts were distinguishable from the case of *Re Collins and Pension Commission of Ontario* (1986), 56 O.R. (2d) 274. In *Re Collins* the company had given "repeated assurances" to the employees concerning the surplus in the course of collective bargaining, and it knew that the employees were aware of the surplus and

conséquent, a-t-il conclu, la compagnie pouvait à bon droit utiliser ce surplus pour s'acquitter de ses obligations en matière de cotisation au cours des années 1985 à 1988, mais, en raison de l'existence de la fiducie en faveur des employés de Catalytic, la cotisation n'aurait pu être prélevée sur la part du surplus actuariel revenant à Catalytic.

Cour d'appel de l'Alberta (1992), 125 A.R. 224 (les juges McClung, Foisy et Major)

La Cour d'appel a confirmé le jugement du juge en chef Moore, n'ajoutant que deux brefs commentaires. Les anciens employés de Stearns ont soutenu de nouveau que la modification apportée au régime de Stearns en 1982 leur donnait droit au surplus. La cour a fait remarquer que le juge en chambre avait conclu que l'avant-projet de disposition qu'invoquaient les employés n'avait jamais fait partie du régime, et elle n'a trouvé aucun élément de preuve qui portait à croire que sa conclusion était erronée.

La Cour d'appel a ensuite examiné l'argument des employés voulant que la compagnie était tenue, aux termes d'une brochure publiée en 1982 au sujet des prestations des employés, de verser le surplus à ces derniers. Sous la rubrique [TRADUCTION] «Avenir du régime», cette brochure prévoyait (p. 227):

> [TRADUCTION] Si la caisse accuse un surplus une fois versées toutes les prestations, la compagnie souhaite que ce surplus soit distribué équitablement aux employés qui cotisent au régime à la date de la cessation.

Le juge en chambre avait souligné l'existence de cette brochure, sans toutefois en commenter l'effet juridique dans son jugement.

La Cour d'appel a conclu que la preuve entourant la brochure n'était pas suffisante pour modifier les dispositions du régime qui permettaient à Stearns d'utiliser le surplus à sa discrétion. Les faits étaient différents de ceux de l'affaire *Re Collins and Pension Commission of Ontario* (1986), 56 O.R. (2d) 274, où, au cours des négociations collectives, la compagnie avait fait des «promesses répétées» aux employés concernant le surplus, alors qu'elle savait que les employés connaissaient

1994 CanLII 104 (SCC)

expected to receive it. In this case there was no evidence that any employees knew of or relied upon the Stearns brochure. Finally, the court held that the Stearns employees had failed to demonstrate that the brochure estopped the company from appropriating the surplus, or that the company acted unfairly in the exercise of its discretion to distribute the excess funds.

II. Issues on Appeal

A. *The Appeal (The Catalytic Plan)*

1. Whether the Court of Appeal erred in finding that Air Products was not entitled to the monies deriving from the Catalytic Plan which remained in its employee pension fund following termination of the pension plan and provision of all benefits.
2. Whether the Court of Appeal erred in finding that Air Products was not entitled to take existing actuarial surplus deriving from the Catalytic Plan into account in determining the amount of its annual funding obligation.

B. *The Cross-Appeal (The Stearns Plan)*

1. Whether the Court of Appeal erred in holding that Air Products was entitled to take the surplus remaining in its employee pension fund which was derived from the Stearns plan following termination of the plan and provision of all benefits.
2. Whether the Court of Appeal erred in finding that Air Products was entitled to use existing actuarial surplus not derived from the Catalytic plan in order to fund its required annual contribution to the Air Products plan during the years 1985-88.

III. The Legislative Framework

Two separate regimes affect Canadian employer pension plans in surplus. Each province now has in place some form of pension benefits legislation designed to protect member benefits by ensuring that employers meet their funding obligations and

l'existence du surplus et espéraient le toucher. En l'espèce, il n'y a aucune preuve que les employés connaissaient l'existence de la brochure de Stearns ou qu'ils se sont fondés sur elle. Enfin, la cour a conclu que les employés de Stearns n'avaient pas démontré qu'en raison de la brochure la compagnie ne pouvait s'approprier le surplus, ni qu'elle avait agi inéquitablement dans l'exercice de son pouvoir discrétionnaire de répartir les sommes excédentaires.

II. Les questions en litige

A. *Le pourvoi (le régime de Catalytic)*

1. La Cour d'appel a-t-elle commis une erreur en concluant qu'Air Products n'avait pas droit aux sommes provenant du régime de Catalytic, qui restaient dans la caisse de retraite des employés après la cessation du régime de retraite et le versement de toutes les prestations?
2. La Cour d'appel a-t-elle commis une erreur en concluant qu'Air Products n'avait pas le droit de tenir compte du surplus actuariel existant qui provenait du régime de Catalytic pour déterminer le montant de sa cotisation annuelle obligatoire?

B. *Le pourvoi incident (le régime de Stearns)*

1. La Cour d'appel a-t-elle commis une erreur en concluant qu'Air Products avait le droit, après la cessation du régime et le versement de toutes les prestations, de s'approprier le surplus provenant du régime de Stearns, qui restait dans la caisse de retraite de ses employés?
2. La Cour d'appel a-t-elle commis une erreur en concluant qu'Air Products pouvait se servir du surplus actuariel existant qui ne provenait pas du régime de Catalytic pour effectuer sa cotisation annuelle obligatoire au régime d'Air Products pendant les années 1985 à 1988?

III. Le cadre législatif

Les surplus accumulés dans les régimes de retraite des employeurs canadiens sont assujettis à deux régimes distincts. Chaque province possède maintenant une forme quelconque de législation en matière de prestations de retraite, destinée à préser-

1994 CanLII 104 (SCC)

that pension funds remain solvent. The federal income tax authorities have also attempted to regulate employer pension plans in order to limit the tax relief which employers and employees can obtain for their contributions to pension funds. Some of the provincial statutes have recently begun to deal with the issue of surplus upon plan termination or of contribution holidays. The tax regulation pertaining to surplus has to date taken the form of non-binding Information Circulars rather than legislation.

A. *The Income Tax Act*

Under the *Income Tax Act*, S.C. 1970-71-72, c. 63, certain tax benefits are granted to those contributing to registered pension plans. Contributions by employers and employees to a registered pension plan are tax deductible; plan earnings are exempt from taxation, and the taxation of employee benefits is deferred until they are received by the employee. The Act also contains two ceilings, one on the amount which an employer can deduct from income in respect of current service contributions to an employee pension plan, and the other on the maximum benefit which each employee can derive from the employer's deductible contributions.

In addition, on December 31, 1981, Revenue Canada issued Information Circular No. 72-13R7. This circular contains two significant requirements for the registration of pension plans. First, s. 39 of the circular requires that all plans provide that any existing actuarial plan surplus in excess of the employer's normal current service costs over a two-year period must either be refunded to the employer or used to take a contribution holiday. The circular also sets a maximum limit on the benefits which an employee can recover under a plan, and in s. 13.1 stipulates that all pension plans must contain a provision permitting actual surplus to be

ver les prestations des participants en assurant que les employeurs remplissent leurs obligations en matière de financement et que les caisses de retraite demeurent solvables. Les autorités fédérales en matière d'impôt sur le revenu ont également tenté de régir les régimes de retraite des employeurs afin de limiter les allégements fiscaux dont ces derniers et leurs employés peuvent bénéficier à l'égard des cotisations qu'ils versent dans des caisses de retraite. Certaines lois provinciales ont récemment commencé à traiter la question du surplus lors de la cessation d'un régime ou celle des périodes d'exonération de cotisations. La réglementation fiscale relative aux surplus a jusqu'à maintenant pris la forme de circulaires d'information n'ayant aucune force obligatoire, plutôt que celle de textes législatifs.

A. *La Loi de l'impôt sur le revenu*

La *Loi de l'impôt sur le revenu*, S.C. 1970-71-72, ch. 63, accorde certains avantages fiscaux à ceux qui cotisent à des régimes de retraite enregistrés. Les cotisations versées par les employeurs et les employés dans un régime de retraite enregistré sont déductibles d'impôt, les gains réalisés par le régime sont exempts d'impôt et les prestations ne sont imposées qu'au moment de leur versement aux employés. La Loi fixe également deux plafonds, l'un quant à la somme qu'un employeur peut déduire de son revenu relativement aux cotisations pour services courants versées dans un régime de retraite d'employés, et l'autre quant à la prestation maximale que chaque employé peut tirer des cotisations déductibles de l'employeur.

De plus, le 31 décembre 1981, Revenu Canada a publié la circulaire d'information n° 72-13R7 qui énonce deux exigences importantes à l'égard de l'enregistrement des régimes de retraite. D'abord, l'art. 39 de la circulaire exige que tous les régimes prévoient que tout surplus actuariel existant du régime qui excède le coût normal des services courants de l'employeur au cours d'une période de deux ans doit être remboursé à ce dernier ou utilisé aux fins d'une période d'exonération de cotisations. La circulaire fixe également une limite maximale aux prestations que l'employé peut recouvrer en vertu d'un régime, alors que l'art. 13.1 précise

1994 CanLII 104 (SCC)

refunded to employers upon termination of the plan. However, these requirements were never incorporated into the *Income Tax Act* or its Regulations during the lifetime of the Air Products plan or its predecessors.

que tous les régimes de retraite doivent comporter une disposition permettant le remboursement d'un surplus réel aux employeurs lors de la cessation du régime. Toutefois, ces exigences n'ont jamais été incorporées dans la *Loi de l'impôt sur le revenu* ou dans son règlement d'application pendant la durée du régime d'Air Products ou des régimes qui l'ont précédé.

One of the results of the Information Circular has been that many pension plans which originally were silent on the issue of surplus or which stated that employer contributions to a plan were "irrevocable" have been amended to provide that any surplus should be refunded to employers upon termination of the plan. Air Products cites the Information Circular in support of its position, presumably as evidence that Revenue Canada supports employer ownership of a surplus. The employees in turn emphasize the non-binding effect of the circular and contend that the employer's motivation for amending the plan is not a relevant consideration in determining its legal effect.

À la suite de la circulaire d'information, notamment, de nombreux régimes de retraite, qui ne traitaient pas, au départ, de la question du surplus ou qui déclaraient «irrévocables» les cotisations d'un employeur à un régime, ont été modifiés de manière à prévoir que tout surplus devrait revenir à l'employeur lors de la cessation du régime. Air Products cite la circulaire d'information à l'appui de sa position, vraisemblablement comme preuve que Revenu Canada soutient le droit de propriété de l'employeur sur un surplus. Les employés, pour leur part, insistent sur l'effet non obligatoire de la circulaire et prétendent que la raison qui pousse l'employeur à modifier le régime n'est pas un facteur pertinent pour déterminer son effet juridique.

Several years ago I agreed with Zuber J.A. of the Ontario Court of Appeal that the Information Circular is of limited legal significance: *King Seagrave Ltd. v. Canada Permanent Trust* (1986), 13 O.A.C. 305 (C.A.), aff'g (1985), 51 O.R. (2d) 667 (H.C.). I am still of that opinion. At the time the pension plans which are the subject of these appeals were wound up, the requirements contained in the circular did not have binding legal force. The circular did not purport to clarify any provisions of the *Income Tax Act*, and the fact that some pension plans may have been amended to comply with its provisions does not alter my approach to the surplus entitlement issue.

Il y a plusieurs années, j'ai convenu avec le juge Zuber de la Cour d'appel de l'Ontario que la circulaire d'information avait une importance limitée sur le plan juridique: *King Seagrave Ltd. c. Canada Permanent Trust* (1986), 13 O.A.C. 305 (C.A.), conf. (1985), 51 O.R. (2d) 667 (H.C.). Je suis toujours de cet avis. Au moment où les régimes de retraite qui font l'objet des présents pourvois ont été liquidés, les exigences contenues dans la circulaire n'avaient pas force obligatoire. La circulaire n'avait pas pour objet de clarifier des dispositions de la *Loi de l'impôt sur le revenu* et le fait que certains régimes de retraite puissent avoir été modifiés de manière à se conformer aux dispositions de la circulaire ne change rien à ma façon d'aborder la question du droit au surplus.

B. *Provincial Legislation*

No Canadian province has yet dealt directly with the issue of ownership of or entitlement to pension surplus by legislation. The preferred approach in most jurisdictions has been to provide

B. *La législation provinciale*

Aucune province canadienne n'a, à ce jour, légiféré directement sur la question de la propriété ou du droit au surplus d'un régime de retraite. Dans la plupart des cas, on a préféré prévoir qu'il ne sau-

1994 CanLII 104 (SCC)

that the withdrawal or transfer of actuarial surplus can only be accomplished when certain specified conditions have been met. See, for example, the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8. The British Columbia *Pension Benefits Standards Act*, S.B.C. 1991, c. 15, requires that all pension plans must contain clauses providing for the arbitration of disputes concerning entitlement to surplus or contribution holidays. Manitoba has also enacted an interesting variation on the treatment of surplus funds. Section 26(2) of its *Pension Benefits Act*, R.S.M. 1987, c. P32, provides that no existing surplus may be withdrawn from a pension fund unless the Pension Commission "believes it equitable to do so".

rait y avoir de retrait ou de transfert d'un surplus actuariel que si certaines conditions précises sont remplies. Voir, par exemple, la *Loi sur les régimes de retraite* de l'Ontario, L.R.O. 1990, ch. P.8. Pour sa part, la *Pension Benefits Standards Act* de la Colombie-Britannique, S.B.C. 1991, ch. 15, requiert que tous les régimes de retraite prévoient l'arbitrage des litiges portant sur le droit à un surplus ou sur les périodes d'exonération de cotisations. Le Manitoba a lui aussi adopté une variante intéressante quant au traitement des sommes excédentaires. Le paragraphe 26(2) de la *Loi sur les prestations de pension*, L.R.M. 1987, ch. P32, prévoit qu'aucun surplus existant ne peut être retiré d'une caisse de retraite, sauf si la Commission des pensions «croit qu'il est juste qu'un tel versement soit effectué».

The B.C. and Manitoba provisions represent welcome legislative steps. Regrettably, a comprehensive approach to the issues arising from pension surplus has yet to be enacted in any part of this country. The courts have on a number of occasions been required to determine the allocation of pension surplus. Yet the courts are limited in their approach by the necessity of applying the sometimes inflexible principles of contract and trust law. The question of entitlement to surplus raises issues involving both social policy and taxation policy. The broad policy issues which are raised by surplus disputes would be better resolved by legislation than by a case-by-case consideration of individual plans. Yet that is what now must be undertaken.

Les dispositions législatives adoptées par la Colombie-Britannique et le Manitoba sont bienvenues. Malheureusement, nulle part au pays n'a-t-on répondu exhaustivement aux questions qui se posent en matière de surplus accumulé dans les régimes de retraite. Les tribunaux ont dû, à maintes reprises, statuer sur la répartition d'un surplus de caisse de retraite. Cependant, ils sont limités dans leur démarche par la nécessité d'appliquer les principes parfois inflexibles du droit des contrats et du droit des fiducies. Le droit à un surplus soulève des questions tant de politique sociale que de politique fiscale. Les questions de principe générales soulevées dans les litiges en matière de surplus seraient plus adéquatement résolues par voie législative que par un examen individuel de chaque régime. Or, c'est ce qu'il faut maintenant entreprendre.

The pension plans under consideration are governed by the Alberta *Employment Pension Plans Act*, S.A. 1986, c. E-10.05 (proclaimed into force January 1, 1987). Section 42(2) of the Act requires that all plans provide for the allocation of surplus on termination to either the employer, the employees, or both. Section 58 prohibits employer withdrawal of surplus from an ongoing fund unless such withdrawal is specifically permitted in the plan and the permission of the Superintendent of Pensions is obtained.

Les régimes de retraite examinés sont régis par l'*Employment Pension Plans Act* de l'Alberta, S.A. 1986, ch. E-10.05 (promulguée le 1er janvier 1987). Le paragraphe 42(2) de cette loi exige que tous les régimes prévoient l'attribution de tout surplus lors de leur cessation soit à l'employeur, soit aux employés, soit aux deux à la fois. L'article 58 interdit à l'employeur de retirer le surplus d'une caisse existante, sauf si le régime le permet expressément et si on a obtenu l'autorisation du surintendant des régimes de retraite:

1994 CanLII 104 (SCC)

Withdrawal, together with the issue of contribution holidays, is also referred to in s. 34(9) of the Regulations to the Act (Alta. Reg. 364/86) which provides:

34 . . .

(9) Where the actuarial valuation report . . . reveals that the plan has surplus assets,

. . .

(b) when the unfunded liabilities have been amortized or where no unfunded liability exists, the surplus assets may be

(i) used to increase benefits,

(ii) left in the plan,

(iii) if the plan does not so prohibit, applied to reduce the employer contributions referred to in subsection (3)(a), or

(iv) where no solvency deficiency exists and subject to section 58 of the Act and section 39 of this Regulation, paid or transferred to the employer.

The *Employment Pension Plans Act* and its regulations do no more than establish that surplus entitlement must be determined by the wording of the plan. Contribution holidays are permitted provided they are not prohibited by the plan. The previous legislation governing pensions in Alberta, the *Pension Benefits Act*, R.S.A. 1980, c. P-3, did not deal with either surplus remaining on termination or with contribution holidays. As a result, the primacy of the wording of individual pension plans has never been displaced by legislation, and it is therefore those specific provisions which must be considered.

IV. Relevant Pension Plan Provisions

The parties most helpfully compiled a summary of the history and relevant provisions of all the pension plans and related documents pertinent to these appeals. An abbreviated version of this summary, taken from the Agreed Statement of Facts, is attached as an appendix to these reasons.

Le retrait de même que la question des périodes d'exonération de cotisations sont également mentionnés au par. 34(9) du règlement d'application de la Loi (Alta. Reg. 364/86), qui prévoit:

[TRADUCTION] 34 . . .

(9) Si le rapport d'évaluation actuarielle [. . .] révèle que le régime accuse un surplus,

. . .

b) lorsque le passif non capitalisé a été amorti ou qu'il n'existe aucun passif non capitalisé, le surplus peut être

(i) utilisé pour accroître les prestations;

(ii) laissé dans le régime;

(iii) si le régime n'interdit pas de le faire, utilisé pour réduire les cotisations de l'employeur prévues à l'alinéa 3a); ou

(iv) en l'absence d'insolvabilité et sous réserve de l'article 58 de la Loi et de l'article 39 du présent règlement, versé ou transféré à l'employeur.

L'*Employment Pension Plans Act* et son règlement d'application ne font que prévoir que le droit au surplus doit être déterminé par le texte du régime. Les périodes d'exonération de cotisations sont permises dans la mesure où elles ne sont pas interdites par le régime. La loi qui, auparavant, régissait les régimes de retraite en Alberta, soit la *Pension Benefits Act*, R.S.A. 1980, ch. P-3, ne traitait ni du surplus accumulé à la cessation, ni des périodes d'exonération de cotisations. Ainsi, la prééminence du texte des régimes de retraite individuels n'a jamais été écartée par une loi et ce sont, par conséquent, ces dispositions précises qu'il faut étudier.

IV. Les dispositions pertinentes des régimes de retraite

Les parties ont fort utilement dressé un résumé de l'historique et des dispositions pertinentes de tous les régimes de retraite et documents connexes qui sont pertinents à l'égard des présents pourvois. Une version abrégée de ce résumé, tirée de l'exposé conjoint des faits, est annexée aux présents motifs.

1994 CanLII 104 (SCC)

V. Analysis

A. *Surplus Entitlement*

An employer who creates an employee pension plan agrees to provide pension benefits to retiring employees. At first, employers undertaking this obligation paid retired employees directly from company income. Gradually, the practice of creating separate pension funds emerged following the passage of regulations designed to protect employees from the bankruptcy or termination of the company, coupled with the realization of employers that the cost of providing pensions is reduced if money is put aside on behalf of present employees for their future benefit.

Pension funds thus began to be structured in several different ways. Investment contracts and trust funds eventually proved to be the most popular forms of pension plan funding for employers since they provided the requisite degree of "irrevocability" of contribution to entitle an employer to obtain tax relief on its pension contributions. The relatively recent phenomenon of pension plan surplus has created an inevitable tension between employers who claim that they never lose their entitlement to monies which they contribute to the fund but which are not needed to provide agreed benefits, and employees who assert that all pension fund monies belong to them. It is suggested that if employers are not able to retrieve surpluses, they will be tempted to fund existing plans less generously. I cannot agree. First, unless the terms of the plan specifically preclude it, an employer is entitled to take a contribution holiday. Second, most pension plans require the level of employer contribution to be determined by an actuary. The employer will not be able to reduce the level of contribution unilaterally below that required according to standard actuarial practice. Third, employers are required by legislation to make up any unfunded liability. Finally, the fact that some employers cannot recoup surplus on termination is unlikely to influence the conduct of employers as a whole. In order to obtain registration, plans created since 1981 must make provision for distribution of

V. Analyse

A. *Le droit au surplus*

L'employeur qui met sur pied un régime de retraite pour ses employés convient de verser des prestations à ceux qui prennent leur retraite. À l'origine, les employeurs s'engageant ainsi payaient les employés retraités directement sur le revenu de la compagnie. La pratique consistant à créer des caisses de retraite distinctes est née progressivement après qu'eurent été adoptés des règlements destinés à protéger les employés de la faillite ou de la fermeture de la compagnie et que les employeurs eurent réalisé que le coût des prestations de retraite est réduit si l'argent destiné aux employés actuels est mis de côté pour leur bénéfice futur.

Les caisses de retraite ont donc commencé à être structurées de plusieurs façons différentes. Les contrats de placement et les fiducies se sont éventuellement révélés être les formes les plus populaires de financement d'un régime de retraite pour les employeurs puisqu'ils fournissaient le degré d'«irrévocabilité» des cotisations nécessaire pour permettre à l'employeur d'obtenir un allégement fiscal pour ses cotisations au régime de retraite. Le phénomène relativement récent des surplus de caisse de retraite a engendré des tensions inévitables entre les employeurs qui prétendent qu'ils n'ont jamais perdu leur droit aux cotisations qu'ils ont versées dans la caisse, mais qui ne sont pas requises pour offrir les prestations convenues, et les employés qui soutiennent que toutes les sommes comprises dans une caisse de retraite leur appartiennent. On laisse entendre que si les employeurs ne sont pas capables de récupérer les surplus, ils seront tentés de financer moins généreusement les régimes existants. Je ne puis être d'accord avec cela. Premièrement, à moins que les modalités du régime ne l'empêchent de le faire, l'employeur a le droit de s'accorder une période d'exonération de cotisations. Deuxièmement, la plupart des régimes de retraite exigent que le montant des cotisations de l'employeur soit fixé par un actuaire. Il ne sera pas possible à l'employeur de réduire unilatéralement le montant de ses cotisations en deçà de ce qui est nécessaire suivant la

1994 CanLII 104 (SCC)

surplus on termination. It is generally only in pre-existing plans that the problem of ownership of surplus arises and, as the results of these appeals demonstrate, even then employee entitlement to the surplus is not automatic.

pratique actuarielle normale. Troisièmement, les employeurs sont légalement tenus de compenser tout passif non capitalisé. Enfin, le fait que certains employeurs ne puissent récupérer un surplus à la cessation d'un régime est peu susceptible d'influencer la conduite de l'ensemble des employeurs. Pour être enregistrés, les régimes mis sur pied depuis 1981 doivent pourvoir à la répartition de tout surplus à leur cessation. Ce n'est généralement que dans le cas de régimes antérieurs à cette date que se pose le problème de la propriété des surplus et, comme le démontre l'issue des présents pourvois, même là, le droit des employés au surplus n'est pas automatique.

Entitlement to the surplus will often turn upon a determination as to whether the pension fund is impressed with a trust. Accordingly, the first question to be decided in a pension surplus case is whether or not a trust exists.

Le droit au surplus dépendra souvent de la réponse à la question de savoir si la caisse de retraite est assujettie à une fiducie. En conséquence, la première question à trancher dans une affaire de surplus de caisse de retraite est de savoir s'il existe une fiducie.

1. Trust or Contract?

1. Fiducie ou contrat?

Employer-funded defined benefit plans usually consist of an agreement whereby an employer promises to pay each employee upon retirement a pension which is defined by a formula contained in the plan. A pension fund is created pursuant to the plan, either by way of contract or by way of trust. Whether or not any given fund is subject to a trust is determined by the principles of trust law. If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund.

Dans les régimes à prestations déterminées financés par l'employeur, ce dernier s'engage généralement à verser à chaque employé retraité des prestations déterminées selon une formule prévue dans le régime. Une caisse de retraite est créée conformément au régime, soit par contrat, soit par fiducie. La question de savoir si une caisse de retraite est assujettie à une fiducie est résolue par les principes du droit des fiducies. S'il y a eu une déclaration expresse ou implicite de fiducie et si les biens en fiducie ont été confiés à un fiduciaire pour le bénéfice des employés, la caisse de retraite constituera alors un fonds en fiducie.

If no trust is created, then the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the plan. However, when a trust is created, the funds which form the *corpus* are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust

Si aucune fiducie n'est créée, la gestion et la répartition de la caisse de retraite et de tout surplus accumulé seront régies uniquement par les modalités du régime. Toutefois, lorsqu'une fiducie est créée, le fonds qui forme le capital est assujetti aux exigences du droit des fiducies. Les modalités du régime de retraite ne sont alors pertinentes, quant aux questions de répartition, que dans la mesure où elles sont insérées par renvoi dans l'acte qui crée la fiducie. Le contrat ou régime de retraite peut

1994 CanLII 104 (SCC)

funds but its terms cannot compel a result which is at odds with the existence of the trust.

Typically, when a pension fund is subject to a trust, several issues arise: Are such trusts for a purpose or are they "classic" trusts? What part of the pension fund is subject to the trust? To what extent can a settlor-employer alter the terms of a trust in order to appropriate the fund surplus for itself? Is the surplus subject to a resulting trust? Let us consider the nature of the trust in this case.

2. Purpose or 'True' Trust?

Air Products has suggested that the Catalytic pension fund was not subject to an express trust but instead to a trust for a purpose. Relying on *dicta* of the British Columbia Court of Appeal in *Hockin v. Bank of British Columbia* (1990), 71 D.L.R. (4th) 11, the company argues that a trust set up as part of a pension plan constitutes a trust whose sole purpose is to provide defined benefits to members. Once those benefits have been provided the purpose is fulfilled, the trust expires and the terms of the pension plan alone determine entitlement to any remaining fund surplus. I cannot accept this proposition.

Trusts for a purpose are a rare species. They constitute an exception to the general rule that trusts for a purpose are void. (See D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at pp. 127-28.) The pension trust is much more akin to the classic trust than to the trust for a purpose. I agree with the following comments of the Pension Commission of Ontario in *Arrowhead Metals Ltd. v. Royal Trust Co.* (March 26, 1992), unreported, at pp. 13-15, cited by Adams J. in *Bathgate v. National Hockey League Pension Society* (1992), 11 O.R. (3d) 449, at p. 510:

> Purpose trusts are trusts for which there is no beneficiary; that is, they are trusts where no person has an equitable entitlement to the trust funds. Funds are

influer sur le paiement des fonds de la fiducie, mais ses modalités ne peuvent forcer un résultat qui soit incompatible avec l'existence de la fiducie.

Habituellement, lorsqu'une caisse de retraite est assujettie à une fiducie, plusieurs questions se posent: S'agit-il d'une fiducie à une fin ou d'une fiducie «classique»? Quelle partie de la caisse de retraite est assujettie à la fiducie? Dans quelle mesure l'employeur constituant peut-il modifier les termes d'une fiducie pour s'approprier le surplus de la caisse? Ce surplus est-il assujetti à une fiducie par déduction? Voyons la nature de la fiducie en l'espèce.

2. Fiducie à une fin ou fiducie «véritable»?

Air Products a laissé entendre que la caisse de retraite de Catalytic était assujettie non pas à une fiducie expresse, mais plutôt à une fiducie à une fin. Invoquant les remarques incidentes de la Cour d'appel de la Colombie-Britannique dans l'arrêt *Hockin c. Bank of British Columbia* (1990), 71 D.L.R. (4th) 11, la compagnie soutient qu'une fiducie créée dans le cadre d'un régime de retraite a pour seule fin de verser des prestations déterminées aux participants à ce régime. Une fois que ces prestations sont versées, la fin est réalisée, la fiducie est éteinte et seules les modalités du régime de retraite déterminent qui a droit à toute somme excédentaire. Je ne puis souscrire à cette proposition.

Les fiducies à une fin sont rares. Elles sont une exception à la règle générale qui veut que les fiducies à une fin soient nulles. (Voir D. W. M. Waters, *Law of Trusts in Canada* (2e éd. 1984), aux pp. 127 et 128.) La fiducie de régime de retraite s'apparente beaucoup plus à la fiducie classique qu'à la fiducie à une fin. Je partage les commentaires suivants de la Commission des régimes de retraite de l'Ontario, dans l'arrêt *Arrowhead Metals Ltd. c. Royal Trust Co.* (26 mars 1992), inédit, aux pp. 13 à 15, cité par le juge Adams dans *Bathgate c. National Hockey League Pension Society* (1992), 11 O.R. (3d) 449, à la p. 510:

> [TRADUCTION] Dans le cas des fiducies à une fin, aucun bénéficiaire n'est désigné; en d'autres termes, personne n'a un droit d'*equity* sur les fonds en fiducie.

1994 CanLII 104 (SCC)

deposited in trust in order to see that a particular purpose is filled; people may benefit, but only indirectly. . . .

People are clearly direct beneficiaries of pension trusts. Pension trusts are established not to effect some purpose, such building [*sic*] a recreation centre, but to provide money on a regular basis to retired employees. It misconceives both the nature of a purpose trust and of a pension trust to suggest that pensions are for purposes, not persons. It is important to recognize that the characterization of pension trusts as purpose trusts results in the pension text, a contract, taking precedence over the trust agreement. That is, in making common law principles of contract paramount to the equitable principles of trust law. It is trade [*sic*] law that where common law and equity conflict, equity is to prevail. In light of that rule, it seems inappropriate to do indirectly that which could not be done directly.

To repeat, the first step is to determine whether or not the pension fund is in fact a pension trust. This will most often be revealed by the wording of the pension plan itself, but may also be implied from the plan and from the way in which the pension fund is set up. A pension trust is a "classic" or "true" trust and not a mere trust for a purpose. If there is no trust created under the pension plan, the wording of the pension plan alone will govern the allocation of any surplus remaining on termination. However, if the fund is subject to a trust, different considerations may govern.

3. The Definition of the Trust Fund

Before proceeding to an examination of the actual effect of the trust, one more brief investigation must be undertaken. That is the determination of whether all of the monies contained in a given pension fund are subject to the trust, or whether the surplus remaining after termination is separate from the remainder of the fund and thus not subject to the trust. In creating a pension plan and accompanying trust, an employer may be able to

Des fonds sont déposés en fiducie pour réaliser une fin particulière; des personnes peuvent en bénéficier, mais seulement indirectement. . . .

Des personnes sont manifestement bénéficiaires directs des fiducies de régime de retraite. Ces dernières sont créées non pas pour réaliser une fin, comme la construction d'un centre récréatif, mais pour que des sommes soient versées régulièrement à des employés retraités. C'est mal concevoir la nature d'une fiducie à une fin et celle d'une fiducie de régime de retraite que de dire que les prestations de retraite sont versées pour une fin et non pour des personnes. Il importe de reconnaître que, si les fiducies de régime de retraite sont qualifiées de fiducies à une fin, il en résulte que le texte du régime, un contrat, aura préséance sur l'acte de fiducie. Autrement dit, les principes de common law du droit des contrats l'emporteront sur les principes d'*equity* du droit des fiducies. Or, il est bien établi en droit que lorsque la common law et l'*equity* s'opposent, cette dernière doit prévaloir. Compte tenu de cette règle, il semble peu approprié de faire indirectement ce qui ne pourrait être fait directement.

Je le répète, la première étape consiste à déterminer si la caisse de retraite constitue en fait un régime de retraite assujetti à une fiducie. On trouvera le plus souvent la réponse à cette question dans le texte du régime de retraite lui-même, mais il se peut également qu'elle ressorte implicitement du régime et de la façon dont la caisse de retraite est mise sur pied. La fiducie de régime de retraite est une fiducie «classique» ou «véritable», et non une simple fiducie à une fin. Si aucune fiducie n'est créée en vertu du régime de retraite, seul le texte du régime régira la répartition de toute somme excédentaire lors de la cessation. Toutefois, si la caisse est assujettie à une fiducie, différentes considérations peuvent s'appliquer.

3. La définition du fonds en fiducie

Avant d'étudier l'effet réel de la fiducie, il faut procéder à un autre bref examen, c'est-à-dire qu'il faut se demander si tout l'argent contenu dans une caisse de retraite donnée est assujetti à la fiducie, ou si le surplus qui reste après la cessation est distinct du reste de la caisse et échappe ainsi à la fiducie. En créant un régime de retraite assorti d'une fiducie, un employeur peut être en mesure de définir l'objet de la fiducie de façon à n'inclure que le

1994 CanLII 104 (SCC)

define the subject matter of the trust so as to include only the amount necessary to cover the employee benefits owed. However, very specific wording will be necessary before an ongoing surplus will be excluded from the operation of the pension trust.

montant nécessaire pour couvrir les prestations dues aux employés. Toutefois, il faudra un texte très précis pour qu'un surplus existant échappe à l'application de la fiducie de régime de retraite.

The definition of the trust fund in the pension plan and in the trust agreement will usually establish that any surplus monies form part of the trust. In *Re Reevie and Montreal Trust Co. of Canada*, *supra*, for example, part of Canada Dry's pension plan, cited at p. 596 of the judgement of Zuber J.A., provided:

> 10.1 A Trustee shall be appointed by the Board of Directors from time to time and a Trust Agreement executed between the Board of Directors and such trustee, under the terms of which a Trust Fund shall be established to receive and hold all Contributions payable by the Members and the Company, interest and other income, and to pay the benefits provided by the Plan and any of its expenses not paid directly by the Company. [Emphasis added.]

La définition du fonds en fiducie dans le régime de retraite et dans l'acte de fiducie établira généralement que les sommes excédentaires font partie de la fiducie. Par exemple, dans l'arrêt *Re Reevie and Montreal Trust Co. of Canada*, précité, une partie du régime de retraite de Canada Dry, cité à la p. 596 des motifs du juge Zuber, prévoyait ceci:

[TRADUCTION]

> 10.1 Le conseil d'administration nomme un fiduciaire et il conclut avec ce dernier un acte de fiducie aux termes duquel un fonds en fiducie est établi afin que toutes les cotisations des participants et de la compagnie y soient versées, de même que les intérêts et autres revenus, et afin de verser les prestations prévues par le régime et de payer les frais y relatifs qui ne sont pas payés directement par la compagnie. [Je souligne.]

In the absence of any more specific definition of the content of the trust fund in either the plan or the trust agreement such a phrase establishes that all money in the care of the trustee is subject to the trust in favour of the employees. The wording of the plan in *Hockin*, *supra*, at p. 13, was even more explicit:

> (h) "Fund" means the trust consisting of all sums of money and other property as shall from time to time be paid or delivered to the Trustee in accordance with the provisions hereof, all investments and proceeds thereof and all earnings, profits and other accretions thereto, less all payments and deductions that are made therefrom as herein provided.

À défaut d'une définition plus précise du contenu du fonds en fiducie dans le régime ou dans l'acte de fiducie, pareille phrase établit que tout l'argent confié au fiduciaire est assujetti à la fiducie en faveur des employés. Le texte du régime dans *Hockin*, précité, à la p. 13, était même plus explicite:

[TRADUCTION]

> h) «fonds» La fiducie qui réunit toutes les sommes versées et autres biens confiés à l'occasion au fiduciaire conformément aux présentes dispositions, de même que tous les placements et leurs produits, les gains, les profits et autres accroissements réalisés, moins tous les paiements et toutes les déductions effectués sur celle-ci conformément aux présentes.

I would have thought that the wording of this clause would make it clear that any existing surplus formed a part of the trust and was subject to the provisions of the trust.

J'aurais cru que le texte de cette disposition ferait clairement ressortir que tout surplus existant faisait partie de la fiducie et était assujetti à ses dispositions.

The definition of the trust fund should not be confused with the issue of the definition of the

On ne devrait pas confondre la définition du fonds en fiducie avec la question de la détermina-

1994 CanLII 104 (SCC)

benefits to which the employee/beneficiaries are entitled according to the terms of the pension plan. As the examples demonstrate, the trust fund will normally include all monies contributed to the pension fund, including both any ongoing actuarial surplus and any surplus on termination.

4. Amendment of the Trust

When a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles. The significance of this for the present appeals is twofold. Firstly, the employer will not be able to claim entitlement to funds subject to a trust unless the terms of the trust make the employer a beneficiary, or unless the employer reserved a power of revocation of the trust at the time the trust was originally created. Secondly, if the objects of the trust have been satisfied but assets remain in the trust, those funds may be subject to a resulting trust.

The settlor of a trust can reserve any power to itself that it wishes provided the reservation is made at the time the trust is created. A settlor may choose to maintain the right to appoint trustees, to change the beneficiaries of the trust, or to withdraw the trust property. Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it.

Employers seeking to obtain a pension surplus have frequently made the argument that they reserved a power to revoke, or to revoke partially the pension trust fund they set up for the benefit of their employees. This approach has had mixed results. The inconsistency of the decisions on the revocation of pension trusts exists on two levels. At one level, the different decisions can be explained on the basis of the wording of the particular amending clause and the limitations put upon it in each case. However, the decisions also reveal a more fundamental difference of opinion as to whether the revocation of trusts is possible when a

tion des prestations auxquelles les employés-bénéficiaires ont droit aux termes du régime de retraite. Comme les exemples le démontrent, le fonds en fiducie inclut normalement toutes les cotisations versées dans la caisse de retraite, y compris tout surplus actuariel existant et tout surplus accumulé à la cessation.

4. Modification de la fiducie

La caisse de retraite assujettie à une fiducie est soumise à tous les principes applicables du droit des fiducies. Cela revêt une double importance en l'espèce. Premièrement, l'employeur ne pourra revendiquer le droit aux fonds assujettis à une fiducie que s'il est bénéficiaire aux termes de la fiducie ou s'il s'est réservé le pouvoir de révoquer la fiducie au moment où elle a été créée. Deuxièmement, si les objets de la fiducie sont atteints mais qu'il reste des éléments d'actif dans la fiducie, ces fonds peuvent faire l'objet d'une fiducie par déduction.

Le constituant d'une fiducie peut se réserver les pouvoirs qu'il désire à condition de le faire au moment où la fiducie est créée. Il peut ainsi se réserver le droit de nommer des fiduciaires, de changer les bénéficiaires de la fiducie ou de retirer les biens en fiducie. En général, toutefois, le transfert des biens en fiducie au fiduciaire est absolu. Tout pouvoir de contrôler ces biens sera perdu, sauf si le transfert est expressément assujetti à ce pouvoir.

Les employeurs qui cherchent à s'approprier un surplus de caisse de retraite ont souvent fait valoir qu'ils s'étaient réservé le pouvoir de révoquer à tout le moins partiellement la fiducie de régime de retraite qu'ils ont créée au bénéfice de leurs employés. Cette approche a entraîné des résultats divers. L'incohérence des décisions portant sur la révocation des fiducies de régime de retraite se manifeste à deux niveaux. D'une part, les différentes décisions peuvent s'expliquer par le texte de la disposition modificatrice en cause et les restrictions qui lui sont imposées dans chaque cas. D'autre part, les décisions révèlent également une divergence d'opinions plus fondamentale quant à savoir si une fiducie peut être révoquée lorsque le

1994 CanLII 104 (SCC)

settlor has reserved a broad power of amendment. This difference must be resolved in this case.

The differing approaches to revocation of the trust are perhaps most starkly illustrated by the cases of *Reevie*, *supra*, and *Hockin*, *supra*. In both of these cases, a trust fund was established pursuant to a pension plan which contained a broad power of amendment. Each amending power was subject only to the proviso that no amendment could reduce members' entitlement to accrued benefits.

The court in *Reevie* relied upon a passage from Waters to the effect that it is a cardinal rule of trust law that a settlor can only revoke his or her trust when the settlor has expressly reserved the power to do so and found that the broad amendment power reserved by Canada Dry did not amount to an express reservation. The Court in *Hockin*, on the other hand, preferred the approach of McLennan J. in *Re Campbell-Renton & Cayley*, [1960] O.R. 550 (H.C.).

In *Re Campbell-Renton & Cayley*, the settlors of a private trust sought to revoke the trust in order to set up a more tax-beneficial trust in England. After considering the unlimited power of amendment contained in the trust agreement, McLennan J. stated at pp. 552-53:

> I am advised that there is no decision either in England or in this country as to whether or not a power to alter and amend includes the power to revoke or perhaps it would be better to say includes a power to amend in such a way as to permit the revocation of the trust instrument but there is American law on the subject and statements in 3 *Scott's Law of Trust*, 2nd ed., pp. 2393, 2402-3, 2413, 2395 and 2416 and at the latter citation it is stated that an unrestricted power to amend is equivalent to a power to revoke.

McLennan J. elected to follow the American jurisprudence on this point, as did the court in *Hockin* at p. 19 which relied upon the following more recent excerpt from Scott (*The Law of Trusts* (4th ed. 1989), vol. 4, at pp. 346-48):

constituant s'est réservé un large pouvoir de modification. Nous devons résoudre cette divergence en l'espèce.

Les différentes façons d'aborder la révocation de la fiducie sont peut-être illustrées d'une manière plus frappante par les arrêts *Reevie* et *Hockin*, précités. Dans ces deux affaires, une fiducie avait été établie conformément à un régime de retraite qui conférait un large pouvoir de modification, assujetti à la seule condition qu'aucune modification ne puisse réduire le droit des participants aux prestations accumulées.

Dans l'affaire *Reevie*, la cour a invoqué un passage de Waters voulant que, selon une règle cardinale du droit des fiducies, le constituant ne puisse révoquer sa fiducie que s'il s'est expressément réservé le pouvoir de le faire, et elle a conclu que le large pouvoir de modification que s'était réservé Canada Dry ne constituait pas une réserve explicite. Dans l'affaire *Hockin*, la cour a, par ailleurs, préféré le point de vue adopté par le juge McLennan dans l'arrêt *Re Campbell-Renton & Cayley*, [1960] O.R. 550 (H.C.).

Dans cet arrêt, les constituants d'une fiducie privée ont cherché à la révoquer pour mettre sur pied, en Angleterre, une autre fiducie plus profitable sur le plan fiscal. Après avoir examiné le pouvoir illimité de modification prévu dans l'acte de fiducie, le juge McLennan affirme, aux pp. 552 et 553:

> [TRADUCTION] On m'informe qu'aucune décision n'a été rendue en Angleterre ou ici sur la question de savoir si le pouvoir de modification inclut le pouvoir de révocation, ou peut-être serait-il préférable de dire, s'il inclut le pouvoir de modifier d'une façon qui permette de révoquer l'acte de fiducie. Toutefois, le droit américain en traite et on trouve des exposés sur ce point dans 3 *Scott's Law of Trust*, 2e éd., pp. 2393, 2402, 2403, 2413, 2395 et 2416, où on déclare que le pouvoir illimité de modifier équivaut à un pouvoir de révoquer.

Le juge McLennan a choisi de suivre la jurisprudence américaine sur ce point, comme l'a fait la cour dans l'affaire *Hockin*, à la p. 19, en invoquant un passage plus récent de Scott (*The Law of Trusts* (4e éd. 1989), vol. 4, aux pp. 346 à 348):

1994 CanLII 104 (SCC)

330.1. Where the creation of a trust is evidenced by a written instrument that purports to include the terms of the trust, and there is no provision in the instrument expressly or impliedly reserving to the settlor power to revoke the trust, the trust is irrevocable. The intention to reserve a power of revocation need not be manifested by an express provision to that effect; it can be indicated by the use of language from which it may be inferred.

[TRADUCTION] 330.1. Lorsque la création d'une fiducie ressort d'un acte écrit qui est censé inclure les modalités de la fiducie, et qu'il n'existe, dans l'acte, aucune disposition qui réserve explicitement ou implicitement au constituant le pouvoir de révoquer la fiducie, celle-ci est irrévocable. Il n'est pas nécessaire que l'intention de réserver le pouvoir de révocation ressorte d'une disposition expresse en ce sens; elle peut s'inférer du texte utilisé.

Based upon this authority, the B.C. Court of Appeal concluded at p. 19 that "[a] power to amend includes the power to revoke unless revocation is precluded by specific wording of the power to amend". With respect, I cannot agree with this position.

À la lumière de cette doctrine, la Cour d'appel de la Colombie-Britannique conclut, à la p. 19, que [TRADUCTION] «[l]e pouvoir de modifier comprend le pouvoir de révoquer, à moins que la révocation ne soit interdite par le texte même du pouvoir de modifier». En toute déférence, je ne puis souscrire à cette opinion.

In my view the nature and purpose of the trust as it has evolved in Canada is consistent with a more restrictive interpretation as to when the trust instrument will permit a unilateral revocation of the trust. One of the most fundamental characteristics of a trust is that it involves a <u>transfer</u> of property. In the words of D. W. M. Waters, *Law of Trusts in Canada*, *supra*, at p. 291:

À mon avis, la nature et l'objet de la fiducie telle qu'elle a évolué au Canada appelle une interprétation plus restrictive quant à savoir dans quels cas l'acte de fiducie permettra une révocation unilatérale. L'une des caractéristiques les plus fondamentales de la fiducie est qu'elle entraîne un <u>transfert</u> de bien. Selon D. W. M. Waters, *Law of Trusts in Canada*, *op. cit.*, à la p. 291:

... the trust is a mode of disposition, and once the instrument of creation of the trust has taken effect or a verbal declaration has been made of immediate disposition on trust, the settlor has alienated the property as much as if he had given it to the beneficiaries by an out-and-out gift. This almost self-evident proposition has to be reiterated because it is sometimes said that the trust is a mode of "restricted transfer." So indeed it is, but the restriction does not mean that by employing the trust the settlor inherently retains a right or power to intervene once the trust has taken effect, whether to set the trust aside, change the beneficiaries, name other beneficiaries, take back part of the trust property, or do anything else to amend or change the trust. By restriction is meant that he has transferred the property but subject to restrictions upon who is to enjoy and to what degree. The mode of future enjoyment is regulated in the act of transferring, but the transfer remains a true transfer.

[TRADUCTION] ... la fiducie est un mode d'aliénation. Une fois que l'acte qui crée la fiducie a pris effet ou qu'une déclaration verbale a été faite quant à l'aliénation immédiate à la fiducie, le constituant aliène le bien tout autant que s'il l'avait remis aux bénéficiaires au moyen d'un don véritable. Cette proposition qui va presque de soi doit être réitérée puisque l'on dit parfois que la fiducie est un mode de «transfert restreint». Elle l'est effectivement, mais cette restriction ne signifie pas qu'en ayant recours à une fiducie, le constituant retient de façon inhérente le droit ou le pouvoir d'intervenir une fois que la fiducie a pris effet pour y mettre fin, pour en changer les bénéficiaires ou en nommer d'autres, pour reprendre une partie des biens en fiducie ou pour faire quoi que ce soit d'autre en vue de modifier la fiducie. Par restriction, on entend que le constituant a transféré le bien, mais sous réserve de certaines restrictions quant à savoir qui en bénéficiera et dans quelle mesure. Le mode de jouissance future est régi dans l'acte de transfert, mais le transfert demeure un véritable transfert.

The judgment of the B.C. Court of Appeal in *Hockin*, if followed to its logical conclusion, would mean that the presence of an unlimited

L'arrêt *Hockin* de la Cour d'appel de la Colombie-Britannique, si on en poussait le raisonnement jusqu'à sa conclusion logique, signifierait que

1994 CanLII 104 (SCC)

power of amendment in a trust agreement entitles a settlor to maintain complete control over the administration of the trust and the trust property. That result is inconsistent with the fundamental concept of a trust, and cannot, in my opinion, be sustained without extremely clear and explicit language. A general amending power should not endow a settlor with the ability to revoke the trust. This is especially so when it is remembered that consideration was given by the employee beneficiaries in exchange for the creation of the trust. In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour. The wording of the pension plan and trust instrument are usually drawn up by the employer. The employees as a rule must rely upon the good faith of the employer to ensure that the terms of the specific trust arrangement will be fair. It would, I think, be inequitable to accept the proposition that a broad amending power inserted unilaterally by the employer carries with it the right to revoke the trust. The employer who wishes to undertake a restricted transfer of assets must make those restrictions explicit. Moreover, amendment means change not cancellation which the word revocation connotes.

Furthermore, prior to the 1981 circular, the amendment power in most trust arrangements was specifically made broad and ambiguous at the behest of the employer, who was entitled to tax relief on funds designated for employee pensions only if those funds were committed irrevocably to a trust or some other funding arrangement. The tax motivations of the respective parties to pension plans are not particularly relevant to a judicial interpretation of the trust. However a court should not be eager to sanction a result which would allow an employer to represent to the Minister of National Revenue that it has irrevocably committed funds to an employee pension plan, only to

l'existence d'un pouvoir illimité de modification dans un acte de fiducie autorise le constituant à exercer un contrôle total sur la gestion de la fiducie et sur les biens en fiducie. Ce résultat va à l'encontre de la notion fondamentale d'une fiducie et ne peut, à mon avis, être soutenu en l'absence d'un texte extrêmement clair et explicite. Le pouvoir général de modification ne devrait pas investir le constituant du pouvoir de révoquer une fiducie, et ce, d'autant plus si on considère que les employés bénéficiaires ont versé une contrepartie en échange de la création de la fiducie. Dans le cas des régimes de retraite, non seulement les employés cotisent-ils à la caisse, mais encore ils conviennent presque toujours d'accepter un salaire inférieur et des avantages sociaux réduits en échange de l'établissement par l'employeur d'une fiducie de régime de retraite en leur faveur. Le texte du régime de retraite et l'acte de fiducie sont habituellement rédigés par l'employeur. Les employés doivent, en principe, s'en remettre à la bonne foi de l'employeur pour ce qui est d'assurer que les modalités de l'acte de fiducie en question seront équitables. Il serait, à mon avis, injuste d'accepter la proposition voulant qu'un pouvoir général de modification incorporé unilatéralement par l'employeur comporte le pouvoir de révoquer la fiducie. L'employeur qui souhaite effectuer un transfert restreint de biens doit expliciter ces restrictions. De plus, modifier signifie changer et non annuler comme le connote le terme «révoquer».

En outre, avant la circulaire de 1981, le pouvoir de modification prévu dans la plupart des actes de fiducie était expressément formulé de façon générale et ambiguë à la demande de l'employeur, qui n'avait droit à un allégement fiscal à l'égard de l'argent destiné au régime de retraite des employés que si cet argent était affecté irrévocablement à une fiducie ou à quelque autre convention de financement. Les motivations, sur le plan fiscal, de chaque partie au régime de retraite ne sont pas particulièrement pertinentes relativement à l'interprétation judiciaire de la fiducie. Toutefois, les tribunaux ne devraient pas s'empresser de sanctionner un résultat qui permettrait à un employeur de sou-

1994 CanLII 104 (SCC)

later purport to revoke the pension trust in order to recoup surplus funds.

As a result I find that, at least in the context of pension trusts, the reservation by the settlor of an unlimited power of amendment does not include a power to revoke the trust. A revocation power must be explicitly reserved in order to be valid.

5. The Resulting Trust

A resulting trust may arise if the objects of the trust have been fully satisfied and money still remains in the trust fund. In such situations, the remaining trust funds will ordinarily revert by operation of law to the settlor of the fund. However, a resulting trust will not arise if, at the time of settlement, the settlor demonstrates an intention to part with his or her money outright. This is to say the settlor indicates that he or she will not retain any interest in any remaining funds.

Several Canadian cases have dealt with the resulting trust in relation to pension surplus cases. In *Re Canada Trust Co. and Cantol Ltd.* (1979), 103 D.L.R. (3d) 109 (B.C.S.C.), the pension plan had been terminated. The plan provided that upon termination, assets were to be applied to four listed categories of beneficiaries. All the beneficiaries were paid in accordance with this provision, and a surplus remained in the fund. The trustee of the fund, Canada Trust, sought directions from the court as to how to deal with the surplus.

Gould J. held, at p. 111, that the "purposes of this trust simply did not exhaust the fund and the outcome here, *i.e.*, a surplus balance of $31, 163.38, was not foreseen by the respondent.... The situation appears to be one where a resulting trust arises by operation of the law." This conclusion could well be questioned in light of another provision in the plan (at p. 110) which provided

tenir devant le ministre du Revenu national qu'il a irrévocablement affecté de l'argent à un régime de retraite d'employés, pour ensuite tenter de révoquer la fiducie de régime de retraite afin de récupérer les sommes excédentaires.

Par conséquent, j'estime que le pouvoir illimité de modifier une fiducie que se réserve le constituant n'inclut pas le pouvoir de la révoquer, tout au moins dans le contexte des fiducies de régime de retraite. Pour être valide, le pouvoir de révocation doit être explicitement réservé.

5. La fiducie par déduction

Une fiducie par déduction peut prendre naissance si les objets de la fiducie ont été atteints pleinement et qu'il reste des sommes dans le fonds en fiducie. En pareils cas, les fonds en fiducie qui restent reviendront habituellement, en vertu de la loi, au constituant du fonds. Toutefois, aucune fiducie par déduction ne naîtra si, à l'époque de la constitution, le constituant manifeste l'intention de se départir complètement de son argent. En d'autres termes, le constituant indique qu'il ne conservera aucun droit sur les sommes restantes.

Les tribunaux canadiens ont examiné à maintes reprises la fiducie par déduction dans des affaires de surplus de caisse de retraite. Dans l'affaire *Re Canada Trust Co. and Cantol Ltd.* (1979), 103 D.L.R. (3d) 109 (C.S.C.-B.), on avait mis fin au régime de retraite. Celui-ci prévoyait qu'à la cessation l'actif serait réparti entre quatre catégories déterminées de bénéficiaires. Après que tous les bénéficiaires eurent été payés conformément à cette disposition, un surplus est resté dans la caisse. Le fiduciaire de celle-ci, Canada Trust, a demandé au tribunal des directives sur la façon de traiter le surplus.

Le juge Gould a conclu (à la p. 111) que la [TRADUCTION] «réalisation des objets de cette fiducie n'a simplement pas permis d'épuiser le fonds et l'intimée [. . .] n'avait pas prévu le résultat auquel on est arrivé en l'espèce, c.-à-d. le solde excédentaire de 31 163,38 $. Il paraît s'agir d'une situation où une fiducie par déduction prend naissance en vertu de la loi.» Cette conclusion pourrait bien être

1994 CanLII 104 (SCC)

that "no alteration, amendment or termination of the Plan or any part thereof shall permit any part of the trust fund to revert to or to be recoverable by the Company or to be used for or diverted to purposes other than the exclusive benefits of members . . .". Perhaps the decision can be explained on the basis that the employees were not parties before the court and did not contribute to the plan which was funded solely by the employer.

In most cases, the existence of a non-reversion clause will be evidence of a permanent intention to part with the trust property and it will preclude the operation of the resulting trust. The trust agreement in *C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd.*, *supra*, contained the following clause, at p. 538:

> No part of the capital or income of the fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of the employees and former employees under the plan except as therein and herein provided.

I agree with Montgomery J.'s conclusion, at p. 540, that these provisions "effectively dispose of the respondents' arguments that the surplus is subject to the doctrine of resulting trust". The employer had absolutely and irrevocably waived its interest in any surplus that might arise upon the termination of the pension fund despite the contributions it had made to that fund.

The exigencies of tax law are such that preferential tax treatment will only be afforded to registered pension plans. Registration, originally contingent upon clear evidence that the employer's contribution would be irrevocable, now requires a plan to provide that, following termination of the plan, any remaining surplus in excess of the statutory maximum level of employee benefits must revert to the employer. Therefore, the provisions of most registered pension plans will normally themselves exclude the possibility of a resulting trust's

contestée du fait qu'une autre disposition du régime (à la p. 110) prévoyait qu'[TRADUCTION] «aucune modification ou cessation du régime ou d'une partie de celui-ci ne doit permettre qu'une partie du fonds en fiducie soit retournée à la compagnie ou récupérable par cette dernière, ou qu'elle soit utilisée ou affectée à d'autres fins que le bénéfice exclusif des participants . . .». Cette décision peut peut-être s'expliquer par le fait que les employés n'étaient pas des parties devant le tribunal et ne cotisaient pas au régime qui était financé uniquement par l'employeur.

Dans la plupart des cas, l'existence d'une disposition interdisant la réversion sera la preuve de l'intention de se départir de façon permanente des biens en fiducie et elle empêchera l'application de la fiducie par déduction. L'acte de fiducie en cause dans l'arrêt *C.A.W., Local 458 c. White Farm Manufacturing Canada Ltd.*, précité, contenait la disposition suivante, à la p. 538:

> [TRADUCTION] Aucune partie du capital ou du revenu de la caisse ne doit être retournée à la compagnie, ni être utilisée ou affectée à d'autres fins que le bénéfice exclusif des employés et anciens employés participant au régime, si ce n'est en conformité avec les dispositions du régime ou du présent acte de fiducie.

Je souscris à la conclusion du juge Montgomery, à la p. 540, que ces dispositions [TRADUCTION] «réfutent efficacement les arguments des intimés voulant que le surplus soit assujetti au principe de la fiducie par déduction». L'employeur avait absolument et irrévocablement renoncé à son droit à tout surplus qui pourrait être accumulé à la cessation de la caisse de retraite, en dépit des cotisations qu'il y avait versées.

Les exigences du droit fiscal sont telles qu'un traitement fiscal préférentiel ne sera accordé qu'aux régimes de retraite enregistrés. Initialement subordonné à la preuve manifeste que la cotisation de l'employeur serait irrévocable, l'enregistrement requiert aujourd'hui que le régime prévoie qu'à la cessation du régime on remette à l'employeur toute somme restante qui excède le montant maximal des prestations des employés, prévu par la loi. Par conséquent, les dispositions de la plupart des régimes de retraite enregistrés écarteront normale-

1994 CanLII 104 (SCC)

arising. That is not to say that the resulting trust will never have a place in the context of pension funds. Yet the practical reality is that the factual circumstances which could trigger the operation of a resulting trust will rarely occur in pension surplus cases.

The relevant documents in this case are such that it is not necessary to examine all of the difficult issues which can arise in relation to resulting trusts. Nonetheless, when a resulting trust arises in respect of a contributory plan, I would be inclined to prefer the view of Nitikman J. in *Martin & Robertson Administration Ltd. v. Pension Commission of Manitoba* (1980), 2 A.C.W.S. (2d) 249, to that of Scott J. in *Davis v. Richards & Wallington Industries Ltd.*, [1991] 2 All E.R. 563 (Ch.D.). Nitikman J. held that where employers and employees are (by virtue of their contributions) settlors of the trust, surplus funds remaining on termination can revert on a resulting trust to both employers and employees in proportion to their respective contributions. Scott J., on the other hand, held that employees cannot benefit from a resulting trust since, by the mere act of contributing to the fund, they manifest an intention to part irrevocably with their money.

I do not think that any general rule can be laid down as to the intentions of employees contributing to a pension trust. Where the circumstances of a particular case do not indicate any particular intention to part outright with money contributed to a pension fund, equity and fairness would seem to require that all parties who contributed to the fund should be entitled to recoup a proportionate share of any surplus subject to a resulting trust. However, this issue should be left to be resolved when it arises.

In most pension trust cases the resulting trust will never arise. This may be because the objects

ment elles-mêmes la possibilité qu'une fiducie par déduction prenne naissance. Cela ne revient pas à dire que la fiducie par déduction n'aura jamais sa place dans le contexte des caisses de retraite. Mais en pratique, les faits qui pourraient déclencher l'application d'une fiducie par déduction surviendront rarement dans les cas de surplus de caisse de retraite.

Les documents pertinents en l'espèce sont tels qu'il n'est pas nécessaire d'examiner toutes les questions épineuses qui peuvent se poser relativement aux fiducies par déduction. Néanmoins, lorsque la question de la fiducie par déduction se pose relativement à un régime contributif, je serais porté à préférer le point du vue du juge Nitikman dans l'arrêt *Martin & Robertson Administration Ltd. c. Pension Commission of Manitoba* (1980), 2 A.C.W.S. (2d) 249, à celui du juge Scott dans l'affaire *Davis c. Richards & Wallington Industries Ltd.*, [1991] 2 All E.R. 563 (Ch.D.). Le juge Nitikman a statué que, lorsque l'employeur et les employés sont (en vertu de leurs cotisations) les constituants de la fiducie, les sommes excédentaires accumulées à la cessation du régime peuvent, en vertu d'une fiducie par déduction, revenir à l'employeur et aux employés proportionnellement à leurs cotisations respectives. Par contre, le juge Scott a décidé que les employés ne sauraient bénéficier d'une fiducie par déduction parce que, du simple fait qu'ils cotisent à la caisse, ils manifestent l'intention de se départir irrévocablement de leur argent.

Je ne crois pas qu'il soit possible d'énoncer une règle générale quant aux intentions des employés qui cotisent à une fiducie de retraite. Lorsque les circonstances d'une affaire ne révèlent l'existence d'aucune intention particulière de se départir complètement de l'argent versé dans une caisse de retraite, toutes les parties qui ont cotisé à la caisse devraient, pour des motifs d'équité et de justice, avoir droit à une part proportionnelle de tout surplus sous réserve d'une fiducie par déduction. Toutefois, cette question devrait être tranchée lorsqu'elle se posera.

Dans la plupart des affaires mettant en cause une fiducie de régime de retraite, la question de la fidu-

1994 CanLII 104 (SCC)

of the trust can never be said to be fully satisfied so long as funds which could benefit the employees remain in the pension trust, or because the settlor has manifested a clear intention to part outright with its contributions. The operation of the resulting trust may also be precluded by the presence of specific provisions dealing with the disposition of surplus on plan termination.

cie par déduction ne se posera jamais. Cela peut être dû au fait qu'on ne peut jamais dire que les objets de la fiducie sont pleinement atteints tant que les fonds dont pourraient bénéficier les employés demeurent dans la caisse de retraite en fiducie, ou au fait que le constituant a exprimé clairement l'intention de se départir complètement de ses cotisations. L'application de la fiducie par déduction peut aussi être écartée par l'existence de dispositions précises concernant l'aliénation du surplus lors de la cessation du régime.

B. *Contribution Holiday*

Two issues arise in respect of the contribution holiday. The first is whether or not, in the calculation of an employer's required annual contribution to a pension plan, consideration of actuarial surplus in an ongoing pension fund is permitted by law. The second is whether a consideration of that surplus is permitted or prohibited under the terms of a specific plan.

Both parties to the appeals accept that, subject to the plan provisions, the application of an existing surplus to contribution obligations was at all relevant times permitted by Alberta law. This proposition seems incontrovertible in light of the provisions of the *Employment Pension Plans Act* and *Pension Benefits Act* referred to earlier. It also accords with the provisions of Information Circular No. 72-13R7, *supra*. Therefore the provisions of the plan must determine the issue.

Before turning to the Air Products plan, it may be helpful to review the cases which have dealt with contribution holidays. The Ontario Court of Appeal held in *C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro* (1989), 68 O.R. (2d) 620, that Ontario Hydro could not take a contribution holiday when its employee pension plan was in surplus. The pension plan for Hydro employees was unusual in that it was established pursuant to a statute which enacted the employer's obligation to contribute. Section 20(4) of the *Power Corpora-*

B. *Période d'exonération de cotisations*

Deux questions se posent à l'égard de la période d'exonération de cotisations. La première est de savoir si, dans le calcul de la cotisation annuelle obligatoire de l'employeur à un régime de retraite, la loi permet de tenir compte du surplus actuariel accumulé dans une caisse de retraite existante. La seconde est de savoir s'il est permis ou interdit de tenir compte de ce surplus en vertu d'un régime donné.

Les deux parties aux pourvois conviennent que, sous réserve des dispositions du régime, l'affectation d'un surplus existant à des cotisations obligatoires était en tout temps pertinent permise par la loi albertaine. Cette proposition semble irréfutable compte tenu des dispositions de l'*Employment Pension Plans Act* et de la *Pension Benefits Act* mentionnées précédemment. Elle est également compatible avec les dispositions de la circulaire d'information n° 72-13R7, *op. cit.* Par conséquent, la question doit être résolue en fonction des dispositions du régime.

Avant d'étudier le régime d'Air Products, il peut se révéler utile de revoir la jurisprudence en matière de période d'exonération de cotisations. Dans l'arrêt *C.U.P.E.-C.L.C., Local 1000 c. Ontario Hydro* (1989), 68 O.R. (2d) 620, la Cour d'appel de l'Ontario a conclu qu'Hydro Ontario ne pouvait s'accorder une période d'exonération de cotisations au moment où le régime de retraite de ses employés accusait un surplus. Le régime de retraite des employés d'Hydro était inusité du fait qu'il avait été établi conformément à une loi qui

1994 CanLII 104 (SCC)

tion Act, R.S.O. 1980, c. 384 (as cited by Robins J.A. at p. 623), provided:

20. . . .

(4) The Corporation *shall* contribute towards the cost of the benefits mentioned in subsection (1) *the amount of the difference between the amount of the contributions of the employees and the amount of the cost of the benefits as determined by actuarial valuations*. [Emphasis of Robins J.A.]

Robins J.A. held that this clause was unequivocal and required Hydro to contribute each year the difference between the cost of the benefits for that year as determined by an actuary and the contributions of the employees. The existence of an ongoing fund surplus was irrelevant to this obligation. Robins J.A. explicitly added at p. 630 that s. 20(4) should not be treated:

. . . as tantamount to stating that "the corporation shall make contributions to the plan on such basis as may be determined by the actuary from time to time" or "the corporation shall contribute to the plan an amount determined by an actuary in accordance with generally accepted actuarial principles". While clauses of that kind may not be uncommon, particularly in private pension plans, the statutory provisions regulating this plan and under which it operates are not to that effect. Under the formula mandated by the Act, an actuarial valuation is required only for the purpose of ascertaining the cost of the benefits. The actuary is not empowered to set the over-all level of corporation contributions on such basis as he may determine, notwithstanding that his determination may be by reference to generally accepted actuarial principles.

Subsequent cases have limited the application of *Ontario Hydro*. In *Askin v. Ontario Hospital Association* (1991), 2 O.R. (3d) 641, the Ontario Court of Appeal considered a plan (at p. 644) which required that "[e]ach Contributing Member Hospital shall make contributions to the Plan on a basis determined by the Actuary from time to time". Carthy J.A. held that this provision allowed the employers to take a contribution holiday. He distinguished *Ontario Hydro* in this way, at p. 651:

obligeait l'employeur à cotiser. Le paragraphe 20(4) de la *Power Corporation Act*, R.S.O. 1980, ch. 384 (cité par le juge Robins, à la p. 623), prévoyait ceci:

[TRADUCTION] **20.** . . .

(4) La Société *assume*, à titre de cotisation au coût des prestations prévues au paragraphe (1), *la différence entre la somme des cotisations des employés et le coût de ces prestations, déterminé par voie d'évaluation actuarielle*. [Italiques du juge Robins.]

Le juge Robins a conclu que cette disposition était non équivoque et obligeait Hydro à cotiser chaque année la différence entre le coût des prestations pour l'année, déterminé par un actuaire, et les cotisations des employés. La présence d'un surplus de caisse existant était sans rapport avec cette obligation. Le juge Robins ajoute expressément, à la p. 630, que le par. 20(4) ne devrait pas être considéré:

[TRADUCTION] . . . comme signifiant que «la société doit verser dans le régime les cotisations que l'actuaire peut fixer à l'occasion» ou que «la société doit cotiser au régime une somme déterminée par un actuaire conformément aux principes actuariels généralement reconnus». Si de telles dispositions ne sont pas inhabituelles, particulièrement dans les régimes de retraite privés, les dispositions législatives qui régissent ce régime et en vertu desquelles il s'applique ne vont pas dans ce sens. Selon la formule prescrite par la Loi, l'évaluation actuarielle n'est requise que pour déterminer le coût des prestations. L'actuaire n'est pas habilité à fixer le montant global des cotisations de la société selon l'assiette qu'il détermine, bien qu'il puisse prendre sa décision en se référant aux principes actuariels généralement reconnus.

Des affaires subséquentes ont restreint l'application de l'arrêt *Ontario Hydro*. Dans l'arrêt *Askin c. Ontario Hospital Association* (1991), 2 O.R. (3d) 641, la Cour d'appel de l'Ontario étudie, à la p. 644, un régime qui exigeait que [TRADUCTION] «[c]haque hôpital participant cotise au régime, selon l'assiette déterminée par un actuaire». Le juge Cathy a conclu que cette disposition permettait aux employeurs de s'accorder une période d'exonération de cotisations. Il a établi la distinction suivante d'avec l'arrêt *Ontario Hydro*, à la p. 651:

1994 CanLII 104 (SCC)

To repeat for clarity, the *ratio* I take from the *Ontario Hydro* case is that, if a specific calculated contribution is mandated by statute or by the plan itself, it is an indirect use of trust funds to apply surplus to meet that obligation. The intended *ratio* of the present case is that, where the specific method of calculation is not mandated, it is inoffensive and in accordance with statutory authorization and normal actuarial practice to consider a surplus as one factor in the calculation of the contribution.

[TRADUCTION] Par souci de clarté, je réitère le raisonnement qui, à mon avis, sous-tend l'arrêt *Ontario Hydro* et qui veut que, si la loi ou le régime lui-même prescrit une cotisation déterminée, l'usage d'un surplus pour s'acquitter de cette obligation constitue une utilisation indirecte des fonds en fiducie. Le raisonnement qu'on a voulu suivre en l'espèce veut que, lorsqu'aucune méthode précise de calcul n'est prescrite, considérer un surplus comme un facteur dont il faut tenir compte dans le calcul de la cotisation ne porte pas à conséquence et est conforme à l'autorisation d'origine législative et à la pratique actuarielle normale.

A contribution holiday was also permitted in *Maurer v. McMaster University* (1991), 4 O.R. (3d) 139 (Gen. Div.). The relevant plan provision there (at p. 144) provided that "[t]he University shall pay into the Fund each year the amount required to fund fully the current service cost of the Plan, as determined by the Actuary, after allowing for the Members' required contributions". Haley J. considered that the words "as determined by the Actuary" modified the phrase "the amount required to fund fully the current service cost of the Plan", and therefore held that the provision enabled the University to use the actuarial surplus to offset current contributions.

Dans l'affaire *Maurer c. McMaster University* (1991), 4 O.R. (3d) 139 (Div. gén.), on a également autorisé une période d'exonération de cotisations. La disposition pertinente du régime dans cette affaire (à la p. 144) prévoyait que [TRADUCTION] «[l]'Université verse annuellement dans la caisse la somme nécessaire pour financer entièrement le coût des services courants du régime, déterminé par l'actuaire, après avoir tenu compte des cotisations obligatoires des participants». Le juge Haley estimait que les mots «déterminé par l'actuaire» atténuaient la phrase «la somme nécessaire pour financer entièrement le coût des services courants du régime» et il a donc conclu que la disposition permettait à l'Université d'utiliser le surplus actuariel pour compenser ses cotisations courantes.

Most recently, the Ontario Divisional Court applied *Ontario Hydro* and held that the specific contribution requirements contained in its pension plan prohibited Trent University from taking a holiday from its contributions to its employee pension plan (*Trent University Faculty Assn. v. Trent University* (1992), 99 D.L.R. (4th) 451).

Tout récemment, la Cour divisionnaire de l'Ontario a appliqué l'arrêt *Ontario Hydro* et conclu que les exigences expresses en matière de cotisation prévues dans le régime de retraite de l'Université Trent interdisaient à celle-ci de s'accorder une période d'exonération de cotisation au régime de retraite de ses employés (*Trent University Faculty Assn. c. Trent University* (1992), 99 D.L.R. (4th) 451).

Finally, I note that the taking of a contribution holiday was contemplated by the court in *Reevie*, *supra*, even though in that case employees were held to be entitled to the fund surplus upon termination. The thought was expressed in this manner at pp. 600-601:

Enfin, je remarque que, dans l'affaire *Reevie*, précitée, la cour a envisagé la possibilité de s'accorder une période d'exonération de cotisations, même si, dans cette affaire, on a conclu que les employés avaient droit au surplus de caisse à la cessation. L'opinion est ainsi exprimée, aux pp. 600 et 601:

1994 CanLII 104 (SCC)

While the plan continues to operate, a surplus will simply afford a cushion against years during which the fund performs poorly, or, it may lead to the reduction of future contributions. If the plan is discontinued, other considerations will arise.

All of these cases are perfectly consistent with one another. Together they demonstrate only that whether or not a contribution holiday is permissible must be decided on the basis of the applicable plan provisions. I can see no objection in principle to employers' taking contribution holidays when they are permitted to do so by the terms of the pension plan. When permission is not explicitly given in the plan, it may be implied from the wording of the employer's contribution obligation. Any provision which places the responsibility for the calculation of the amount needed to fund promised benefits in the hands of an actuary should be taken to incorporate accepted actuarial practice as to how that calculation will be made. That practice currently includes the application of calculated surplus funds to the determination of overall current service cost. It is a practice that is in keeping with the nature of a defined benefits plan, and one which is encouraged by the tax authorities.

An employer's right to take a contribution holiday can also be excluded by the terms of the pension plan or the trust created under it. An explicit prohibition against applying an existing fund surplus to the calculation of the current service cost, or other provisions which in effect convert the nature of the plan from a defined benefit to a defined contribution plan, will preclude the contribution holiday. For example, the presence of a specific formula for calculating the contribution obligation, such as those considered in the *Ontario Hydro* and *Trent University* cases, prevents employers from taking a contribution holiday. However, whenever the contribution requirement simply refers to actuarial calculations, the presumption will normally be that it also authorizes the use of standard actuarial practices.

[TRADUCTION] Pendant l'existence du régime, le surplus offre simplement une protection pour les années pendant lesquelles la caisse connaîtra un mauvais rendement, ou il peut entraîner la réduction des cotisations futures. S'il est mis fin au régime, d'autres considérations jouent.

Toutes ces affaires sont parfaitement compatibles les unes avec les autres. Ensemble, elles démontrent seulement que la question de savoir si la période d'exonération de cotisations est permise doit être résolue en fonction des dispositions applicables du régime. Je ne vois, en principe, aucune objection à ce que les employeurs s'accordent des périodes d'exonération de cotisations lorsque le régime de retraite les autorise à le faire. Lorsque le régime ne donne pas expressément cette autorisation, celle-ci peut-être déduite du texte de l'obligation de l'employeur de cotiser. Toute disposition qui confie à un actuaire la tâche de calculer le montant requis pour financer les prestations promises devrait être considérée comme incorporant la pratique actuarielle reconnue quant à la façon d'effectuer ce calcul. Cette pratique comprend actuellement l'utilisation des sommes excédentaires calculées pour déterminer le coût global des services courants. C'est une pratique conforme à la nature d'un régime à prestations déterminées, que les autorités en matière d'impôt encouragent.

Le droit d'un employeur de s'accorder une période d'exonération de cotisations peut également être exclu par les modalités du régime de retraite ou de la fiducie créée en vertu de ce régime. Une interdiction expresse d'utiliser un surplus de caisse existant pour calculer le coût des services courants, ou d'autres dispositions qui ont pour effet de convertir le régime à prestations déterminées en un régime à cotisations déterminées, empêchent le recours à une période d'exonération de cotisations. Par exemple, l'existence d'une formule précise de calcul de l'obligation de cotiser, comme celles qui ont été examinées dans les affaires *Ontario Hydro* et *Trent University*, empêche les employeurs de s'accorder une période d'exonération de cotisations. Toutefois, lorsque l'exigence en matière de cotisation renvoit simplement à des calculs actuariels, on présumera ordinairement qu'elle autorise également le recours aux pratiques actuarielles normales.

1994 CanLII 104 (SCC)

The former Catalytic employees successfully argued before the chambers judge that to permit a contribution holiday is to permit an encroachment upon the trust fund of which they are the beneficiaries. I do not agree. As noted earlier, the trust property usually consists of all the monies contributed to the pension fund. To permit a contribution holiday does not reduce the corpus of the fund nor does it amount to applying the monies contained in it to something other than the exclusive benefit of the employees. The entitlement of the trust beneficiaries is not affected by a contribution holiday. That entitlement is to receive the defined benefits provided in the pension plan from the trust and, depending upon the terms of the trust to receive a share of any surplus remaining upon termination of the plan.

Les anciens employés de Catalytic ont soutenu avec succès devant le juge en chambre qu'autoriser une période d'exonération de cotisations revient à permettre un empiétement sur le fonds en fiducie dont ils sont bénéficiaires. Je ne suis pas d'accord. Comme je l'ai mentionné précédemment, les biens en fiducie se composent habituellement de toutes les sommes versées dans la caisse de retraite. Permettre une période d'exonération de cotisations ne réduit pas le capital de la caisse et ne revient pas à utiliser les sommes qu'elle contient à d'autres fins que le bénéfice exclusif des employés. Le droit des bénéficiaires de la fiducie n'est pas touché par une période d'exonération de cotisations. Ils ont droit au paiement sur la fiducie des prestations déterminées que prévoit le régime de retraite et, selon les modalités de la fiducie, à une part de tout surplus accumulé à la cessation du régime.

Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.

Une fois que des sommes sont versées dans le régime de retraite, elles constituent des «prestations acquises» des employés. Toutefois, les prestations sont de deux ordres différents. Les employés ont d'abord droit aux prestations déterminées que prévoit le régime. Il s'agit d'une somme établie selon une formule. L'autre prestation à laquelle les employés peuvent avoir droit est le surplus accumulé à la cessation. Cette somme n'est jamais certaine pendant l'existence du régime. Au contraire, le surplus n'existe que théoriquement. Il résulte de calculs actuariels et dépend des hypothèses utilisées par l'actuaire. Les employés ne peuvent revendiquer aucun droit au surplus d'un régime existant puisqu'il n'est pas définitif. Le droit à tout surplus n'est cristallisé que lorsque celui-ci devient vérifiable à la cessation du régime. Par conséquent, le fait de s'accorder une période d'exonération de cotisations ne représente ni un empiétement sur la fiducie, ni une réduction des prestations acquises.

Similar reasoning explains why I cannot accept the proposition that an employer entitled to take a contribution holiday must also be entitled to recover surplus on termination.

Un raisonnement semblable explique pourquoi je ne puis accepter la proposition voulant que l'employeur qui a le droit de s'accorder une période d'exonération de cotisations ait aussi le droit de récupérer tout surplus à la cessation du régime.

While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus.

Pendant l'existence d'un régime sous forme de fiducie, le surplus est un surplus actuariel. Ni l'em-

1994 CanLII 104 (SCC)

Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus.

C. *Summary*

In the absence of provincial legislation providing otherwise, the courts must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. The first step is to determine whether the pension fund is impressed with a trust. This is a determination which must be made according to ordinary principles of trust law. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries.

If the pension fund, or any part of it, is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying the principles which pertain to the interpretation of contracts to the pension plan.

If, however, the fund is impressed with a trust, different considerations apply. The trust is not a trust for a purpose, but a classic trust. It is governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail. The trust will in most cases extend to an ongoing or actual surplus as well as to that part of the pension fund needed to provide employee benefits. However, an employer may

ployeur ni les employés n'ont de droit précis sur cette somme puisqu'elle n'existe que théoriquement, même si les employés bénéficiaires ont, en *equity*, un droit sur tous les éléments d'actif de la caisse pendant qu'elle existe. À la cessation du régime, le surplus actuariel devient un surplus réel et est dévolu aux employés bénéficiaires. La distinction entre le surplus réel et le surplus actuariel signifie qu'il n'y a pas d'incompatibilité entre le droit de l'employeur à des périodes d'exonération de cotisations et le fait qu'il n'a pas le droit de récupérer le surplus accumulé à la cessation du régime. Le premier repose sur un surplus actuariel et le second, sur un surplus réel.

C. *Résumé*

En l'absence d'une loi provinciale contraire, les tribunaux doivent se prononcer sur des revendications opposées du droit à un surplus de caisse de retraite en effectuant une analyse minutieuse du régime de retraite et des structures de financement créées en application de ce régime. La première étape consiste à déterminer si la caisse de retraite est assujettie à une fiducie. C'est une décision qui doit être prise conformément aux principes ordinaires du droit des fiducies. Il existera une fiducie dans tous les cas où il y a eu déclaration de fiducie expresse ou implicite et où des biens en fiducie ont été confiés à un fiduciaire qui les détient pour des bénéficiaires donnés.

Si la totalité ou une partie de la caisse de retraite n'est pas assujettie à une fiducie, il faut alors résoudre toutes les questions relatives aux prestations de retraite dues ou au droit à un surplus en appliquant au régime de retraite les principes d'interprétation des contrats.

Si, toutefois, la caisse est assujettie à une fiducie, différentes considérations entrent en jeu. Il s'agit non pas d'une fiducie à une fin, mais d'une fiducie classique. Elle est régie par l'*equity* et, dans la mesure où les principes d'*equity* applicables sont incompatibles avec les dispositions du régime, l'*equity* doit prévaloir. La fiducie s'étendra, dans la plupart des cas, au surplus existant ou réel de même qu'à la partie de la caisse de retraite qui est

1994 CanLII 104 (SCC)

explicitly limit the operation of the trust so that it does not apply to surplus.

The employer, as a settlor of the trust, may reserve a power to revoke the trust. In order to be effective, that power must be clearly reserved at the time the trust is created. A power to revoke the trust or any part of it cannot be implied from a general unlimited power of amendment.

Funds remaining in a pension trust following termination and payment of all defined benefits may be subject to a resulting trust. Before a resulting trust can arise, it must be clear that all of the objectives of the trust have been fully satisfied. Even when this is the case, the employer cannot claim the benefit of a resulting trust when the terms of the plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's but also the employees' intentions which must be considered. Both are settlors of the trust. Both are entitled to benefit from a reversion of trust property.

An employer's right to take a contribution holiday must also be determined on a case-by-case basis. The right to take a contribution holiday can be excluded either explicitly or implicitly in circumstances where a plan mandates a formula for calculating employer contributions which removes actuarial discretion. Contribution holidays may also be permitted by the terms of the plan. When the plan is silent on the issue, the right to take a contribution holiday is not objectionable so long as actuaries continue to accept the application of existing surplus to current service costs as standard practice. These principles apply whether or not the pension fund is subject to a trust. Because no money is withdrawn from the fund by the employer, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits. These general con-

nécessaire pour verser les prestations aux employés. Cependant, un employeur peut expressément limiter l'application de la fiducie de façon à ce qu'elle ne s'applique pas à un surplus.

L'employeur peut, en tant que constituant de la fiducie, se réserver le pouvoir de révoquer la fiducie. Pour être valide, ce pouvoir doit être clairement réservé au moment où la fiducie est créée. Le pouvoir de révoquer une fiducie ou une partie de celle-ci ne saurait s'inférer d'un pouvoir de modification général et illimité.

Les sommes qui restent dans une caisse de retraite en fiducie à la cessation du régime et après le paiement de toutes les prestations déterminées peuvent faire l'objet d'une fiducie par déduction. Pour qu'une fiducie par déduction naisse, il doit être clair que tous les objets de la fiducie ont été pleinement atteints. Même alors, l'employeur ne peut se prévaloir d'une fiducie par déduction lorsque les modalités du régime démontrent l'intention de se départir complètement de tout l'argent versé dans la caisse de retraite. Dans les régimes contributifs, ce ne sont pas uniquement les intentions de l'employeur qui comptent, mais également celles des employés. Ils sont, dans les deux cas, les constituants de la fiducie. De même, ils ont tous le droit de bénéficier d'un retour des biens en fiducie.

Le droit d'un employeur de s'accorder une période d'exonération de cotisations doit également être déterminé en fonction de chaque cas. Ce droit peut être exclu explicitement ou implicitement dans les cas où le régime prescrit une formule de calcul des cotisations de l'employeur qui retire toute discrétion à l'actuaire. Les périodes d'exonération de cotisations peuvent également être autorisées par les modalités du régime. Lorsque le régime est silencieux sur la question, le droit de s'accorder une période d'exonération de cotisations ne peut être contesté dans la mesure où les actuaires continuent d'accepter comme pratique normale l'affectation d'un surplus existant aux coûts des services courants. Ces principes s'appliquent peu importe que la caisse de retraite soit ou non assujettie à une fiducie. Aucune somme n'étant retirée de la caisse par l'employeur, la

1994 CanLII 104 (SCC)

siderations are, of course, subject to applicable legislation.

Let us see how these principles should be applied to the agreements presented in this case.

VI. Application to the Facts

A. *Surplus Entitlement*

1. The Catalytic Plan

The plan provided under Article V that all contributions would be paid to a trustee to be held and administered in accordance with a trust agreement which formed part of the plan. The plan also contained the following definitions in Section II:

12. "Trust Agreement" means the agreement entered into between the Company and the Trustee establishing the Trust Fund;

13. "Trustee" means the Canada Trust Company, or such other successor trust company, if any, as the Board may appoint;

14. "Trust Fund" means the pension fund established pursuant to the Trust Agreement and to which contributions are made after January 1, 1959, by the Company and by contributing members and from which pensions and other benefits under this Plan are to be paid.

A trust agreement was executed between the company and Canada Trust, which contained the following:

AND WHEREAS under the PLAN contributions will be made to the Trustee which when received by the Trustee shall constitute a Pension Trust Fund (hereinafter called the "FUND") to be held and administered for the benefit of such persons or their estates as may from time to time be designated in or pursuant to the PLAN;

. . .

période d'exonération de cotisations ne constitue pas un empiétement sur la fiducie ni une réduction des prestations acquises. Ces considérations générales sont évidemment sujettes à la loi applicable.

Voyons comment ces principes devraient être appliqués aux ententes intervenues dans la présente affaire.

VI. Application aux faits

A. *Droit au surplus*

1. Le régime de Catalytic

Le régime prévoyait à l'article V que toutes les cotisations seraient versées à un fiduciaire qui les détiendrait et les gérerait conformément à l'acte de fiducie faisant partie du régime. Celui-ci énonçait également les définitions suivantes à l'article II:

[TRADUCTION]

12. «acte de fiducie» L'entente conclue entre la compagnie et le fiduciaire, qui crée le fonds en fiducie.

13. «fiduciaire» La Société Canada Trust, ou toute autre société de fiducie subséquente, le cas échéant, que le conseil peut nommer.

14. «fonds en fiducie» La caisse de retraite établie conformément à l'acte de fiducie, dans laquelle des cotisations sont versées après le 1er janvier 1959 par la compagnie et les cotisants, et sur laquelle les prestations de retraite et autres prestations prévues au régime sont versées.

La compagnie et Canada Trust ont signé un acte de fiducie prévoyant ce qui suit:

[TRADUCTION] ET ATTENDU QU'aux termes du RÉGIME les cotisations versées au fiduciaire constitueront la caisse de retraite en fiducie (ci-après la «CAISSE»), détenue et gérée pour le bénéfice des personnes, ou de leur succession, qui peuvent à l'occasion être désignées dans le RÉGIME ou conformément à celui-ci;

. . .

1994 CanLII 104 (SCC)

ARTICLE I

ESTABLISHMENT OF TRUST

1. This Agreement is hereby made a part of the PLAN.

2. The Company may pay or cause to be paid from time to time to the Trustee upon the trusts of this Agreement money or property acceptable to the Trustee for the purpose of the PLAN, all of which together with the earnings, profit and increments thereon and property from time to time substituted therefore shall constitute the FUND hereby created and established. [Emphasis added.]

ARTICLE I

CONSTITUTION D'UNE FIDUCIE

1. Le présent acte fait partie du RÉGIME.

2. La compagnie peut, à l'occasion, verser ou faire verser au fiduciaire, à valoir sur les fiducies créées par le présent acte, des sommes d'argent ou des biens que le fiduciaire juge acceptables pour les fins du RÉGIME et qui, avec les gains, les profits, les accroissements et les biens y substitués à l'occasion, constituent la CAISSE créée et établie par les présentes. [Je souligne.]

These provisions establish that a trust was created in 1959. The plan and the agreement constitute a clear declaration of an intention to create a trust. The subject matter of the trust is defined as all contributions made by the company and by employees together with all the earnings of those contributions; the beneficiaries are defined in the Trust Agreement by reference back to the Plan. This is a classic trust established for the benefit of a defined group of persons.

Ces dispositions démontrent qu'une fiducie a été créée en 1959. Le régime et l'acte reflètent clairement l'intention de créer une fiducie dont les biens y assujettis sont définis comme étant toutes les cotisations versées par la compagnie et les employés, ainsi que les gains qui en découlent; les bénéficiaires sont désignés dans l'acte de fiducie par renvoi au régime. Il s'agit d'une fiducie classique établie pour le bénéfice d'un groupe donné.

As Moore C.J. noted, there is no evidence that this trust was ever terminated. I agree with that finding. It must then be assumed that the trust continues to exist. This conclusion is strengthened by the definition of "Trustee" in the original plan, which accepts that Canada Trust might not always be in charge of the fund. Thus it can be seen that the parties contemplated that the trust would continue if a different trustee was named. It follows that the trust was not terminated when, in 1974, the company transferred control of its pension fund to Confederation Life Insurance Company pursuant to the terms of an investment contract which is not included in the evidence. Further, the fact that the 1978 version of the Catalytic plan removed all reference to a trust could not have the effect of terminating the trust. Nor could any of the provisions of the 1984 investment contract entered into by Stearns Catalytic and Confederation Life have that effect.

J'estime, à l'instar du juge en chef Moore, qu'il n'y a aucune preuve qu'on a mis fin à cette fiducie. Il faut donc présumer qu'elle continue d'exister. Cette conclusion est renforcée par la définition de «fiduciaire» énoncée dans le régime initial, qui reconnaît qu'il se pourrait que Canada Trust n'ait pas toujours la responsabilité de la caisse. On peut donc constater que les parties avaient prévu que la fiducie subsisterait si un fiduciaire différent était nommé. Il s'ensuit que la fiducie n'a pas cessé d'exister lorsqu'en 1974 la compagnie a cédé le contrôle de sa caisse de retraite à La Confédération conformément aux modalités d'un contrat de placement non soumis en preuve. En outre, le fait que la version de 1978 du régime de Catalytic ait supprimé tout renvoi à une fiducie ne pouvait avoir pour effet d'éteindre celle-ci. Les dispositions du contrat de placement de 1984 conclu entre Stearns Catalytic et La Confédération ne pouvaient pas non plus avoir cet effet.

What then is the effect of this trust? The preamble to the Trust Agreement, the underlined portion of Article I.2 of that agreement, and the definition of "Trust Fund" contained in the 1959 Plan, taken

Quel est donc l'effet de cette fiducie? Lus conjointement, le préambule de l'acte de fiducie, la partie soulignée de l'article I.2 de cet acte et la définition de [TRADUCTION] «fonds en fiducie»

1994 CanLII 104 (SCC)

together, make it clear that the trust fund was comprised of all contributions made by both the company and the employees, together with any earnings of those monies. The fact that the 1959 plan was a defined contribution plan under which no surplus could arise does not affect this definition of the trust fund. These provisions in themselves refute the company's argument that only that portion of the fund necessary to cover the benefits defined in the plan was subject to the trust.

contenue dans le régime de 1959 indiquent clairement que le fonds en fiducie se composait de toutes les cotisations versées par la compagnie et par les employés, de même que des gains en découlant. Le fait que le régime de 1959 ait été un régime à cotisations déterminées, en vertu duquel aucun surplus ne pouvait être accumulé, ne change rien à la définition du fonds en fiducie. En elles-mêmes, ces dispositions réfutent l'argument de la compagnie suivant lequel seule la partie de la caisse nécessaire pour verser les prestations déterminées par le régime était assujettie à la fiducie.

All monies in the Catalytic pension fund were impressed with a trust. It follows that the company could only claim the surplus remaining on termination by virtue of a resulting trust, or according to the terms of the trust itself. No resulting trust arises in this case. In my opinion, the purposes of the trust were not fully satisfied by the payment of all defined benefits. One of the objects of the trust was to use any money contained in the fund for the benefit of the employees.

Tout l'argent versé dans la caisse de retraite de Catalytic était assujetti à une fiducie. La compagnie ne pouvait donc revendiquer le surplus accumulé à la cessation qu'en vertu d'une fiducie par déduction ou conformément aux modalités de la fiducie elle-même. Aucune fiducie par déduction n'existe dans la présente affaire. À mon avis, les objets de la fiducie n'ont pas été pleinement réalisés par le paiement de toutes les prestations déterminées. L'un d'eux consistait en effet à utiliser toute somme contenue dans la caisse pour le bénéfice des employés.

This objective can be implied from the "exclusive benefit" and "non-diversion" clauses contained in the original trust agreement. Furthermore, Section XI of the plan provided that all contributions on behalf of employees who left the company prior to the vesting of their rights as members should be forfeited to the fund and "allocated among the Company Accounts of the remaining Members at that date".

On peut déduire l'existence de cet objet des dispositions relatives au «bénéfice exclusif» et à l'«interdiction d'utiliser à d'autres fins», contenues dans l'acte de fiducie initial. De plus, l'article XI du régime prévoyait que toutes les cotisations versées pour le compte des employés qui avaient quitté la compagnie avant l'acquisition de leurs droits à titre de participants devaient être abandonnées dans la caisse et [TRADUCTION] «réparties entre les comptes de la compagnie établis au nom des participants qui rester[aient] à cette date».

Section XV of the plan governed an employee's pension entitlement. It reads:

L'article XV du régime régissait le droit d'un employé aux prestations de retraite. Il était ainsi rédigé:

SECTION XV AMOUNT OF PENSION

When a Member retires, the proceeds of his Member's Account, if any, and of his Company Account . . . shall be used in their entirety to purchase for the Member an

[TRADUCTION]

ARTICLE XV PRESTATIONS DE RETRAITE

Lorsqu'un participant prend sa retraite, le produit de son compte, le cas échéant, et du compte de la compagnie établi en son nom [. . .] est entièrement consacré à

1994 CanLII 104 (SCC)

Annuity from an insurance company .... [Emphasis added.]

These clauses demonstrate that all money in the fund was to be used for the benefit of employees. Even though originally the plan was one of "defined contribution", the entitlement of each employee was never limited to the contributions made on his behalf. Collectively, the entitlement of all eligible employees was to all monies contained in the fund, whether the money resulted from contributions made on their behalf or "windfall" funds resulting from the withdrawal of employees from the plan prior to the vesting of their rights.

These provisions, specifically incorporated by reference into the 1959 Trust Agreement, clearly indicate that one of the objectives of the trust was to divide all monies in the fund among eligible members. The corollary to this is that the trust objects are not exhausted so long as some money remains in the fund and some eligible employees can be found. Therefore, a resulting trust cannot arise in this case.

Air Products is only entitled to the surplus, if at all, under the terms of the trust. In this case both the trust agreement and all versions of the plan make some provision for what was to occur on termination of the plan. The question is which of the different provisions dealing with termination governed in 1988? The answer depends upon the validity of the amendments purportedly made by the employer since 1959.

Section XXII of the 1959 plan provided:

3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination....

This section was reproduced in nearly identical form in the 1966 plan. The issue of entitlement to surplus was not specifically addressed until the

l'achat, auprès d'une compagnie d'assurances, d'une rente pour le compte du participant ... [Je souligne.]

Ces dispositions démontrent que tout l'argent de la caisse devait être utilisé pour le bénéfice des employés. Bien qu'à l'origine le régime ait été un régime à «cotisations déterminées», le droit de chaque employé n'a jamais été limité aux cotisations versées pour son compte. Collectivement, le droit de tous les employés admissibles portait sur tout l'argent contenu dans la caisse, peu importe que cet argent provienne de cotisations versées pour leur compte ou de fonds accumulés fortuitement grâce au retrait d'employés du régime avant l'acquisition de leurs droits.

Ces dispositions, expressément insérées par renvoi dans l'acte de fiducie de 1959, démontrent clairement que l'un des objets de la fiducie était de répartir tout l'argent de la caisse entre les participants admissibles. Il s'ensuit que les objets de la fiducie ne sont pas épuisés tant qu'il reste de l'argent dans la caisse et que des employés y ont droit. Il ne peut donc y avoir de fiducie par déduction en l'espèce.

Air Products n'a droit au surplus, si tant est que ce soit le cas, qu'aux termes de la fiducie. Dans la présente affaire, l'acte de fiducie et toutes les versions du régime pourvoient à ce qui doit se produire à la cessation du régime. La question est de savoir laquelle des différentes dispositions portant sur la cessation s'appliquait en 1988. La réponse dépend de la validité des modifications qui auraient été apportées par l'employeur depuis 1959.

L'article XXII du régime de 1959 prévoyait ceci:

[TRADUCTION]

3. En cas de cessation du régime, la compagnie ne peut recouvrer les sommes versées jusqu'à cette date et chaque participant reçoit le produit qui, à la date de la cessation, se trouve dans son compte et dans celui de la compagnie établi en son nom ...

Cet article a été repris presque intégralement dans le régime de 1966. La question du droit au surplus n'a été abordée expressément qu'au

1994 CanLII 104 (SCC)

plan was amended again in 1978. Section 17.05 of the 1978 plan provided that any surplus remaining on termination was to be distributed according to the directions of the company. The 1983 Air Products Plan contained the same stipulation (renumbered to become Section 18.05), and added an additional clause imposing a maximum level of benefits recoverable by an employee and stating that any surplus remaining once that maximum level had been reached was to revert to the company.

The validity of these amended provisions depends upon the original 1959 documents. Section XXII.2 of the pension plan prohibited any amendment which would operate to reduce the benefits which had accrued to the employees prior to the date of the amendment. The Trust Agreement contained the following provision:

ARTICLE V

MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided . . . that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time. . . .

The company therefore reserved a general amending power subject to the provisos that no amendments could reduce accrued benefits or allow the trust fund to be used in any way other than for the employees' exclusive benefit. The company did not expressly reserve for itself the power to revoke the trust. Such a power cannot be implied under the broad general amendment power.

I cannot accept that when the Catalytic Plan became a defined benefit plan in 1966, the parties did not intend Article V of the Trust Agreement to

moment où le régime a été modifié de nouveau en 1978. L'article 17.05 du régime de 1978 prévoyait que tout surplus accumulé à la cessation devait être distribué conformément aux directives de la compagnie. Le régime de 1983 d'Air Products contenait la même disposition (devenue l'art. 18.05) et ajoutait une disposition supplémentaire imposant un plafond aux prestations recouvrables par un employé et prévoyant la remise à la compagnie de tout surplus accumulé une fois ce plafond atteint.

La validité de ces dispositions modifiées dépend des documents initiaux de 1959. L'article XXII.2 du régime de retraite interdisait toute modification ayant pour effet de réduire les prestations acquises par les employés avant la date de la modification. L'acte de fiducie contenait la disposition suivante:

[TRADUCTION]

ARTICLE V

MODIFICATION ET CESSATION

1. Sous réserve du présent acte et du RÉGIME, la compagnie se réserve le droit de modifier à tout moment, en totalité ou en partie, les dispositions du RÉGIME (dont le présent acte), à condition [. . .] que, sauf avec l'approbation du ministre du Revenu national, aucune modification n'autorise ou ne permette qu'une partie de la CAISSE soit utilisée ou affectée à d'autres fins que le bénéfice exclusif des personnes et de leur succession, qui peuvent à l'occasion être désignées dans le RÉGIME tel que modifié à l'occasion, ou conformément à celui-ci . . .

La compagnie s'est donc réservé un pouvoir général de modifier, à la condition qu'aucune modification ne puisse réduire les prestations acquises ou permettre que le fonds en fiducie soit utilisé à d'autres fins que le bénéfice exclusif des employés. La compagnie ne s'est pas expressément réservé le pouvoir de révoquer la fiducie. Un tel pouvoir ne saurait s'inférer du pouvoir général de modifier.

Je ne puis accepter qu'au moment où le régime de Catalytic est devenu un régime à prestations déterminées en 1966, les parties n'ont pas voulu

1994 CanLII 104 (SCC)

apply to any surplus which might arise. Although the Trust Agreement was not altered, several provisions contained in the 1959 plan were modified in the 1966 version of the plan. The nature of the modifications indicates that the parties considered the effect of changing to a defined benefit plan and made the necessary amendments to the 1966 plan. In these circumstances, the parties must be taken to have intended that the unaltered provisions of the plan and the Trust Agreement should continue to apply to the new arrangement. Article V therefore continued to apply to all monies in the pension fund after 1966.

que l'article V de l'acte de fiducie s'applique à tout surplus qui pourrait être accumulé. Même si l'acte de fiducie n'était pas changé, plusieurs dispositions du régime de 1959 ont été modifiées dans la version de 1966 du régime. La nature des modifications indique que les parties ont considéré l'effet de la conversion en un régime à prestations déterminées et apporté les modifications nécessaires au régime de 1966. Dans ces circonstances, on doit considérer que les parties ont voulu que les dispositions non modifiées du régime et de l'acte de fiducie continuent de s'appliquer à la nouvelle entente. En conséquence, l'article V a continué de s'appliquer à toutes les sommes contenues dans la caisse de retraite après 1966.

In the result, the 1978 amendment purporting to give the company the power to distribute surplus to itself, as well as the reversion clause of the 1983 plan, are invalid. Both represent attempts to revoke partially a trust in favour of the employees which was established in 1959. Neither is within the scope of the control which the company reserved to itself at that time.

En définitive, la modification de 1978 qui avait pour effet de conférer à la compagnie le pouvoir de s'approprier le surplus, de même que la disposition en matière de réversion dans le régime de 1983, sont invalides. Elles représentent toutes les deux une tentative de révoquer partiellement une fiducie établie en 1959 en faveur des employés. Le contrôle que s'est réservé la compagnie à cette époque ne comprend ni l'une ni l'autre.

I agree with the Chambers Judge and the Court of Appeal that, by virtue of a continuing trust in their favour, the employees are entitled to those surplus funds which are derived from the Catalytic plans.

Je conviens avec le juge en chambre et la Cour d'appel qu'en vertu d'une fiducie existante en leur faveur, les employés ont droit aux sommes excédentaires qui découlent des régimes de Catalytic.

B. *Contribution Holiday*

B. *Période d'exonération de cotisations*

The relevant plan provisions which govern the taking of a contribution holiday are those contained in the 1983 Air Products Plan. As the employees point out, the Chambers Judge, when considering this issue, mistakenly quoted the contribution provisions from the 1977 Stearns plan. The Stearns plan expressly reserved to the company the right to pay its contributions from surplus. It is therefore necessary to consider whether the actual provisions of the 1983 plan would affect the result he reached.

Les dispositions pertinentes qui régissent les périodes d'exonération de cotisations sont contenues dans le régime de 1983 d'Air Products. Comme les employés le soulignent, lorsqu'il a examiné la question, le juge en chambre a cité par erreur les dispositions en matière de cotisation du régime de 1977 de Stearns. Le régime de Stearns réservait expressément à la compagnie le droit de se servir d'un surplus pour verser ses cotisations. Il faut donc se demander si les dispositions véritables du régime de 1983 changeraient le résultat auquel il est arrivé.

1994 CanLII 104 (SCC)

Section 4.03 of the Air Products plan (which is identical to s. 4.03 of the 1978 Catalytic plan) provides that:

4.03 Company Contributions

> The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

The employees submit that this section, like the contribution clause in the *Ontario Hydro* case, provides a fixed formula according to which the annual contribution obligation must be calculated. On this approach, the standard actuarial practice of applying surplus to current service funding obligations is excluded. Instead, Section 4.03 requires the company to contribute an amount equal to not less than the sum of:

(i) the amount necessary to provide the retirement benefits accruing to members during the current year, and

(ii) the amount required to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the *Pension Benefits Act*, after taking into account the assets of the Pension Fund and all other relevant factors.

Where no amount is required under (ii), the employees submit that the Company's minimum annual contribution is the amount determined under (i).

In my view, the words "after taking into account the assets of the Pension Fund and all other relevant factors" must qualify all of the preceding phrase beginning with "as necessary. . .". Such an interpretation is consistent with the natural gram-

L'article 4.03 du régime d'Air Products (identique à l'art. 4.03 du régime de 1978 de Catalytic) prévoit ceci:

[TRADUCTION] 4.03 Cotisations de la compagnie

> La compagnie cotise à l'occasion, au moins une fois par année, une somme au moins égale à celle que l'actuaire, après avoir tenu compte de l'actif de la caisse de retraite et de tout autre facteur pertinent, certifie comme étant nécessaire pour verser les prestations de retraite qui, aux termes du régime, sont dues aux participants au cours de l'année en cours et pour pourvoir à l'amortissement suffisant de tout passif initial non capitalisé ou au déficit actuariel à l'égard des prestations antérieurement acquises conformément aux exigences de la Pension Benefits Act.

Les employés soutiennent que cet article, à l'instar de la disposition en matière de cotisation dans l'affaire *Ontario Hydro*, établit une formule déterminée selon laquelle la cotisation annuelle obligatoire doit être calculée. Selon ce point de vue, la pratique actuarielle normale qui consiste à affecter le surplus aux obligations de financement des services courants est écartée. L'article 4.03 exige plutôt que la compagnie cotise un montant au moins égal à la somme:

(i) du montant nécessaire pour verser les prestations de retraite acquises par les participants durant l'année en cours, et

(ii) du montant requis pour pourvoir à l'amortissement suffisant de tout passif initial non capitalisé ou au déficit actuariel à l'égard des prestations antérieurement acquises, conformément aux conditions de la *Pension Benefits Act*, compte tenu de l'actif de la caisse de retraite et de tout autre facteur pertinent.

Les employés font valoir que, lorsqu'aucun montant n'est requis aux termes du sous-al. (ii), la cotisation annuelle minimale de la compagnie est le montant déterminé en vertu du sous-al. (i).

À mon avis, les mots «après avoir tenu compte de l'actif de la caisse de retraite et de tout autre facteur pertinent» doivent atténuer toute la phrase suivante qui commence par «nécessaire . . .». Une telle interprétation est compatible avec l'interpréta-

1994 CanLII 104 (SCC)

matical construction of Section 4.03. The absence of a comma between the phrases "to provide the retirement benefits accruing to Members during the current year pursuant to the Plan" and "to make provision for the proper amortization of any initial unfunded liability or experience deficiency" supports this position. Further, to agree to the interpretation suggested by the employees would be to accept that the company either overlooked or decided not to take advantage of the chance to take into account a surplus in the ongoing plan in determining its contributions. This seems to me unlikely since elsewhere in the amended provisions specific reference is made to a potential surplus on termination. There is as well the Revenue Canada circular which requires employers to take contribution holidays when the actuarial surplus exceeds certain levels. It is more likely that in 1983 the company simply assumed that the wording of Section 4.03 permitted the consideration of an actuarial surplus in the calculation of the current service cost.

The Air Products Plan, like those considered in *Askin* and *Maurer, supra*, is not one which specifically mandates regular contribution on a specified basis which would leave an actuary no discretion to employ the standard actuarial practice of considering existing surplus. The wording of the plan itself implicitly authorizes an actuary to consider an actuarial surplus when calculating the company's annual funding obligation.

As a result, I am of the opinion that the plan did allow the company to take contribution holidays. The appeal should be allowed in respect of the order made by the courts below requiring Air Products to pay $1,465,400 (which represents the actuarial surplus applied to the current service costs in the years when the company made no contributions) into the plan.

tion grammaticale normale de l'art. 4.03. Ce point de vue est étayé par l'absence d'une virgule entre les phrases «pour verser les prestations de retraite qui, aux termes du régime, sont dues aux participants au cours de l'année en cours» et «pour pourvoir à l'amortissement suffisant de tout passif initial non capitalisé ou au déficit actuariel». En outre, souscrire à l'interprétation proposée par les employés reviendrait à accepter que la compagnie a soit ignoré la possibilité de tenir compte du surplus dans le régime existant pour calculer ses cotisations, soit décidé de ne pas en profiter. Cela me semble invraisemblable puisque, ailleurs dans les dispositions modifiées, on mentionne explicitement la possibilité d'un surplus lors de la cessation. Il y a aussi la circulaire de Revenu Canada qui oblige les employeurs à s'accorder des périodes d'exonération de cotisations lorsque le surplus actuariel excède certains niveaux. Il est plus probable qu'en 1983 la compagnie a simplement présumé que le texte de l'art. 4.03 lui permettait de tenir compte d'un surplus actuariel pour calculer le coût des services courants.

Le régime d'Air Products, à l'instar de ceux examinés dans les affaires *Askin* et *Maurer*, précitées, ne prescrit pas explicitement une cotisation régulière selon une assiette précise, qui ne laisserait à l'actuaire aucun pouvoir discrétionnaire de recourir à la pratique actuarielle normale qui consiste à tenir compte d'un surplus existant. Le texte du régime lui-même autorise implicitement l'actuaire à tenir compte d'un surplus actuariel pour calculer la cotisation annuelle obligatoire de la compagnie.

En conséquence, je suis d'avis que le régime autorisait effectivement la compagnie à s'accorder des périodes d'exonération de cotisations. Le pourvoi devrait être accueilli à l'égard de l'ordonnance des tribunaux d'instance inférieure enjoignant à Air Products de verser dans le régime la somme de 1 465 400 $ (qui représente le surplus actuariel affecté aux coûts des services courants pendant les années où la compagnie n'a versé aucune cotisation).

1994 CanLII 104 (SCC)

2. The Stearns Plan

The Stearns employees also claim entitlement to the surplus remaining in the pension fund. They argue that the original Stearns fund was subject to a trust in their favour. Even if no trust existed, the employees say that the company is obligated by the provisions of a 1972 employee pension brochure and by the existence of a fiduciary duty to exercise its discretion to distribute the surplus in favour of the employees.

The 1970 Stearns plan differs in two significant ways from the original Catalytic plan. Firstly the Stearns plan makes no reference to the existence of a trust; secondly, it specifically contemplates the reversion of surplus assets to the company in these words:

ARTICLE XIV

Amendment or Termination of the Plan

14.1 . . .

c) . . .

Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1 (c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine.

This provision remained in the 1977 version of the Stearns plan and was then replaced in 1983 by Section 18.05 of the Air Products plan which, as observed earlier, provided for the automatic reversion of surplus to the company. The employees seek to establish the existence of a trust in order to make the further argument that the 1983 amendment to the plan was invalid as an unauthorized partial revocation of the trust.

2. Le régime de Stearns

Les employés de Stearns prétendent également avoir droit au surplus accumulé dans la caisse de retraite. Ils soutiennent que la caisse initiale de Stearns était assujettie à une fiducie en leur faveur. Même en l'absence d'une fiducie, affirment-ils, la compagnie est tenue de distribuer le surplus aux employés en vertu des dispositions de la brochure de 1972 concernant le régime de retraite des employés et de son obligation fiduciaire d'exercer son pouvoir discrétionnaire.

Le régime de 1970 de Stearns diffère sur deux points importants du régime initial de Catalytic. Premièrement, le régime de Stearns ne mentionne pas l'existence d'une fiducie et, deuxièmement, il envisage explicitement le retour de l'actif excédentaire à la compagnie dans les termes suivants:

[TRADUCTION]

ARTICLE XIV

Modification et cessation du régime

14.1 . . .

c) . . .

Sous réserve de l'approbation du ministre du Revenu national et du surintendant des régimes de retraite de l'époque, le surplus qui reste après que toutes les prestations visées au présent alinéa 14.1 c) sont versées peut être remis à la compagnie ou être utilisé au profit des participants, anciens participants, leurs ayants droit ou succession, de la manière juste que la compagnie peut à sa discrétion déterminer.

Cette disposition a été maintenue dans la version de 1977 du régime de Stearns pour ensuite être remplacée en 1983 par l'art. 18.05 du régime d'Air Products qui, comme je l'ai déjà fait remarquer, prévoyait le retour automatique de tout surplus à la compagnie. Les employés cherchent à établir l'existence d'une fiducie pour faire valoir également que la modification apportée au régime en 1983 était invalide parce qu'elle constituait une révocation partielle non autorisée de la fiducie.

1994 CanLII 104 (SCC)

(a) *Was the Stearns Fund Impressed with a Trust?*

Neither the 1970 nor the 1977 Stearns plans make any reference to a trust nor provide for the creation of a trust agreement. The plan was funded by means of a Group Annuity Policy entered into between the company and the Mutual Life Assurance Group. The employees contend that the terms of the pension plan clearly implied a trust onto this fund. In particular, the employees rely upon the following provisions of the plan:

> 13.2 No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. . . .
>
> 14.1 . . .
>
> b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants . . .

This plan, together with the 1972 Brochure and the 1977 Stearns plan, are said to constitute the trust documents.

It is true that the alleged subject matter of the trust, the pension fund, was defined under the two Stearns plans, and that the employees were identified as those entitled to receive the fund monies. Furthermore, the exclusive benefit and non-diversion clauses relied upon by the employees above are consistent with the existence of a trust. Nonetheless, I am not convinced that a trust was ever created. Certain phrases, such as the exclusive benefit and non-diversion clauses identified above, are commonly found in plans which do create pension trusts. They may point to the existence of a trust but of themselves they cannot be taken as demonstrating an intention by the employer to create a trust.

The company identifies several other clauses which it claims are equally consistent with the non-existence of trust, and clearly identify the plan as a contract to receive defined benefits. These individual clauses are of little assistance in deter-

a) *La caisse de Stearns était-elle assujettie à une fiducie?*

Ni le régime de 1970 de Stearns ni celui de 1977 ne parlent d'une fiducie ou ne prévoient la création d'une fiducie. Le régime était financé à l'aide d'un contrat de rente collective que la compagnie avait conclu avec la Mutuelle. Les employés soutiennent que les modalités du régime de retraite impliquent clairement que cette caisse est assujettie à une fiducie. En particulier, les employés invoquent les dispositions suivantes du régime:

[TRADUCTION]

> 13.2 Aucune partie de la caisse ne doit être utilisée ou affectée à d'autres fins que le bénéfice exclusif des participants et de leurs ayants droit. . . .
>
> 14.1 . . .
>
> b) Aucune modification ne doit avoir pour effet d'utiliser une partie de la caisse à d'autres fins que le bénéfice exclusif des participants . . .

On dit de ce régime, de la brochure de 1972 et du régime de 1977 de Stearns, qu'ils constituent les documents de fiducie.

Il est vrai que le bien en fiducie allégué, soit la caisse de retraite, a été précisé dans les deux régimes de Stearns et que les employés étaient décrits comme ceux qui avaient droit à l'argent de la caisse. En outre, les dispositions relatives au bénéfice exclusif et à l'interdiction d'utiliser à d'autres fins, invoquées par les employés ci-dessus, sont compatibles avec l'existence d'une fiducie. Je ne suis toutefois pas convaincu qu'une fiducie n'ait jamais été créée. Certaines dispositions, comme celles décrites plus haut relativement au bénéfice exclusif et à l'interdiction d'utiliser à d'autres fins, sont courantes dans les régimes qui créent des fiducies de régime de retraite. Elles peuvent indiquer l'existence d'une fiducie, mais elles ne peuvent être considérées comme démontrant en soi l'intention de l'employeur de créer une fiducie.

La compagnie énumère plusieurs autres dispositions qui, soutient-elle, sont également compatibles avec l'inexistence d'une fiducie et décrivent nettement le régime comme un contrat de réception de prestations déterminées. Ces dispositions indivi-

1994 CanLII 104 (SCC)

mining whether a trust came into existence. Rather, all of the documents relied upon by the employees must be construed in their entirety in order to see whether an intention to create a trust can be imputed to the company. I do not see any such intention apparent on the face of these documents.

Unlike the Catalytic plan, the Stearns plan makes no mention of any trust, trust fund or trustee. The Stearns fund was not created pursuant to a trust agreement but pursuant to a contract. This is so even though by 1970 the use of the trust in the creation of private employer pension plans had become a well-established practice. The absence of any reference to a trust in these circumstances indicates that there was a deliberate decision to avoid the use of a trust. Any argument that the employer merely "omitted" to state explicitly its intention to create a trust is difficult to accept.

At the time of the 1970 plan, the employer tax benefits to be gained from the creation of a "trusted" pension fund were equally available to employers who preferred to purchase a group insurance policy.

Finally, the employees contend that three documents — the 1970 and the 1977 plans and the 1972 employee brochure — made up the trust deed. On this approach, it would seem that the employer's intention to create a trust was not perfected until seven years after the creation of the fund. There was no significant change in circumstances between 1970 and 1977 which warrants a finding that a trust which did not exist at the inception of the plan suddenly came into existence in 1977.

I do not think that the Stearns pension fund was ever subject to a trust.

(b) *The Pension Brochure*

The Stearns employees relied upon the effect of a pension brochure which was distributed to

duelles ne sont guère utiles pour déterminer si une fiducie a pris naissance. Il faut plutôt interpréter intégralement les documents invoqués par les employés afin de voir si l'intention de créer une fiducie peut être attribuée à la compagnie. Je ne vois aucune intention de la sorte à la lecture de ces documents.

Contrairement au régime de Catalytic, celui de Stearns ne mentionne aucune fiducie, aucun fonds en fiducie ni aucun fiduciaire. La caisse de Stearns a été créée non pas conformément à un acte de fiducie, mais conformément à un contrat. Il en est ainsi même si, en 1970, l'utilisation de la fiducie pour créer des régimes privés de retraite pour employeurs était devenue une pratique bien établie. L'absence de toute mention d'une fiducie dans les présentes circonstances indique qu'on avait pris délibérément la décision de ne pas recourir à une fiducie. Tout argument voulant que l'employeur ait simplement «omis» d'exprimer explicitement son intention de créer une fiducie est difficilement acceptable.

À l'époque du régime de 1970, les avantages fiscaux que les employeurs pouvaient tirer de la création d'une caisse de retraite en fiducie étaient également offerts aux employeurs qui préféraient souscrire une police d'assurance collective.

Enfin, les employés soutiennent que les trois documents, savoir les régimes de 1970 et de 1977 et la brochure de 1972 destinée aux employés, constituaient l'acte de fiducie. Sur ce point, il semblerait que l'employeur n'a véritablement eu l'intention de créer une fiducie que sept ans après la création de la caisse. Entre 1970 et 1977, il n'y a eu aucun changement majeur de circonstances qui permettrait de conclure qu'une fiducie qui n'existait pas lors de la création du régime a soudainement pris naissance en 1977.

Je suis d'avis que la caisse de retraite de Stearns n'a jamais été assujettie à une fiducie.

b) *La brochure concernant le régime de retraite*

Les employés de Stearns ont invoqué l'effet d'une brochure concernant le régime de retraite qui

1994 CanLII 104 (SCC)

employees in 1972. They urged us to accept that clauses contained in that document must be taken to have fixed the employer with an equitable obligation to distribute any surplus remaining on termination to the employees.

The brochure is entitled "Stearns-Roger Canada Ltd. — Employee Benefits". In his supplementary affidavit, Gunter Schmidt stated that he received the brochure, which is dated June 1, 1972, when he joined the company in 1973. It consists of eight pages of text in which the operation of the pension plan is explained in some detail. The brochure contains the following relevant provisions:

Future of the Plan

It is the intention of the Company that the plan will continue indefinitely but of necessity they reserve the right to amend, modify or terminate the plan at any time. . . . In the event there is a surplus in the fund after all benefits have been paid it is the Company's intention that the surplus will be distributed in an equitable manner to the employees active in the plan at the date of termination.

General

This outline has been prepared to acquaint you with the provisions of your plan. Please read it carefully.

The precise terms of the plan are contained in the official plan text and Insurance company contract which may be read by any employee on request at the Calgary Office of the Company.

. . .

The company reserves the right to revise or discontinue any of the benefit plans at any time.

The above are transcripts from the various insurance policies and contracts. If more detailed information is desired our insurance group will be pleased to answer questions.

The employees assert that this brochure formed a binding part of the pension plan documents and that the statement contained in it to the effect that

a été distribuée aux employés en 1972. Ils nous pressent de considérer que les dispositions contenues dans ce document ont imposé à l'employeur une obligation d'*equity* de distribuer aux employés tout surplus accumulé à la cessation du régime.

La brochure est intitulée [TRADUCTION] «Stearns-Roger Canada Ltd. — Prestations des employés». Dans son affidavit supplémentaire, Gunter Schmidt a affirmé avoir reçu la brochure datée du 1er juin 1972 au moment où il a joint les rangs de la compagnie en 1973. Dans ce document de huit pages, on explique de façon assez détaillée le fonctionnement du régime de retraite. La brochure contient les dispositions pertinentes suivantes:

[TRADUCTION] Avenir du régime

La compagnie souhaite que le régime subsiste indéfiniment, mais elle se réserve forcément le droit de modifier ou de mettre fin au régime à tout moment. [. . .] Si la caisse accuse un surplus une fois versées toutes les prestations, la compagnie souhaite que ce surplus soit distribué équitablement aux employés qui cotisent au régime à la date de la cessation.

Généralités

Le présent exposé vise à vous familiariser avec les dispositions de votre régime. Lisez-le donc soigneusement.

Les modalités précises du régime sont énoncées dans le texte officiel du régime et dans le contrat de la compagnie d'assurance qui peut être consulté par tout employé qui en fait la demande auprès du bureau de la compagnie à Calgary.

. . .

La compagnie se réserve le droit de revoir ou d'interrompre tout régime de prestations à tout moment.

Ce qui précède représente les transcriptions de différents contrats et polices d'assurance. Pour de plus amples renseignements, veuillez communiquer avec notre groupe chargé de l'assurance.

Les employés font valoir que cette brochure formait une partie obligatoire des documents du régime de retraite et que la déclaration qu'on y

1994 CanLII 104 (SCC)

the company intends to pay any rémaining surplus to the employees estops the company from now claiming the surplus for itself.

Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees.

Foisy J. explained why courts will in specified circumstances bind an employer to the terms of a pension brochure in *Harris v. Robert Simpson Co.*, [1985] 1 W.W.R. 319, at p. 327:

> If it were otherwise then an employer could provide the employee with a brochure claiming to represent the significant and material terms in the company's pension plan. Yet the "true" plan could vary significantly from this representation without the employee's knowledge. In such a case it cannot be said that the "true" agreement prevails, as to do so would leave the door open to mischief.

In other words it would be unfair or unacceptable if an employer were to attract and retain employees by making representations as to the pension benefits available upon which the employees could be expected to rely and then resile from those representations as being contrary to the actual pension terms.

The 1972 brochure does not purport to have any contractual effect. It does, however, contain a detailed outline of an employee's entitlements under the plan, although it states that it is merely a "transcript" of the various policies and that the benefits can be amended by the company. The brochure is worded in a way that is declarative of the rights of individual employees under the plan. For example, the plan states "The Life Insurance is payable in the event of your death from any cause. . . . If you should become totally and perma-

trouvait, selon laquelle la compagnie avait l'intention de verser aux employés tout surplus accumulé, empêche la compagnie de réclamer aujourd'hui le surplus pour elle-même.

Les documents qui ne sont pas considérés normalement comme ayant un effet juridique peuvent néanmoins faire partie de la structure juridique dans laquelle les droits des employeurs et des employés cotisant à un régime de retraite doivent être déterminés. La question de savoir s'ils en font partie dépend du texte des documents, des circonstances dans lesquelles ils ont été rédigés et de l'incidence qu'ils ont eu sur les parties, particulièrement sur les employés.

Dans *Harris c. Robert Simpson Co.*, [1985] 1 W.W.R. 319, à la p. 327, le juge Foisy explique la raison pour laquelle les tribunaux obligeront, dans des circonstances précises, l'employeur à respecter les termes d'une brochure de régime de retraite:

> [TRADUCTION] Dans le cas contraire, l'employeur pourrait remettre à l'employé une brochure censée représenter les modalités importantes et pertinentes du régime de retraite de la compagnie. Pourtant, le «véritable» régime pourrait différer sensiblement de cette représentation sans que l'employé le sache. Dans un tel cas, on ne saurait dire que l'entente «véritable» l'emporte puisqu'on ouvrirait ainsi la porte au méfait.

En d'autres termes, il serait injuste ou inacceptable qu'un employeur attire des employés et les retienne en faisant des représentations sur les prestations de retraite dont ils peuvent espérer bénéficier, pour ensuite se rétracter en disant que ces représentations sont contraires aux modalités réelles du régime de retraite.

La brochure de 1972 n'est pas censée avoir un effet contractuel. Elle contient toutefois un exposé détaillé des droits des employés dans le cadre du régime, quoiqu'on y affirme qu'il s'agit d'une simple «transcription» des diverses politiques et que les prestations peuvent être modifiées par la compagnie. La brochure prend la forme d'une déclaration des droits de chaque employé visé par le régime. Par exemple, le régime prévoit ceci: [TRADUCTION] «L'assurance-vie est payable à votre décès quelle qu'en soit la cause. [. . .] Si vous

1994 CanLII 104 (SCC)

nently disabled while insured and prior to age sixty your life insurance will remain in force as long as you remain so disabled but you must furnish proof of disability . . . ."

devenez frappé d'invalidité totale et permanente pendant que vous êtes assuré, mais avant d'avoir atteint soixante ans, votre assurance-vie demeure en vigueur pendant la durée de cette invalidité, mais vous devez fournir une preuve d'invalidité . . .»

The only notable exception to this didactic style is contained in the clause concerning the future of the plan. The brochure there sets out the "intention" of the company. This is a declaration of intention as to a future act, but it does not in any way indicate that the company is undertaking an obligation to allocate surplus to the employees.

La seule exception remarquable à ce style didactique se trouve dans la disposition concernant l'avenir du régime. La brochure y expose l'«intention» de la compagnie. Il s'agit d'une déclaration d'intention quant à un acte futur, qui n'indique nullement que la compagnie s'engage à verser tout surplus aux employés.

The brochure is potentially misleading. Yet there is no evidence as to the effect that this brochure had on the employees of the company. All that is known is that the brochure was distributed to the employees of the company in June, 1972, and that Mr. Schmidt received a copy in 1973 when he joined the company. There is no indication that Mr. Schmidt was induced to join the company on the basis of the terms of the brochure, or that he even read it. There is no evidence that either the employees or their union relied upon the brochure in such a way as to affect their position during collective bargaining sessions. This may be contrasted to the situation in *Re Collins and Pension Commission of Ontario*, *supra*, where the Ontario Divisional Court found, at p. 277, that a booklet describing the terms of the pension plan, together with the plan itself, led to a belief amongst plan members that the company had no right to claim any part of the fund.

La brochure est susceptible d'induire en erreur. Pourtant, il n'y a aucune preuve quant à l'effet que cette brochure a eu sur les employés de la compagnie. On sait seulement que la brochure a été distribuée aux employés de la compagnie en juin 1972 et que M. Schmidt en a reçu un exemplaire en 1973, lorsqu'il s'est joint à la compagnie. Rien n'indique que M. Schmidt a été incité à se joindre à la compagnie par cette brochure, ni qu'il l'ait même lue. Il n'y a aucune preuve que les employés ou leur syndicat se sont fiés à cette brochure au point de modifier leur position au cours des rondes de négociation collective. Cela peut se comparer à la situation dans l'affaire *Re Collins and Pension Commission of Ontario*, précitée, où la Cour divisionnaire de l'Ontario a conclu, à la p. 277, qu'une brochure décrivant les modalités du régime de retraite, jointe au régime lui-même, a amené les cotisants à croire que la compagnie n'avait pas le droit de réclamer quelque partie que ce soit de la caisse.

Finally, I have some doubts as to the extent to which a brochure issued in 1972 can influence entitlement to plan surplus in 1988 particularly since it specifically states that the plan will be subject to amendment from time to time. As a brochure describing pension benefits becomes outdated, it becomes increasingly difficult for employees to rely upon it as the source of a supplementary obligation undertaken by the employer.

Enfin, j'ai des doutes quant à la mesure dans laquelle une brochure publiée en 1972 peut influer sur le droit à un surplus de régime en 1988, étant donné particulièrement qu'elle précise que le régime fera, à l'occasion, l'objet de modifications. Au fur et à mesure qu'une brochure décrivant les prestations de retraite devient désuète, il devient de plus en plus difficile pour les employés de l'invoquer comme source d'une obligation supplémentaire de la part de l'employeur.

1994 CanLII 104 (SCC)

I agree with the Court of Appeal that the brochure provisions concerning the treatment of surplus did not, on the evidence adduced in this case, amount to a promise intended to affect the legal relationship between the parties. It cannot form the basis for an estoppel as there is no evidence of inducement or reliance upon it by the employees.

Je conviens avec la Cour d'appel que les dispositions de la brochure concernant le traitement du surplus n'équivalaient pas, compte tenu de la preuve produite en l'espèce, à une promesse destinée à modifier la relation juridique entre les parties. Elle ne saurait justifier une fin de non-recevoir puisqu'il n'y a aucune preuve que les employés ont été incités à s'y fier ou qu'ils s'y sont fiés.

(c) *Interpretation of the Plan Provisions*

c) *Interprétation des dispositions du régime*

Since no trust was ever created under the Stearns plan and the 1972 brochure did not have any legal effect, the issue of entitlement to the plan surplus must be decided on the basis of an interpretation of the plan's provisions.

Étant donné qu'aucune fiducie n'a été créée dans le cadre du régime de Stearns et que la brochure de 1972 n'a eu aucun effet juridique, la réponse à la question de savoir qui a droit au surplus du régime passe par l'interprétation des dispositions de ce régime.

The position of the employees is that Section 18.05 of the Air Products Plan was an invalid amendment. Therefore, they argue that Article 14.1(c) of the 1970 plan (Article 14.3 of the 1977 plan) still applies, that that section gives the company a discretion as to whether distribute surplus to employees or to itself, and that the employer owes a fiduciary duty to the employees which compels it to exercise that distribution discretion in favour of the employees.

Les employés soutiennent que l'art. 18.05 du régime d'Air Products était une modification invalide. Ils font donc valoir que l'al. 14.1c) du régime de 1970 (l'art. 14.3 du régime de 1977) s'applique toujours, qu'il confère à la compagnie le pouvoir discrétionnaire de distribuer les surplus aux employés ou de se les approprier, et que l'employeur a envers les employés une obligation fiduciaire qui le force à exercer ce pouvoir discrétionnaire en faveur des employés.

Moore C.J. did not explicitly deal with the validity of the 1983 amendment. He decided that, even under the 1977 version of the plan, the employer was entitled to take the surplus. The issue of fiduciary duty was not raised before him.

Le juge en chef Moore n'a pas explicitement examiné la validité de la modification de 1983. Il a décidé que, même aux termes de la version de 1977 du régime, l'employeur avait le droit de s'approprier le surplus. La question de l'obligation fiduciaire n'a pas été soulevée devant lui.

It may be helpful to begin by examining the 1983 amendment. Whether or not the surplus reversion clause contained in Section 18.05 of the Air Products plan is valid must be determined by reference to the amendment clause contained in both the 1970 and the 1977 plans:

Il peut être utile de commencer par examiner la modification de 1983. La question de savoir si la disposition relative au retour du surplus contenue à l'art. 18.05 du régime d'Air Products est valide doit être tranchée par renvoi à la disposition modificatrice contenue dans les régimes de 1970 et de 1977:

14.1 The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner

[TRADUCTION]

14.1 La compagnie se réserve le droit de modifier le régime ou d'y mettre fin en totalité ou en partie à sa discrétion, de la manière et dans la mesure

1994 CanLII 104 (SCC)

and to such extent as it may deem advisable, subject to the following provisions:

a) No amendment shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, beneficiary's, or estate's then existing interest in the Fund;

b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, beneficiaries, or estates;

qu'elle estime souhaitables, sous réserve de ce qui suit:

a) Aucune modification ne doit avoir pour effet de réduire le droit alors existant que tout participant, ancien participant, rentier conjoint, ayant droit ou succession possède sur la caisse;

b) Aucune modification ne doit avoir pour effet d'utiliser une partie de la caisse à d'autres fins que le bénéfice exclusif des participants, anciens participants, rentiers conjoints, ayants droit ou succession;

In my opinion, the 1983 amendment of the pension plan was within the limits of this power of amendment. The amendment does not violate Article 14.1(a) because at the time it was enacted it did not reduce any "then existing" interest of the employees. Under the prior plans, the employees had no interest in the surplus remaining upon termination until such time as the company exercised its discretion to give them an interest. The removal of a mere potential interest in the funds was within the company's amending power.

À mon avis, la modification apportée en 1983 au régime de retraite était conforme à ce pouvoir de modification. Elle ne viole pas l'al. 14.1a) car, à l'époque où elle a été adoptée, elle n'a réduit aucun droit «alors existant» des employés. Selon les régimes antérieurs, les employés n'avaient aucun droit au surplus accumulé à la cessation du régime tant et aussi longtemps que la compagnie n'avait pas exercé son pouvoir discrétionnaire de leur en conférer un. Le retrait d'un simple droit éventuel sur les sommes était conforme au pouvoir de modification de la compagnie.

Nor do I think that the amendment violated the limitation on the amending power contained in Article 14.1(b). I agree with Moore C.J. that this restriction on amendment was in the nature of a general protection of the benefits and rights of the plan participants and that it must be read in the light of other provisions dealing with specific rights including the treatment of surplus. He considered that two particular provisions in the 1977 plan overrode any conflict with the more general terms of the amendment power. I agree. This was also true of the corresponding provisions in the 1970 plan. The relevant 1970 clauses are that part of s. 14.1(c) which gives the employer a discretion as to the allocation of surplus, and:

Je ne crois pas non plus que la modification a violé la restriction imposée au pouvoir de modifier énoncé à l'al. 14.1b). Je suis d'accord avec le juge en chef Moore pour dire que cette restriction imposée au pouvoir de modification tenait d'une protection générale des prestations et des droits des participants au régime et qu'elle doit être interprétée à la lumière des autres dispositions qui portent sur des droits précis, dont le traitement du surplus. Il a considéré que deux dispositions particulières du régime de 1977 écartaient tout conflit avec les termes plus généraux du pouvoir de modifier. Je suis d'accord. Il en était de même des dispositions correspondantes du régime de 1970. Les dispositions pertinentes du régime de 1970 sont cette partie de l'al. 14.1c) qui confère à l'employeur un pouvoir discrétionnaire quant à la répartition du surplus, et:

13.2 No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. No Participant, retired Participant, survivor or beneficiary under

[TRADUCTION]

13.2 Aucune partie de la caisse ne doit être utilisée ou affectée à d'autres fins que le bénéfice exclusif des participants et de leurs ayants droit. Aucun participant, participant retraité, survivant ou ayant droit

1994 CanLII 104 (SCC)

the Plan, or any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in or to or under such Fund or any part of the assets thereof, except and to the extent expressly provided in this Plan.

The amending power contained in Article 14.1(b) must therefore be read in light of the fact that the employee rights under the plan are limited by s. 13.2 (and indeed throughout the plan) to the benefits defined in the plan, as well as by the stipulation that the company has the right to distribute surplus as it chooses. The 1970 plan does not deal with the issue of whether the reversion of surplus to the company is inconsistent with the non-diversion and exclusive benefit clauses contained in Article 13.2. I do not think it is. The prohibition on diversion of funds and the exclusive benefit clause applied from the outset only in respect of the defined benefits to which the employees were contractually entitled. They did not apply to the distribution of a plan surplus. The revamped version of Article 13.2, which appeared as Article 13.4 in the 1977 plan, and upon which Moore C.J. based his conclusion, clarified this point but did not change the substance of the original provisions.

13.4 No part of the Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants, their designated Beneficiaries, or estates, except to the extent that surpluses, as certified by the Actuary, may be returned to the Company with the approval of the Minister of National Revenue and the Superintendent of Pensions. . . . No Participant, retired Participant, survivor, or designated Beneficiary under this Plan, or any other person, shall have any interest in or right to any part of the Fund except and to the extent expressly provided in this Plan. [Emphasis added.]

Whether measured against the 1970 or the 1977 plan provisions, Section 18.05 of the Air Products Plan was a valid amendment. The company is entitled according to its terms to any surplus remaining in the pension fund which can be traced to the

aux termes du régime, ou toute autre personne, n'a de droit sur une partie des revenus de la caisse, ou sur cette caisse ou une partie de son actif, sauf dans la mesure expressément prévue dans le présent régime.

Le pouvoir de modification prévu à l'al. 14.1b) doit donc être interprété en fonction du fait que les droits des employés découlant du régime sont limités par l'art. 13.2 (et, en fait, dans tout le régime) aux prestations déterminées dans le régime, de même que par la disposition voulant que la compagnie ait le droit de répartir tout surplus à sa discrétion. Le régime de 1970 ne traite pas la question de savoir si le retour du surplus à la compagnie est incompatible avec les dispositions de l'art. 13.2 relatives à l'interdiction d'utiliser à d'autres fins et au bénéfice exclusif. Je ne crois pas qu'elle le soit. L'interdiction d'utiliser les fonds à d'autres fins et la disposition relative au bénéfice exclusif se sont appliquées dès le début uniquement à l'égard des prestations déterminées auxquelles les employés avaient droit en vertu d'un contrat. Elles ne s'appliquaient pas à la répartition d'un surplus de régime. La nouvelle version de l'art. 13.2, qui figurait à l'art. 13.4 du régime de 1977 et sur laquelle le juge en chef Moore a fondé sa conclusion, clarifiait ce point, sans toutefois changer le fond des dispositions initiales.

[TRADUCTION]

13.4 Aucune partie de la caisse ne doit être utilisée, ou affectée à, d'autres fins que le bénéfice exclusif des participants, de leurs ayants droit désignés ou de leur succession, sauf dans la mesure où le surplus, comme le certifie l'actuaire, peut être remis à la compagnie avec l'approbation du ministre du Revenu national et du surintendant des régimes de retraite [. . .] Aucun participant, participant retraité, survivant, ou ayant droit désigné aux termes de ce régime, ou toute autre personne, n'a de droit sur une partie de la caisse sauf dans la mesure expressément prévue dans le présent régime. [Je souligne.]

Qu'il soit comparé aux dispositions du régime de 1970 ou à celles du régime de 1977, l'art. 18.05 du régime d'Air Products était une modification valide. La compagnie a le droit, en vertu de cet article, à tout surplus accumulé dans la caisse de

1994 CanLII 104 (SCC)

former Stearns plans. This is the conclusion which must be reached on an interpretation of the contract. The issue of a fiduciary duty does not arise.

retraite qui peut être attribué aux anciens régimes de Stearns. C'est la conclusion qu'il faut tirer de l'interprétation du contrat. La question d'une obligation fiduciaire ne se pose pas.

(d) *The Contribution Holiday*

d) *La période d'exonération de cotisations*

For the reasons given on the appeal, Air Products was entitled to take a contribution holiday. The application of an actuarial surplus to current service funding obligations was permitted under the terms of the Air Products Plan, and did not have the effect of reducing any benefits which had accrued to the employees.

Pour les motifs exposés quant au pourvoi, Air Products avait le droit de s'accorder une période d'exonération de cotisations. L'utilisation d'un surplus actuariel pour s'acquitter d'obligations en matière de financement des services courants était permise par les termes du régime d'Air Products, et n'avait pas pour effet de réduire les prestations acquises des employés.

(e) *The Need for Legislation*

e) *La nécessité de légiférer*

The results in these appeals demonstrate the need for legislation. In both appeals the pension fund was created to benefit the employees. During the contribution holiday enjoyed by the employer they continued to pay into the pension fund. They had a real stake in the fund which was created for their benefit and funded in part by their contributions. It seems unfair that there should be a different result for these two groups of employees based only upon a finding that a trust was created in one case but not in the other. In my opinion there should be a legislative scheme set up for determining the proportion of the surplus which should be awarded to the employer and the employees. It could be based at least in part upon their contributions to the creation of the surplus. Principles of equity and fairness should encourage legislators to draft a scheme to provide for the equitable distribution of any surplus in pension plans that are terminated.

Les résultats des présents pourvois démontrent la nécessité de légiférer. Dans les deux pourvois, la caisse de retraite a été créée pour le bénéfice des employés. Au cours de la période d'exonération de cotisations que s'est accordé l'employeur, ils ont continué à cotiser à la caisse de retraite. Ils avaient un réel intérêt dans la caisse créée pour leur bénéfice et financée en partie par leurs cotisations. Il semble injuste d'imposer un résultat différent à ces deux groupes d'employés pour le seul motif qu'il a été conclu qu'une fiducie a été créée dans un cas, et non dans l'autre. À mon avis, on devrait établir un régime législatif permettant de déterminer la proportion du surplus qui devrait être accordée à l'employeur et aux employés. Elle pourrait être fondée à tout le moins en partie sur leur contribution à la création du surplus. Les principes d'équité et de justice devraient encourager le législateur à concevoir un régime qui permette une répartition équitable de tout surplus de caisse de retraite auquel il est mis fin.

VII. Disposition

VII. Dispositif

In the result, I would dispose of these appeals as follows:

En définitive, je suis d'avis de statuer ainsi sur les présents pourvois:

The Appeal

Le pourvoi

1. The former Catalytic Employees are entitled to any surplus remaining in the pension fund which derives from former Cat-

1. Les anciens employés de Catalytic ont droit à tout surplus accumulé dans la caisse de retraite, qui provient des anciens

1994 CanLII 104 (SCC)

alytic plans. The appeal is dismissed on this ground and the order of the Court of Appeal varied accordingly.

2. Air Products was entitled under the terms of its pension plan to take a contribution holiday. The appeal is allowed on this ground.

The Cross-Appeal

1. Air Products is entitled to all surplus remaining in the pension fund which derives from the former Stearns plan.
2. Air Products was entitled to take a contribution holiday.

The cross-appeal is dismissed on both grounds. In light of the potentially misleading provisions contained in the brochure prepared and circulated by the employer, there should be no costs against the employees.

The costs of all parties on the appeal should be paid out of the Catalytic pension fund on a solicitor and client basis.

Similarly the costs of all parties on the cross-appeal should be paid out of the Stearns pension fund on a solicitor and client basis.

APPENDIX A

The following is an edited version of the Agreed Statement of Facts provided by the parties. The full text of the document is incorporated in the reasons of the Chief Justice of the Alberta Court of Queen's Bench.

I. HISTORY OF CATALYTIC PLANS

A. THE 1959 CATALYTIC PLAN

The 1959 Catalytic Plan was a money purchase plan which contained the following provisions:

régimes de Catalytic. Le pourvoi est rejeté quant à ce moyen et l'ordonnance de la Cour d'appel est modifiée en conséquence.

2. Air Products avait le droit, aux termes de son régime de retraite, de s'accorder une période d'exonération de cotisations. Le pourvoi est accueilli quant à ce moyen.

Le pourvoi incident

1. Air Products a droit à tout surplus de la caisse de retraite provenant de l'ancien régime de Stearns.
2. Air Products avait le droit de s'accorder une période d'exonération de cotisations.

Le pourvoi incident est rejeté quant aux deux moyens. En raison des dispositions susceptibles d'induire en erreur que contient la brochure préparée et distribuée par l'employeur, les employés ne devraient pas avoir à payer des dépens.

Les dépens de toutes les parties au pourvoi principal devraient être payés, comme entre avocat et client, sur la caisse de retraite de Catalytic.

De même, les dépens de toutes les parties au pourvoi incident devraient être payés, comme entre avocat et client, sur la caisse de retraite de Stearns.

ANNEXE A

Voici une version élaguée de l'exposé conjoint des faits fourni par les parties. Le texte intégral du document est annexé aux motifs du Juge en chef de la Cour du Banc de la Reine de l'Alberta.

[TRADUCTION]

I. HISTORIQUE DES RÉGIMES DE CATALYTIC

A. LE RÉGIME DE 1959 DE CATALYTIC

Le régime de 1959 de Catalytic était un régime à formule d'achat qui comportait les dispositions suivantes:

1994 CanLII 104 (SCC)

SECTION V TRUST FUND

All contributions made by the members and the Company will be paid to the Trustee to be administered subject to the provisions of the Act governing the investment of Pension funds, and in accordance with the terms of the Trust Agreement which forms part of this plan and of which this plan is Exhibit "A".

All benefits on the death or break of service of a Member shall be payable from the Trust Fund. All benefits on the retirement of a Member shall be payable as set forth in Section XV.

Expenses of the Trust Fund shall be paid out of the Fund unless paid by the Company.

SECTION VIII MEMBERS' ACCOUNTS

The Pension Committee shall keep for each Member of the Plan two accounts as follows:

1. Member's Account

   Here will be kept a cumulative record of any contributions made by the Member and the interest income and capital gains and losses realized and unrealized allocated thereon in accordance with Section X.

2. The Company Account

   Here will be kept a cumulative record of the amounts allocated to the Member as follows:

   (a) the Company's contribution allocated in accordance with Section IX.

   (b) The interest income and capital gains and losses realized and unrealized allocated in accordance with Section X.

   (c) The forfeitures allocated in accordance with Section XI.

SECTION XXII FUTURE OF THE PLAN

1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.

2. No amendment to the Plan shall operate to reduce the benefits which have occrued (*sic*) to the Members of the Plan prior to the date of amendment.

ARTICLE V CAISSE EN FIDUCIE

Toutes les cotisations versées par les participants et par la compagnie seront remises à un fiduciaire qui les gérera compte tenu des dispositions de la Loi qui régit le placement des caisses de retraite et conformément à l'acte de fiducie qui fait partie du présent régime et dont ce dernier constitue la pièce «A».

Au décès ou à la cessation d'emploi d'un participant, toutes les prestations seront payables sur le fonds en fiducie. À la retraite d'un participant, toutes les prestations seront payables conformément à l'article XV.

Les frais relatifs à la caisse en fiducie seront payés sur la caisse, sauf s'ils le sont par la compagnie.

ARTICLE VIII LES COMPTES DES PARTICIPANTS

Le comité de retraite tient, à l'égard de chaque participant, deux comptes:

1. Compte du participant

   Il s'agit du relevé cumulatif des cotisations versées par le participant et des revenus d'intérêt, gains et pertes en capital réalisés et non réalisés, qui leur sont attribués conformément à l'article X.

2. Compte de la compagnie

   Il s'agit du relevé cumulatif des montants attribués au participant comme suit:

   a) la cotisation versée par la compagnie conformément à l'article IX;

   b) les revenus d'intérêt, gains et pertes en capital réalisés et non réalisés, attribués conformément à l'article X;

   c) les cotisations abandonnées qui sont réparties conformément à l'article XI.

ARTICLE XXII AVENIR DU RÉGIME

1. La compagnie souhaite et compte maintenir indéfiniment le régime et le paiement des cotisations ci-dessous, ce maintien ne constituant toutefois pas une obligation contractuelle. La compagnie se réserve expressément le droit, par l'entremise de son conseil, de modifier le régime ou d'y mettre fin en totalité ou en partie si, à son avis, des circonstances futures le justifient.

2. Aucune modification du régime n'a pour effet de réduire les prestations des participants qui ont été accumulées avant la date de la modification.

1994 CanLII 104 (SCC)

3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company.

. . .

B. TRUST AGREEMENT

As contemplated by the 1959 Catalytic Plan, Catalytic entered into an agreement dated September 8, 1959 (the "Trust Agreement") with Canada Trust Company whereby Canada Trust, as trustee, was to hold, invest and administer the fund. The Trust Agreement provided:

ARTICLE I

ESTABLISHMENT OF TRUST

1.This Agreement is hereby made a part of the PLAN.

2. The Company may pay or cause to be paid from time to time to the Trustee upon the trusts of this Agreement money or property acceptable to the Trustee for the purpose of the PLAN, all of which together with the earnings, profit and increments thereon and property from time to time substituted therefore shall constitute the FUND hereby created and established.

3. The Trustee hereby accepts the trusts herein set out and agrees to hold, invest, distribute and administer the FUND in accordance with the provisions of this Agreement.

ARTICLE V

MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time

3. En cas de cessation du régime, la compagnie ne peut recouvrer les sommes versées jusqu'à cette date et chaque participant reçoit le produit qui, à la date de la cessation, se trouve dans son compte et dans celui de la compagnie établi en son nom. Aucun autre employé ne pourra devenir participant et aucune autre cotisation ne sera versée par la compagnie.

. . .

B. ACTE DE FIDUCIE

Tel que prévu par le régime de 1959 de Catalytic, Catalytic a, le 8 septembre 1959, conclu avec la Société Canada Trust une entente (l'«acte de fiducie») en vertu de laquelle cette dernière devait, à titre de fiduciaire, détenir, investir et gérer la caisse. L'acte de fiducie prévoyait:

ARTICLE I

CONSTITUTION D'UNE FIDUCIE

1. Le présent acte fait partie du RÉGIME.

2. La compagnie peut, à l'occasion, verser ou faire verser au fiduciaire, à valoir sur les fiducies créées par le présent acte, des sommes d'argent ou des biens que le fiduciaire juge acceptables pour les fins du RÉGIME et qui, avec les gains, les profits, les accroissements et les biens y substitués à l'occasion, constituent la CAISSE créée et établie par les présentes.

3. Le fiduciaire accepte, par les présentes, les fiducies ici créées et convient de détenir, d'investir, de distribuer et de gérer la CAISSE conformément aux dispositions du présent acte.

ARTICLE V

MODIFICATION ET CESSATION

1. Sous réserve du présent acte et du RÉGIME, la compagnie se réserve le droit de modifier à tout moment, en totalité ou en partie, les dispositions du RÉGIME (dont le présent acte), à condition qu'aucune modification de ce genre qui influe sur les droits, les obligations, la rétribution ou les responsabilités du fiduciaire ne soit effectuée sans son consentement, et à condition que, sauf avec l'approbation du ministre du Revenu national, aucune modification n'autorise ou ne permette qu'une partie de la CAISSE soit utilisée ou affectée à d'autres fins que le bénéfice exclusif des personnes et de leur succession, qui peuvent à l'occasion être désignées dans le RÉGIME tel que modifié à l'occasion, ou conformé-

1994 CanLII 104 (SCC)

to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof.

2. This Agreement may be terminated at any time by the Company upon at least sixty (60) days' prior written notice to the Trustee, and with its termination, or upon the dissolution or liquidation of the Company, the FUND shall be paid out by the Trustee as directed by the Company.

C. THE 1966 CATALYTIC PLAN

The 1966 Catalytic Plan changed the benefit formula from a money purchase formula to a defined benefit formula. . . . [E]ffective October 1, 1966 the plan provided that:

> . . . the Company shall not less frequently than annually make such contributions as are necessary to provide the benefits accruing to Members during the current year and to amortize any initial unfunded liability or experience deficiency in accordance with the provisions of The Pension Benefits Act of Ontario. (Section VI)

The provisions regarding the future of the plan remained unchanged from Section XXII of the 1959 Catalytic Plan.

The money purchase portion of the Catalytic 1959 and 1966 Plans was segregated and is administered separately from the funds generated in the defined benefit plans. No surplus was or could be generated from the money purchase portion of the 1959 and 1966 Catalytic Plans.

D. THE 1978 CATALYTIC PLAN

This plan was a defined benefit plan. . . . [It] provided . . .:

. . .

SECTION 2 — DEFINITIONS

2.12 "Funding Agency" means the trustees, trust company or insurance company that the Company may appoint to hold and invest the Pension Fund or the Pooled Pension Trust Fund or such successor trustees, trust company or insurance company as the Company may appoint from time to time to hold

ment à celui-ci, et aux fins du paiement des impôts ou autres cotisations prévus au paragraphe 2 de l'article II des présentes, ainsi que des frais et de la rétribution du fiduciaire, prévus au paragraphe 4 de l'article IV des présentes.

2. La Compagnie peut à tout moment mettre fin au présent acte sur préavis écrit de soixante (60) jours au fiduciaire, et, à sa cessation, ou encore à la dissolution ou à la liquidation de la compagnie, la CAISSE est distribuée par le fiduciaire suivant les directives de la compagnie.

C. LE RÉGIME DE 1966 DE CATALYTIC

Le régime de 1966 de Catalytic a converti la formule d'achat en une formule à prestations déterminées. . . . [À] compter du 1er octobre 1966, le régime prévoyait que:

> . . . la Compagnie cotise, au moins une fois par année, la somme nécessaire pour verser les prestations de retraite qui sont dues aux participants au cours de l'année en cours et pour pourvoir à l'amortissement de tout passif initial non capitalisé ou au déficit actuariel conformément aux dispositions de la Pension Benefits Act de l'Ontario. (article VI)

Les dispositions relatives à l'avenir du régime contenues à l'article XXII du régime de 1959 de Catalytic sont demeurées inchangées.

La partie des régimes de 1959 et de 1966 de Catalytic qui prévoyait la formule d'achat a été isolée et gérée séparément des sommes générées par les régimes à prestations déterminées. Aucun surplus ne résultait ou ne pouvait résulter de la partie des régimes de 1959 et de 1966 de Catalytic qui prévoyait la formule d'achat.

D. LE RÉGIME DE 1978 DE CATALYTIC

Il s'agissait d'un régime à prestations déterminées. . . . [Il] prévoyait . . .:

. . .

ARTICLE 2 — DÉFINITIONS

2.12 «Gestionnaire». Les fiduciaires, compagnies de fiducie ou compagnies d'assurances, ou leurs successeurs, que la compagnie peut désigner pour

1994 CanLII 104 (SCC)

and invest the Pension Fund or the Pooled Pension Trust Fund.

2.13 "Funding Agreement" means the agreement entered into between the Company and the Funding Agency establishing and maintaining the Pension Fund.

2.18 "Pension Fund" means the fund established pursuant to the Funding Agreement to which contributions are made by the Members and Company and from which retirement and other benefits under the Plan are to be provided.

SECTION 4 — CONTRIBUTIONS

4.03 The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

. . .

SECTION 17 — AMENDMENT TO OR TERMINATION OF THE PLAN

17.01 Continuation of Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the Plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

17.02 Amendment of Plan

No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

17.03 Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension

détenir et investir la caisse de retraite ou la caisse de retraite commune en fiducie.

2.13 «Accord de financement». L'entente conclue entre la compagnie et le gestionnaire, qui établit et maintient la caisse de retraite.

2.18 «Caisse de retraite». La caisse établie conformément à l'accord de financement, dans laquelle des cotisations sont versées par les participants et par la compagnie, et sur laquelle les prestations de retraite et autres prestations prévues au régime sont versées.

ARTICLE 4 — COTISATIONS

4.03 La compagnie cotise à l'occasion, au moins une fois par année, une somme au moins égale à celle que l'actuaire, après avoir tenu compte de l'actif de la caisse de retraite et de tout autre facteur pertinent, certifie comme étant nécessaire pour verser les prestations de retraite qui, aux termes du régime, sont dues aux participants au cours de l'année en cours et pour pourvoir à l'amortissement suffisant de tout passif initial non capitalisé ou au déficit actuariel à l'égard des prestations antérieurement acquises conformément aux exigences de la Pension Benefits Act.

. . .

ARTICLE 17 — MODIFICATION OU CESSATION DU RÉGIME

17.01 Maintien du régime

La compagnie compte maintenir en vigueur indéfiniment le présent régime, mais elle se réserve forcément le droit de modifier ou de mettre fin au régime en totalité ou en partie si, à son avis, des circonstances futures le justifient, sous réserve toujours des exigences du ministère du Revenu national et des dispositions de la Pension Benefits Act.

17.02 Modification du régime

Aucune modification du régime ne doit avoir pour effet de réduire les prestations des participants qui ont été accumulées en vertu de celui-ci, avant la date de la modification.

17.03 Cessation du régime

S'il est mis fin en totalité au régime, la compagnie n'est tenue de verser aucune cotisation supplémentaire au régime, et l'actif de la caisse de retraite est

1994 CanLII 104 (SCC)

Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact business in Canada, in the form elected by the Members, or through the continuation of the Funding Agreement for this purpose. If the assets of the Pension Fund are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act.

. . .

17.05 Distribution of Benefits

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct. Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the Department of National Revenue with respect to registered pension plans.

. . .

II. A HISTORY OF THE STERNS PLANS

A. THE 1962 STEARNS PLAN

On January 1, 1962, Stearns obtained a Group Annuity Policy (GA577) from the Mutual Life Assurance Company for the purpose of providing retirement benefits to its employees. No surplus was or could have been derived pursuant to this plan.

B. THE 1970 STEARNS PLAN

Stearns established a pension plan effective January 1, 1970 for the retirement of and payment of pensions to its employees.

. . .

affecté au versement des prestations accumulées auxquelles les participants, leurs ayants droit et leur rentier conjoint ont droit, d'une manière juste que peut déterminer la compagnie de concert avec l'actuaire, jusqu'à ce que toutes les obligations créées par le régime soient remplies. Ces prestations peuvent être versées au moyen de l'achat de contrats de rente auprès de compagnies d'assurances autorisées à faire des affaires au Canada, selon la forme choisie par les participants, ou par le maintien de l'accord de financement à cette fin. Si l'actif du régime de retraite n'est pas suffisant pour verser lesdites prestations accumulées, la caisse de retraite est répartie conformément à la Pension Benefits Act.

. . .

17.05 Distribution des prestations

Si, après le versement de toutes les prestations accumulées aux participants, à leurs ayants droit et à leur rentier conjoint, la caisse de retraite accuse un surplus, celui-ci est utilisé comme la compagnie, le liquidateur ou le syndic de faillite, s'il y a lieu, le prescrit. Toute distribution de la caisse de retraite qui résulte de la cessation du régime doit être conforme aux dispositions applicables de la Pension Benefits Act et de la Loi de l'impôt sur le revenu, et aux règles et règlements du ministère du Revenu national relatifs aux régimes de retraite enregistrés.

. . .

II. HISTORIQUE DES RÉGIMES DE STEARNS

A. LE RÉGIME DE 1962 DE STEARNS

Le 1er janvier 1962, Stearns a conclu un contrat de rente collective (GA577) avec la Mutuelle, Compagnie d'assurance sur la vie, afin d'offrir des prestations de retraite à ses employés. Ce régime ne pouvait donner lieu à aucun surplus.

B. LE RÉGIME DE 1970 DE STEARNS

Stearns a créé un régime de retraite entrant en vigueur le 1er janvier 1970, pour la retraite de ses employés et le paiement à ces derniers de prestations de retraite.

. . .

1994 CanLII 104 (SCC)

As required by Article 13.1 of this plan, the Company entered into a Group Annuity Policy (GA1328) with the Mutual Life Assurance Company and a fund was established by transfer of the assets from the 1962 Stearns Plan and by contributions from the employees and the Company.

The 1970 Stearns Plan provided that:

ARTICLE I

DEFINITIONS

Fund shall mean the Fund to be established under the Deposit Administration Policy issued by the Insurer by transfer of assets from the Prior Plan and by contributions by the Participants and the Company from which the benefits of the Plan are to be provided.

ARTICLE II

ESTABLISHMENT OF THE PLAN

. . .

2.2 Prior to the Effective Date, certain Employees of the Company had accumulated retirement benefits under the Prior Plan. The Prior Plan shall be terminated 31 December 1969 and all benefits earned thereunder shall be transferred to the Plan. All benefits accrued under the Prior Plan transferred to the Plan shall become a liability of the Plan and shall be paid in accordance with the provisions of the Plan. Future contributions by such Employees and Employees who become eligible on and after the Effective Date shall be made under the Plan.

ARTICLE IV

CONTRIBUTIONS

4.3 (a) The Company will contribute each year to the Fund such amounts as determined by the Actuary, which, when added to the Participant's contributions made under Section 4.1 will provide the regular benefits described in the Plan and will provide for funding in accordance with the tests for solvency prescribed by the regulations under the Pension Benefits Act.

(b) It is expressly stipulated that the Company will not make any additional contributions corresponding to or in respect of the additional vol-

Conformément à l'art. 13.1 de ce régime, la compagnie a conclu un contrat de rente collective (GA1328) avec La Mutuelle, Compagnie d'assurance sur la vie, et une caisse a été constituée par le transfert de l'actif du régime de 1962 de Stearns et par les cotisations versées par les employés et la compagnie.

Le régime de 1970 de Stearns prévoyait ceci:

ARTICLE I

DÉFINITIONS

Caisse. La caisse à créer, en vertu du contrat d'administration de dépôt délivré par l'assureur, par le transfert de l'actif du régime antérieur et les cotisations versées par les participants et par la compagnie, et sur lesquelles les prestations du régime doivent être versées.

ARTICLE II

CONSTITUTION DU RÉGIME

. . .

2.2 Avant la date d'entrée en vigueur, certains employés de la compagnie avaient accumulé des prestations de retraite en vertu du régime antérieur. Le régime antérieur prend fin le 31 décembre 1969 et toutes les prestations accumulées en vertu de celui-ci sont transférées dans le régime, lesquelles prestations deviennent un passif du régime et sont versées conformément à ses dispositions. Les cotisations futures de ces employés et de ceux qui deviennent admissibles à compter de la date d'entrée en vigueur sont versées conformément au régime.

ARTICLE IV

COTISATIONS

4.3 a) La compagnie cotisera chaque année à la caisse les sommes déterminées par l'actuaire, qui, en sus des cotisations versées par les participants en vertu de l'article 4.1, garantiront les prestations normales décrites au régime et le financement conformément aux critères de solvabilité prescrits par le règlement d'application de la Pension Benefits Act.

b) Il est expressément prévu que la compagnie ne versera aucune cotisation supplémentaire correspondant aux cotisations supplémentaires versées

1994 CanLII 104 (SCC)

untary contributions made by a Participant as provided for in Section 4.2 or 4.4.

ARTICLE XIII

RETIREMENT FUND

13.2 No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. No Participant, retired Participant, survivor or beneficiary under the Plan, or any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in or to or under such Fund or any part of the assets thereof, except and to the extent expressly provided in this Plan.

ARTICLE XIV

Amendment or Termination of the Plan

14.1 The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

a) No amendment shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, beneficiary's, or estate's then existing interest in the Fund;

b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, beneficiaries, or estates;

Article 14.1(c) set out the following scheme of distribution to be instituted upon termination of the plan:

c) If it should become necessary to discontinue the Plan, the assets of the Fund shall be used, to the extent adequate, for the following purposes:

. . .

Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1 (c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine.

volontairement par les participants conformément à l'article 4.2 ou 4.4.

ARTICLE XIII

CAISSE DE RETRAITE

13.2 Aucune partie de la caisse ne doit être utilisée ou affectée à d'autres fins que le bénéfice exclusif des participants et de leurs ayants droit. Aucun participant, participant retraité, survivant ou ayant droit aux termes du régime, ou toute autre personne, n'a de droit sur une partie des revenus de la caisse, ou sur cette caisse ou une partie de son actif, sauf dans la mesure expressément prévue dans le présent régime.

ARTICLE XIV

Modification ou cessation du régime

14.1 La compagnie se réserve le droit de modifier le régime ou d'y mettre fin en totalité ou en partie à sa discrétion, de la manière et dans la mesure qu'elle estime souhaitables, sous réserve de ce qui suit:

a) Aucune modification ne doit avoir pour effet de réduire le droit alors existant que tout participant, ancien participant, ayant droit ou succession possède sur la caisse;

b) Aucune modification ne doit avoir pour effet d'utiliser une partie de la caisse à d'autres fins que le bénéfice exclusif des participants, anciens participants, rentiers conjoints, ayants droit ou succession.

L'alinéa 14.1c) énonçait de la façon suivante le mécanisme de distribution applicable à la cessation du régime:

c) S'il devient nécessaire de mettre fin au régime, l'actif de la caisse sera utilisé, dans une mesure suffisante, aux fins suivantes:

. . .

Sous réserve de l'approbation du ministre du Revenu national et du surintendant des régimes de retraite de l'époque, le surplus qui reste après que toutes les prestations visées au présent alinéa 14.1 c) sont versées peut être remis à la compagnie ou être utilisé au profit des participants, anciens participants, leurs ayants droit ou succession, de la manière juste que la compagnie peut à sa discrétion déterminer.

1994 CanLII 104 (SCC)

C. BROCHURE . . .

On June 1, 1972, Stearns issued to its employees a brochure entitled 'Employee Benefits' which provided that:

Future of the Plan

It is the intention of the Company that the plan will continue indefinitely but of necessity they reserve the right to amend, modify or terminate the plan at any time. If it becomes necessary to terminate the plan at some future date, all employees would be granted 100% vesting, regardless of their service. No part of the assets of the fund will be available to the Company until all benefits earned under the plan to the date of termination have been paid. In the event there is a surplus in the fund after all benefits have been paid it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the plan at the date of termination.

D. THE 1977 STEARNS PLAN . . .

By an amendment dated January 1, 1977, Stearns amended the 1970 plan. . . .

The 1977 Stearns Plan contained . . . the following provisions:

ARTICLE I

DEFINITIONS

1.14 Fund means the corpus and all earnings, appreciations, or additions thereon and thereto held by the Funding Agency under the Funding Agreement.

1.15 Funding Agency means the Trust Company, Trustees, Insurance Company or successors thereof as the Company may appoint to hold the Fund pursuant to the Funding Agreement.

1.16 Funding Agreement means the agreement or contract entered into between the Company and the Funding Agency establishing the Fund.

ARTICLE IV

CONTRIBUTIONS

4.1 The Company will contribute to the Fund, not less frequently than annually, such amounts which are not less than those certified by the Actuary as being necessary to provide benefits accruing during each Plan Year and to make provision in accordance with

C. BROCHURE . . .

Le 1er juin 1972, Stearns a remis à ses employés une brochure intitulée «Prestations des employés», qui prévoyait ceci:

Avenir du régime

La compagnie souhaite que le régime subsiste indéfiniment, mais elle se réserve forcément le droit de modifier ou de mettre fin au régime à tout moment. S'il devient nécessaire de mettre fin au régime ultérieurement, tous les employés obtiendront 100 % de leur droit aux prestations, peu importe leur nombre d'années de service. La compagnie n'aura droit à une partie de l'actif de la caisse que si toutes les prestations accumulées en vertu du régime à la date de la cessation sont versées. Si la caisse accuse un surplus une fois versées toutes les prestations, la compagnie souhaite que ce surplus soit distribué équitablement aux employés qui cotisent au régime à la date de la cessation.

D. LE RÉGIME DE 1977 DE STEARNS . . .

Le 1er janvier 1977, Stearns a modifié le régime de 1970 . . .

Le régime de 1977 de Stearns contenait [. . .] les dispositions suivantes:

ARTICLE I

DÉFINITIONS

1.14 Caisse. L'ensemble de tous les gains, plus-value ou acquisitions en découlant, détenu par le gestionnaire en vertu de l'accord de financement.

1.15 Gestionnaire. La compagnie de fiducie, les fiduciaires, la compagnie d'assurances ou leurs successeurs que la compagnie peut désigner pour détenir la caisse conformément à l'accord de financement.

1.16 Accord de financement. L'entente ou le contrat conclu entre la compagnie et le gestionnaire, qui établit la caisse.

ARTICLE IV

COTISATIONS

4.1 La compagnie cotisera à la caisse, au moins une fois par année, une somme au moins égale à celle que l'actuaire, après avoir tenu compte de l'actif de la caisse de retraite et de tout autre facteur qu'il peut juger pertinent, certifie comme étant nécessaire

1994 CanLII 104 (SCC)

the Pension Benefits Act for the amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued after taking into account the assets of the Fund and such other factors as may be deemed relevant. The Company reserves the right, however, subject to the provisions of Article XIII, to pay its contributions from such surpluses as may accumulate and shall be determined in a valuation of the Funds' assets and liabilities certified by an Actuary.

4.2 Participants shall not be required to contribute to the Plan.

ARTICLE XIII

ESTABLISHMENT OF THE FUND

13.4 No part of the Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants, their designated Beneficiaries, or estates, except to the extent that surpluses, as certified by the Actuary, may be returned to the Company with the approval of the Minister of National Revenue and the Superintendent of Pensions and except as provided in Sub-section 14.2 (d) of Article XIV. No Participant, retired Participant, survivor, or designated Beneficiary under this Plan, or any other person, shall have any interest in or right to any part of the Fund except and to the extent expressly provided in this Plan.

ARTICLE XIV

AMENDMENT OR TERMINATION OF THE PLAN

14.1 The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

(a) no amendment, modification or termination shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, Beneficiary's or estate's then existing interest in the Fund.

(b) no amendment, modification or termination shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, Beneficiaries or estates.

pour verser les prestations qui s'accumulent chaque année et pour pourvoir à l'amortissement de tout passif initial non capitalisé ou au déficit actuariel à l'égard des prestations antérieurement acquises, conformément à la Pension Benefits Act. La compagnie se réserve toutefois le droit, sous réserve des dispositions de l'article XIII, de verser ses cotisations sur les surplus qui peuvent s'accumuler et qui sont déterminés dans une évaluation de l'actif et du passif de la caisse, certifiée par un actuaire.

4.2 Les participants ne sont pas tenus de cotiser au régime.

ARTICLE XIII

CONSTITUTION DE LA CAISSE

13.4 Aucune partie de la caisse ne doit être utilisée ou affectée à d'autres fins que le bénéfice exclusif des participants, de leurs ayants droit désignés ou de leur succession, sauf dans la mesure où le surplus, comme le certifie l'actuaire, peut être remis à la compagnie avec l'approbation du ministre du Revenu national et du surintendant des régimes de retraite, et sous réserve de ce que prévoit l'alinéa 14.2 d) de l'article XIV. Aucun participant, participant retraité, survivant ou ayant droit désigné aux termes du présent régime, ou toute autre personne, n'a de droit sur une partie de la caisse, sauf dans la mesure expressément prévue dans le présent régime.

ARTICLE XIV

MODIFICATION OU CESSATION DU RÉGIME

14.1 La compagnie se réserve le droit de modifier le régime ou d'y mettre fin en totalité ou en partie à sa discrétion, de la manière et dans la mesure qu'elle estime souhaitables, sous réserve de ce qui suit:

a) aucune modification ou cessation ne doit avoir pour effet de réduire le droit alors existant que tout participant, ancien participant, ayant droit ou succession possède sur la caisse;

b) aucune modification ou cessation ne doit avoir pour effet d'utiliser une partie de la caisse à d'autres fins que le bénéfice exclusif des participants, anciens participants, rentiers conjoints, ayants droit ou succession.

1994 CanLII 104 (SCC)

The scheme of distribution upon termination was ... contained in Article 14.2 ...:

14.2 Should the Plan be terminated, whether by the Company or as a result of wind-up or bankruptcy of the Company, the assets of the Fund shall be used, to the extent adequate, and subject to the provisions of the Pension Benefits Act, for the following purposes:

. . .

14.3 Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the Company or may be used for the benefit of Participants, former Participants, designated Beneficiaries, or estates, in such equitable manner as the Company may at its discretion determine.

L'article 14.2 prévoyait [. . .] le mécanisme de distribution applicable à la cessation ...:

14.2 S'il est mis fin au régime, soit par la compagnie ou par suite de la liquidation ou de la faillite de la compagnie, l'actif de la caisse sera utilisé, dans une mesure suffisante, et sous réserve des dispositions de la Pension Benefits Act, aux fins suivantes:

. . .

14.3 Sous réserve de l'approbation du ministre du Revenu national et du surintendant des régimes de retraite, tout surplus accumulé dans la caisse une fois que la distribution effectuée conformément à l'article 14.2 qui précède et une fois remplies toutes les autres obligations créées par le régime, peut être remis à la compagnie ou être utilisé au bénéfice des participants, des anciens participants, des ayants droit désignés, ou de la succession, de la manière juste que la compagnie peut à sa discrétion déterminer.

E. THE 1982 STEARNS PLAN CONSOLIDATION ...

The 1982 Stearns Plan Consolidation is virtually identical to the 1977 Stearns Plan with one important exception. Article 14.3 of the 1982 Sterns Plan Consolidation provides that:

14.3 Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the former Participants, designated Beneficiaries, or estates, in such equitable manner as the Company may at its discretion determine, so long as the surplus is distributed in such manner as to observe the maximum benefit allowed by the Department of National Revenue.

This consolidation was not registered with the Employment Pension Plans Branch and there is no Directors' Resolution authorizing it.

E. LA CONSOLIDATION DU RÉGIME DE 1982 DE STEARNS

La consolidation du régime de 1982 de Stearns est pour ainsi dire identique au régime de 1977 de Stearns, à une exception importante près. L'article 14.3 de la consolidation du régime de 1982 de Stearns prévoit ceci:

14.3 Sous réserve de l'approbation du ministre du Revenu national et du surintendant des régimes de retraite, tout surplus accumulé dans la caisse une fois que la distribution est effectuée conformément à l'article 14.2 et une fois remplies toutes les autres obligations créées par le régime, peut être remis aux anciens participants, à leurs ayants droit désignés, ou succession, de la manière juste que la compagnie peut à sa discrétion déterminer, dans la mesure où la distribution du surplus respecte la prestation maximale permise par le ministère du Revenu national.

Cette consolidation n'a pas été enregistrée auprès de la Direction des régimes de retraite d'employeur, et aucune résolution des administrateurs ne l'autorise.

1994 CanLII 104 (SCC)

III. THE STEARNS CATALYTIC PENSION PLANS

[I]n 1983 with the amalgamation of Stearns and Catalytic, the Company instituted the two Stearns Catalytic Pension Plans. . . .

These plans contained, . . . the following terms:

SECTION 1 — ESTABLISHMENT OF THE PLAN

The benefits provided by this Plan, in respect of service prior to October 1, 1983, are in lieu of all and any benefits to which any person, active or retired, may have been entitled under either of these Prior Plans, and in no event shall be less than the benefits to which they were entitled under these Prior Plans.

Effective October 1, 1983, the respective pension funds of the Catalytic Enterprises Plan and the Stearns-Roger Plan shall be merged and held as one fund to the benefit of members of this Pension Plan for Employees (Senior Members of Management) of Stearns Catalytic Ltd. — Construction Division.

SECTION 2 — DEFINITIONS

2.19 "Pension Fund" means the fund established pursuant to the Trust Agreement to which contributions are made by the Members and the Company and from which retirement and other benefits under the Plan are to be provided.

2.24 "Trustee" means the trustees, trust company or insurance company that the Company may appoint from time to time, to hold and invest the Pension Fund.

2.25 "Trust Agreement" means the agreement entered into between the Company and the Trustee establishing and maintaining the Pension Fund.

. . .

SECTION 4 — CONTRIBUTIONS

4.03 The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with

III. LES RÉGIMES DE RETRAITE DE STEARNS CATALYTIC

[E]n 1983, lors de la fusion de Stearns et de Catalytic, la compagnie a créé deux régimes de retraite Stearns Catalytic. . . .

Ces régimes prévoyaient [. . .] ce qui suit:

ARTICLE 1 — CONSTITUTION DU RÉGIME

Les prestations prévues au présent régime, relativement aux années de service antérieures au 1er octobre 1983, tiennent lieu de toutes les prestations auxquelles une personne, active ou à la retraite, peut avoir eu droit en vertu de l'un de ces régimes antérieurs, et en aucun cas ne doivent être inférieures aux prestations auxquelles elle avait droit en vertu de ces régimes antérieurs.

À compter du 1er octobre 1983, les caisses de retraite respectives des régimes de Catalytic Enterprises et de Stearns-Roger seront fusionnées et détenues conjointement en une seule caisse au bénéfice des participants au présent régime de retraite pour les employés (cadres supérieurs) de la division de la construction de Stearns Catalytic Ltd.

ARTICLE 2 — DÉFINITIONS

2.19 «Caisse de retraite». La caisse établie conformément à l'acte de fiducie, dans laquelle des cotisations sont versées par les participants et la compagnie, et sur laquelle les prestations de retraite et autres prestations prévues au régime sont versées.

2.24 «Fiduciaire». Les fiduciaires, compagnies de fiducie ou compagnies d'assurances que la compagnie peut désigner à l'occasion pour détenir et investir la caisse de retraite.

2.25 «Acte de fiducie» L'entente conclue entre la compagnie et le fiduciaire, qui établit et maintient la caisse de retraite.

. . .

ARTICLE 4 — COTISATIONS

4.03 La compagnie cotise à l'occasion, au moins une fois par année, une somme au moins égale à celle que l'actuaire, après avoir tenu compte de l'actif de la caisse de retraite et de tout autre facteur pertinent, certifie comme étant nécessaire pour verser les prestations de retraite qui, aux termes du régime, sont dues aux participants au cours de l'année en cours et pour pourvoir à l'amortissement suffisant de tout passif initial non capitalisé

1994 CanLII 104 (SCC)

the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

. . .

6.05 Statutory Maximum Retirement Benefit

In no event shall the annual retirement benefit payable under the Plan in respect of the retirement or termination of service of a Member or termination of the Plan exceed the lesser of:

a) $1,715 for each year of the Member's Credited Service to a maximum of 35 years; and

b) 2% of the Member's average best three (3) consecutive years' Earnings multiplied by his years of Credited Service, to a maximum of 35 years.

. . .

SECTION 18 — AMENDMENT TO OR TERMINATION OF THE PLAN

18.01 Continuation of Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the Plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

18.02 Amendment of Plan

No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

18.03 Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact annuities business in Canada, in the form elected by the

ou au déficit actuariel à l'égard des prestations antérieurement acquises conformément aux exigences de la Pension Benefits Act.

. . .

6.05 Prestations de retraite maximales prévues par la loi

En aucun cas, les prestations de retraite annuelles payables en vertu du régime, relativement à la retraite ou à la cessation d'emploi d'un participant ou à la cessation du régime, ne doit excéder le moindre des montants suivants:

a) 1 715 $ pour chaque année décomptée du participant, jusqu'à un maximum de 35 années;

b) 2 % du salaire moyen touché par le participant pendant ses trois (3) meilleures années consécutives, multiplié par ses années décomptées, jusqu'à un maximum de 35 années.

. . .

ARTICLE 18 — MODIFICATION OU CESSATION DU RÉGIME

18.01 Maintien du régime

La compagnie compte maintenir indéfiniment le présent régime, mais elle se réserve forcément le droit de modifier ou de mettre fin au régime en totalité ou en partie si, à son avis, des circonstances futures le justifient, sous réserve toujours des exigences du ministère du Revenu national et des dispositions de la Pension Benefits Act.

18.02 Modification du régime

Aucune modification du régime ne doit avoir pour effet de réduire les prestations des participants qui ont été accumulées en vertu de celui-ci, avant la date de la modification.

18.03 Cessation du régime

S'il est mis fin en totalité au régime, la compagnie n'est tenue de verser aucune cotisation supplémentaire au régime, et l'actif de la caisse de retraite est affecté au versement des prestations accumulées auxquelles les participants, leurs ayants droit et leur rentier conjoint ont droit, d'une manière juste que peut déterminer la compagnie de concert avec l'actuaire, jusqu'à ce que toutes les obligations créées par le régime soient remplies. Ces prestations peuvent être versées au moyen de l'achat de contrats de rente auprès de compagnies d'assurances autorisées à conclure des contrats de rente au Canada, selon la forme

1994 CanLII 104 (SCC)

Members, or through the continuation of the Trust Agreement for this purpose. If the assets of the Pension Fund are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act.

. . .

18.05 Distribution of Benefits

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct.

Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the Department of National Revenue with respect to registered pension plans.

The distribution of the assets of the fund must not result in a Member's retirement benefits exceeding the maximum indicated in Section 6.05 hereof. If any surplus remains in the Fund after all allocations have been made, such surplus shall be refunded to the Company.

The contributions made to the Stearns Catalytic Pension Plans [were] provided to Confederation Life Insurance Company under the terms of an Investment Contract dated October 29, 1984. . . .

[This contract] provided . . . that:

PROVISION 6 — WITHDRAWALS

6.1 Confederation Life shall make withdrawals from the Accounts in order to make payments as designated in writing by the Contractholder provided that any such withdrawal shall be for the sole purpose of making payments in accordance with one of the following conditions:

(c) Payments to the Contractholder of any certified actuarial surplus as may be approved by any

choisie par les participants, ou par le maintien de l'acte de fiducie à cette fin. Si l'actif de la caisse de retraite n'est pas suffisant pour verser lesdites prestations accumulées, la caisse de retraite est répartie conformément à la Pension Benefits Act.

. . .

18.05 Distribution des prestations

Si, après le versement de toutes les prestations accumulées aux participants, à leurs ayants droit et à leur rentier conjoint, la caisse de retraite accuse un surplus, celui-ci est utilisé comme la compagnie, le liquidateur ou le syndic de faillite, s'il y a lieu, le prescrit.

Toute distribution de la caisse de retraite qui résulte de la cessation du régime doit être conforme aux dispositions applicables de la Pension Benefits Act et de la Loi de l'impôt sur le revenu, et aux règles et règlements du ministère du Revenu national relatifs aux régimes de retraite enregistrés.

La distribution de l'actif de la caisse ne doit pas avoir pour effet de porter les prestations de retraite d'un participant au-delà du maximum prévu à l'article 6.05 des présentes. Si la caisse accuse un surplus après que toutes les prestations sont versées, ce surplus est remis à la compagnie.

Les cotisations versées dans les régimes de retraite de Stearns Catalytic [étaient] remises à La Confédération, Compagnie d'assurance-vie, en vertu des dispositions d'un contrat de placement en date du 29 octobre 1984. . . .

[Ce contrat] prévoyait [. . .] que:

CLAUSE 6 — RETRAITS

6.1 La Confédération effectuera des retraits sur les comptes afin d'effectuer les paiements que le preneur désigne par écrit, en autant que ces retraits soient effectués à la seule fin d'effectuer des paiements conformément à l'une des conditions suivantes:

c) Paiements au preneur de tout surplus actuariel certifié que peut approuver tout organisme gou-

1994 CanLII 104 (SCC)

provincial or federal government body having jurisdiction in the matter.

vernemental provincial ou fédéral ayant compétence en la matière.

The following are the reasons delivered by

Version française des motifs rendus par

SOPINKA J. (dissenting in part on the appeal (File No. 23047)) — I have read the reasons of Justices Cory and McLachlin. Like McLachlin J. I agree with most of Cory J.'s conclusions but disagree with him on the question of entitlement to the surplus in the Catalytic plan. In my view, the surplus in the Catalytic plan reverts to the employer. However, I have arrived at this conclusion by a somewhat different route from McLachlin J.

LE JUGE SOPINKA (dissident en partie dans le pourvoi principal (nº de greffe 23047)) — J'ai lu les motifs des juges Cory et McLachlin. À l'instar du juge McLachlin, je souscris à la plupart des conclusions du juge Cory, sauf en ce qui concerne le droit au surplus du régime de Catalytic. À mon avis, ce surplus revient à l'employeur. Cependant, j'ai adopté un raisonnement quelque peu différent de celui du juge McLachlin pour en arriver à cette conclusion.

While I agree with Cory J. that all monies in the Catalytic pension fund, including the surplus, were impressed with a trust, this does not foreclose amendment of that trust. In the case of a pension plan, the nature of the rights of amendment will continue to depend upon the terms of the plan and the trust agreement, if any. In my view, nothing in the Catalytic plan precluded the company from exercising the express power of amendment in the plan so as to provide that any surplus funds would revert to it upon termination of the plan.

Bien que je convienne avec le juge Cory que tout l'argent dans la caisse de retraite de Catalytic, y compris le surplus, était assujetti à une fiducie, cela n'empêche pas cette dernière d'être modifiée. Dans le cas d'un régime de retraite, la nature des droits de modification dépendra toujours, le cas échéant, des modalités du régime et de l'acte de fiducie. À mon avis, rien dans le régime de Catalytic n'empêchait la compagnie d'exercer le pouvoir de modification qui y était expressément prévu de manière à préciser que toute somme excédentaire lui serait remise à la cessation du régime.

I should state at the outset that I agree with Cory J.'s conclusion that the parties intended Article V of the Trust Agreement to apply to all monies in the pension fund after 1966, including the surplus funds. Article V purports to restrict the company's right to make amendments which divert parts of the "FUND" and reads as follows:

Je tiens à indiquer, au départ, que je souscris à la conclusion du juge Cory que les parties souhaitaient que l'article V de l'acte de fiducie s'applique à toutes les sommes qui se trouveraient dans la caisse de retraite après 1966, y compris les sommes excédentaires. L'article V a pour effet de restreindre le droit de la compagnie d'effectuer des modifications détournant des parties de la «CAISSE». Il se lit ainsi:

ARTICLE V

MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee

[TRADUCTION]

ARTICLE V

MODIFICATION ET CESSATION

1. Sous réserve du présent acte et du RÉGIME, la compagnie se réserve le droit de modifier à tout moment, en totalité ou en partie, les dispositions du RÉGIME (dont le présent acte), à condition qu'aucune modification de ce genre qui influe sur les droits, les obligations, la rétribution ou les responsabilités du fiduciaire ne soit effec-

1994 CanLII 104 (SCC)

shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

Under the 1959 Catalytic Plan, the Trust Agreement was made part of the plan. It was clear that the terms upon which the monies contributed to that plan were to be held and administered were contained in both the plan and the Trust Agreement. The 1966 Catalytic Plan amended the 1959 Plan but retained a provision stating that all contributions to the plan were to be administered in accordance with the terms of the Trust Agreement. Thus it is clear that when the Catalytic Plan became a defined benefit plan in 1966, the parties intended the provisions of the Trust Agreement to continue to apply to monies contributed to the plan. Furthermore, at all relevant times the Trust Agreement provided that the "FUND" referred to in that Agreement included all the monies paid to the Trustee by the Company for the purpose of the plan, as well as the earnings, profit and increments therefrom. The Catalytic surplus is derived from monies contributed to the plan after 1966 and thus is obviously part of the Fund. Therefore, it follows that Article V applies to amendments concerning the use of the surplus.

This, however, does not end the matter. By its terms Article V is subject to the terms of the plan. Both the 1959 and the 1966 versions of the plan reserved broader powers of amendment to the company than those contained in Article V of the Trust Agreement. The relevant provisions of the 1959 Catalytic Plan are as follows:

tuée sans son consentement, et à condition que, sauf avec l'approbation du ministre du Revenu national, aucune modification n'autorise ou ne permette qu'une partie de la CAISSE soit utilisée ou affectée à d'autres fins que le bénéfice exclusif des personnes et de leur succession, qui peuvent à l'occasion être désignées dans le RÉGIME tel que modifié à l'occasion, ou conformément à celui-ci, et aux fins du paiement des impôts ou autres cotisations prévus au paragraphe 2 de l'article II des présentes, ainsi que des frais et de la rétribution du fiduciaire, prévus au paragraphe 4 de l'article IV des présentes. [Je souligne.]

Le régime de 1959 de Catalytic a incorporé l'acte de fiducie. Il était clair que les modalités suivant lesquelles les sommes versées à ce régime devaient être détenues et administrées se retrouvaient à la fois dans le régime et dans l'acte de fiducie. Le régime de 1966 de Catalytic a modifié le régime de 1959, tout en maintenant la disposition en vertu de laquelle toutes les cotisations au régime devaient être administrées conformément à l'acte de fiducie. Il est donc évident que, lorsque le régime de Catalytic est devenu un régime à prestations déterminées en 1966, les parties souhaitaient que les dispositions de l'acte de fiducie continuent de s'appliquer aux cotisations versées dans le régime. En outre, à toutes les époques pertinentes, l'acte de fiducie prévoyait que la «CAISSE» mentionnée dans l'acte comprenait toutes les sommes versées au fiduciaire par la compagnie aux fins du régime, de même que les gains, les profits et les accroissements réalisés. Le surplus du régime de Catalytic provenait des cotisations qui y avaient été versées après 1966 et il faisait donc nettement partie de la caisse. Aussi l'article V s'applique-t-il aux modifications concernant l'utilisation du surplus.

Cela ne met toutefois pas un terme à la discussion. De par son texte même, l'article V est assujetti aux modalités du régime. Les versions de 1959 et de 1966 du régime réservaient à la compagnie des pouvoirs de modification plus larges que ceux prévus à l'article V de l'acte de fiducie. Les dispositions pertinentes du régime de 1959 de Catalytic sont les suivantes:

1994 CanLII 104 (SCC)

SECTION XXII FUTURE OF THE PLAN

1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.

2. No amendment to the Plan shall operate to reduce the benefits which have occrued [*sic*] to the Members of the Plan prior to the date of amendment.

3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company.

These provisions were carried over into the 1966 version of the Catalytic plan, renumbered as Section XXI. By virtue of those provisions, the only limitation upon the company's power to amend the plan was that no amendment could reduce accrued benefits. The right to receive surplus monies in the pension fund was not a benefit which had accrued to the members of the plan at the time that the company amended the plan to permit the surplus to be distributed to itself. Under the terms of the 1959 and 1966 plan the employees may have obtained a right to the surplus upon termination of the plan, but no such right had accrued to them prior to termination. Even if such a right could be said to have accrued at the time of amendment, it is not a benefit contemplated by that provision. The benefits contemplated by the plan are those to which the members were entitled pursuant to other Articles of the plan. The right to the surplus is not one of those benefits. Indeed, when Article XXII.2 was drafted, it could not have referred to a surplus because no surplus was possible under a defined contribution plan. For both these reasons I conclude that from the outset the company reserved the power to amend the Catalytic plan so as to permit any surplus to be distributed to itself.

[TRADUCTION]

ARTICLE XXII AVENIR DU RÉGIME

1. La compagnie souhaite et compte maintenir indéfiniment le régime et le paiement des cotisations ci-dessous, ce maintien ne constituant toutefois pas une obligation contractuelle. La compagnie se réserve expressément le droit, par l'entremise de son conseil, de modifier le régime ou d'y mettre fin en totalité ou en partie si, à son avis, des circonstances futures le justifient.

2. Aucune modification du régime n'a pour effet de réduire les prestations des participants qui ont été accumulées avant la date de la modification.

3. En cas de cessation du régime, la compagnie ne peut recouvrer les sommes versées jusqu'à cette date et chaque participant reçoit le produit qui, à la date de la cessation, se trouve dans son compte et dans celui de la compagnie établi en son nom. Aucun autre employé ne pourra devenir participant et aucune autre cotisation ne sera versée par la compagnie.

En vertu de ces dispositions, reprises à l'article XXI de la version de 1966 du régime de Catalytic, le pouvoir de la compagnie de modifier le régime était assujetti à la seule condition qu'aucune modification ne réduise les prestations accumulées. Le droit de recevoir les sommes excédentaires de la caisse de retraite n'était pas une prestation que les participants avaient accumulée au moment où la compagnie a modifié le régime de manière à permettre que le surplus lui soit versé. En vertu des dispositions du régime de 1959 et de 1966, les employés ont pu obtenir le droit au surplus à la cessation du régime, mais ils n'avaient pas ce droit avant la cessation. Même si on pouvait dire qu'ils avaient ce droit à l'époque de la modification, ce n'est pas une prestation envisagée par la disposition en question. Les prestations envisagées par le régime sont celles auxquelles les participants avaient droit conformément à d'autres articles du régime. Le droit au surplus n'en est pas une. En fait, lorsque l'article XXII.2 a été rédigé, il n'aurait pu mentionner un surplus puisque aucun surplus n'était possible dans le cadre d'un régime à cotisations déterminées. Pour ces deux raisons, je conclus que, dès le départ, la compagnie s'est réservé le pouvoir de modifier le régime de Catalytic de façon à permettre que tout surplus lui soit versé.

1994 CanLII 104 (SCC)

Assuming that a provision disposing of the surplus in favour of the employer is a partial revocation, I see no magic in the use of those specific words. If the powers of amendment are sufficiently explicit to permit a change which is in law a partial revocation, they should be given effect. After all, a trust can be created by the use of apt words without express reference to a trust. Words are apt to create a trust if the intention of the settlor is clear. Conversely, limitations on the nature of the trust must surely be determined on the same basis.

It is the contention of the respondents that the right to the surplus is an accrued benefit and a reduction of accrued benefits is a revocation or partial revocation of the trust. The fact that reduction in accrued benefits was made an express exception from the power of amendment shows that when the trust was created the parties considered that in the absence of this exception the power of amendment would extend to reduce accrued benefits. It follows that the power of amendment included the power to make changes having the effect of revocation or partial revocation. The real issue, therefore, is whether the right to the surplus comes within the exception. For the reason I have given above, it does not.

As Cory J. points out, there is a fundamental disagreement in the authorities as to whether a power of amendment can be sufficiently explicit to include a power of revocation. This disagreement is said to derive from the conflicting views expressed in Waters, *Law of Trusts in Canada* (2nd ed. 1984) and Scott, *The Law of Trusts* (4th ed. 1989), vol. 4. As I understand my colleague's reasons, he would apply a statement in Waters as requiring nothing short of the use of the actual words "power of revocation" in order to permit the settlor to effect a change which would amount to a revocation or partial revocation. With respect, I am of the opinion that Waters does not go that far. In the passage to which my colleague refers and

À supposer qu'une disposition prévoyant la remise du surplus à l'employeur constitue une révocation partielle, je ne vois rien de magique dans l'utilisation de ces mots précis. Si les pouvoirs de modification sont suffisamment explicites pour permettre un changement qui, en droit, constitue une révocation partielle, ils devraient avoir effet. Après tout, une fiducie peut être créée par l'utilisation de mots appropriés sans mention expresse d'une fiducie. Les mots sont susceptibles de créer une fiducie si l'intention du constituant est claire. À l'inverse, les restrictions quant à la nature de la fiducie doivent sûrement être déterminées de la même façon.

Les intimés font valoir que le droit au surplus est une prestation accumulée et qu'une réduction des prestations accumulées constitue une révocation totale ou partielle de la fiducie. Le fait que la réduction des prestations accumulées ait été soustraite expressément au pouvoir de modification démontre qu'au moment de la création de la fiducie, les parties ont considéré qu'en l'absence de cette exception le pouvoir de modification permettrait de réduire les prestations accumulées. Il s'ensuit que le pouvoir de modification incluait le pouvoir d'effectuer des changements ayant l'effet d'une révocation totale ou partielle. La véritable question est donc de savoir si le droit au surplus tombe sous le coup de cette exception. Pour la raison exposée ci-dessus, la réponse à cette question est non.

Comme le juge Cory le souligne, il existe dans la jurisprudence un désaccord fondamental quant à savoir si un pouvoir de modification peut être suffisamment explicite pour inclure un pouvoir de révocation. On dit de ce désaccord qu'il découle des opinions opposées exprimées dans Waters, *Law of Trusts in Canada* (2e éd. 1984), et Scott, *The Law of Trusts* (4e éd. 1989), vol. 4. Si je comprends bien les motifs de mon collègue, il interpréterait un passage de Waters comme ne requérant rien de moins que l'utilisation des mots «pouvoir de révocation» eux-mêmes pour que le constituant puisse effectuer un changement équivalant à une révocation totale ou partielle. En toute déférence, je suis d'avis que Waters ne va pas aussi loin. Dans

1994 CanLII 104 (SCC)

which was quoted by Zuber J.A. in *Re Reevie and Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595, at p. 600, the learned author states: "A settlor cannot revoke his trust unless he has expressly reserved the power to do so." I do not read this to mean that if the settlor uses language that, when interpreted by reference to the usual canons of construction, clearly establishes an intention to include changes having the effect of revocation, the absence of the magic words is fatal. Nor do I believe that Zuber J.A. was of the opinion that no power of amendment could authorize a change having the effect of revocation. It is clear that he was of the opinion that, in applying the statement in Waters, the appropriate inquiry was whether the wording of the relevant documents could be interpreted to authorize a change having the effect of revocation. At page 600, he stated:

> The appellant does not take issue with these general principles [stated in Waters] but asserts that it has reserved a power of amendment which is wide enough to entitle him to recover surplus funds. In my opinion, this proposition is simply untenable. The language of the trust agreement and the pension plan do not support such an argument. The section in the pension plan (prior to the 1981 amendment) dealing with the powers of amendment specifically affirms the irrevocability of the contributions and the fact that the members of the plan are the sole beneficiaries.

The terms of the trust agreement and plan in *Reevie, supra,* were not identical to the wording of the agreements in this case.

But even if Waters stands for the proposition advanced by Cory J., the logic of the contrary position, which is stated in Scott, *The Law of Trusts, supra,* and adopted by McLennan J. in *Re Campbell-Renton & Cayley,* [1960] O.R. 550 (H.C.), and the British Columbia Court of Appeal in *Hockin v. Bank of British Columbia* (1990), 71 D.L.R. (4th) 11, appeals to me in preference to a formulaic approach that would disregard the clear intention of the parties. Nor am I persuaded that we should adopt a rule of interpretation that ignores the clear intention of the parties in order to maintain the

l'extrait auquel mon collègue renvoie et que cite le juge Zuber dans l'arrêt *Re Reevie and Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595, à la p. 600, l'auteur écrit: [TRADUCTION] «Le constituant ne peut révoquer sa fiducie que lorsqu'il s'est expressément réservé le pouvoir de le faire.» Je ne considère pas que cela signifie que, si le constituant utilise un langage qui, lorsqu'il est interprété selon les principes ordinaires d'interprétation, exprime clairement l'intention d'inclure des changements ayant l'effet d'une révocation, l'absence des mots magiques est fatale. Je ne crois pas non plus que le juge Zuber était d'avis qu'aucun pouvoir de modification ne pouvait autoriser un changement ayant l'effet d'une révocation. Il estimait de toute évidence qu'en appliquant les propos de Waters, il fallait se demander si le texte des documents pertinents pouvait être interprété comme autorisant un changement ayant l'effet d'une révocation. À la page 600, il dit:

> [TRADUCTION] L'appelante ne conteste pas ces principes généraux [exposés dans Waters], mais elle soutient s'être réservé un pouvoir de modification suffisamment large pour lui permettre de recouvrer les sommes excédentaires. À mon avis, cette proposition est tout simplement intenable. Le texte de l'acte de fiducie et du régime de retraite ne justifie pas un tel argument. L'article qui, dans le régime de retraite (avant la modification de 1981), traitait des pouvoirs de modification confirme expressément l'irrévocabilité des cotisations et le fait que les participants au régime en sont les bénéficiaires exclusifs.

Le texte de l'acte de fiducie et du régime dans l'affaire *Reevie*, précitée, n'était pas identique à celui des ententes en l'espèce.

Mais même si Waters appuie la proposition avancée par le juge Cory, la logique de la position contraire, exposée dans Scott, *The Law of Trusts*, *op. cit.*, et adoptée par le juge McLennan dans l'affaire *Re Campbell-Renton & Cayley*, [1960] O.R. 550 (H.C.), et la Cour d'appel de la Colombie-Britannique dans *Hockin c. Bank of British Columbia* (1990), 71 D.L.R. (4th) 11, me plaît davantage qu'une méthode fondée sur une formule qui ferait abstraction de l'intention manifeste des parties. Je ne suis pas non plus convaincu que nous devions adopter une règle d'interprétation qui ignore l'in-

1994 CanLII 104 (SCC)

fundamental character of a trust. Trusts can be revocable or irrevocable. Neither is more fundamental than the other. All we are debating is the means by which we distinguish one from the other. Moreover, the true nature of a trust established as part of a pension plan is to provide funds needed to pay the benefits which accrue to employees under the plan. A power of amendment which is qualified by the requirement that it cannot be used to reduce accrued benefits is not inconsistent with the fundamental purpose of a defined benefits pension trust.

Cory J. also reasons that the circumstances which prevailed when the plans in question were created support his interpretation of the breadth of the power of amendment. In my view, however, the most relevant of those circumstances is the fact that neither the company nor the employees appear to have foreseen the existence of a surplus when the plan was created. In fact, there was no reason for the employees to expect to receive anything more than the defined benefits set out in the plan. Therefore, I see nothing inequitable in allowing the employer to take advantage of the broad amending power to distribute the surplus to itself, so long as it did nothing to reduce the level of benefits provided to the employees.

As far as the tax legislation in force when the plans were created is concerned, I agree with Cory J.'s observation that the tax motivations of the parties to pension plans are of limited relevance in interpreting those plans. I note however that the Catalytic plan expressly stated that the plan was structured so as to ensure that the company's contributions were deductible under the *Income Tax Act*, S.C. 1970-71-72, c. 63, and any amendments thereto. It is not unreasonable to infer that the broad amending power retained in the 1959 Catalytic plan and subsequent versions of the plan was retained in part to deal with changes in income tax legislation. The amendment of the 1983 Air Products Plan to include Section 18.05 was required by Revenue Canada in order to comply with the pension plan registration requirements under the

tention manifeste des parties afin de préserver le caractère fondamental d'une fiducie. La fiducie est soit révocable, soit irrévocable. Aucune n'est plus fondamentale que l'autre. Ce sont les moyens de les distinguer l'une de l'autre qui font l'objet de notre discussion. De plus, la fiducie créée dans le cadre d'un régime de retraite a véritablement pour objet de fournir l'argent nécessaire pour verser les prestations dues aux employés en vertu du régime. Le pouvoir de modification assujetti à l'interdiction d'y avoir recours pour réduire les prestations accumulées n'est pas incompatible avec l'objectif fondamental d'une fiducie de régime à prestations déterminées.

Le juge Cory estime également que les circonstances dans lesquelles les régimes en question ont été créés justifient son interprétation de la portée du pouvoir de modification. À mon avis, toutefois, la plus pertinente de ces circonstances est le fait que ni la compagnie ni les employés ne semblent avoir prévu l'existence d'un surplus lorsque le régime a été créé. En fait, les employés n'avaient aucune raison de s'attendre à recevoir plus que les prestations déterminées dans le régime. Par conséquent, je ne vois rien d'injuste à autoriser l'employeur à tirer profit du pouvoir général de modification pour s'attribuer le surplus, en autant qu'il ne fait rien pour réduire le montant des prestations garanties aux employés.

En ce qui concerne la législation fiscale en vigueur à l'époque de la création des régimes, je souscris à l'observation du juge Cory selon laquelle les motivations des parties aux régimes de retraite, sur le plan fiscal, ont une pertinence limitée pour ce qui est d'interpréter ces régimes. Je remarque toutefois que le régime de Catalytic prévoyait expressément qu'il était structuré de façon à garantir la déductibilité des cotisations de la compagnie sous le régime de la *Loi de l'impôt sur le revenu*, S.C. 1970-71-72, ch. 63, et de ses modifications. Il n'est pas déraisonnable de déduire que le maintien du pouvoir général de modification dans le régime de 1959 de Catalytic et ses versions subséquentes visait en partie à répondre aux changements survenus dans la législation fiscale. La modification du régime de 1983 d'Air Products, de

1994 CanLII 104 (SCC)

Income Tax Act. Therefore, if anything, consideration of the parties' tax motivations supports a broad interpretation of the power of amendment.

manière à inclure l'art. 18.05, a été exigée par Revenu Canada afin que soient respectées les conditions d'enregistrement des régimes de retraite sous le régime de la *Loi de l'impôt sur le revenu*. Par conséquent, l'analyse des motivations des parties sur le plan fiscal appuie plutôt une interprétation large du pouvoir de modification.

Moreover, the approach which Cory J. adopts may make it difficult for the numerous pension plans that had an existence prior to 1981, which do not have an express power of revocation, to conform with the new registration requirements. Both Information Circulars Nos. 72-13R7 (1981) and No. 72-13R8 (1988) provide that the plan must contain a provision permitting an actuarial surplus to be refunded to the employer on termination of the plan. This requirement has apparently been incorporated in ss. 8502(*c*) and 8503(4)(*c*) of the *Income Tax Regulations*. The Minister has indicated that these regulations may be amended; for the time being, however, they have the force of law.

En outre, le point de vue adopté par le juge Cory peut faire en sorte qu'il sera difficile de rendre conformes aux nouvelles conditions d'enregistrement les nombreux régimes de pension qui existaient avant 1981 et qui ne prévoyaient aucun pouvoir exprès de révocation. Les circulaires d'information n°s 72-13R7 (1981) et 72-13R8 (1988) prévoient toutes deux que le régime doit contenir une disposition permettant de remettre un surplus actuariel à l'employeur à la cessation du régime. Cette exigence a apparemment été incorporée dans les al. 8502*c*) et 8503(4)*c*) du *Règlement de l'impôt sur le revenu*. Le ministre a indiqué que ce règlement peut être modifié; toutefois, il a force de loi pour le moment.

For the above reasons I conclude that Section 17.05 of the 1978 plan was a valid amendment to the Catalytic plan, as was Section 18.05 of the 1983 Air Products plan. Pursuant to those provisions the surplus in the Catalytic plan should revert to the company. In light of the result which I have reached by interpreting the terms of the plan it is not necessary for me to consider whether the funds could revert to the employer by the operation of a resulting trust.

Pour les motifs qui précèdent, je conclus que l'art. 17.05 du régime de 1978 était une modification valide du régime de Catalytic, tout comme l'art. 18.05 du régime de 1983 d'Air Products. Conformément à ces dispositions, le surplus accumulé dans le régime de Catalytic devrait être remis à la compagnie. Compte tenu de la conclusion que j'ai tirée en interprétant les modalités du régime, il ne m'est pas nécessaire d'examiner si les sommes pourraient revenir à l'employeur en vertu d'une fiducie par déduction.

In the result I would dispose of the appeals as proposed by Cory J., except with regards to the distribution of the surplus in the Catalytic plan. In this respect, I would allow the appeals with costs.

En définitive, je suis d'avis de trancher les pourvois de la façon proposée par le juge Cory, sauf en ce qui concerne la répartition du surplus du régime de Catalytic, au sujet de laquelle j'accueillerais les pourvois avec dépens.

The following are the reasons delivered by

Version française des motifs rendus par

MCLACHLIN J. (dissenting in part on the appeal (File No. 23047)) — I have read the reasons of Justice Cory. I agree with his conclusions except on the question of the right to surplus on the Catalytic plan. In my view, the surplus on the Catalytic

LE JUGE MCLACHLIN (dissidente en partie dans le pourvoi principal (n[o] de greffe 23047)) — J'ai lu les motifs du juge Cory et je souscris à ses conclusions sauf en ce qui concerne la question du droit au surplus du régime de retraite de Catalytic. À

1994 CanLII 104 (SCC)

Plan reverts to the employer, either on the terms of the plan or on the basis of the doctrine of resulting trust.

mon avis, ce surplus revient à l'employeur en vertu des modalités du régime ou en raison du principe de la fiducie par déduction.

Background: Situating the Problem

Historique: exposé du problème

Modern private pension plans date to the late 19th century. Fundamental and pervasive societal changes — large scale industrialization coupled with the breakdown of family, village and church assistance networks — produced a need to devise methods of caring for those past working age. Employer-sponsored private pension plans, supplemented later by government plans, were the response. Today, together with personal savings, private and public pension plans provide the primary source of income for retired Canadians.

Les régimes de retraite privés contemporains datent de la fin du XIXe siècle. À la suite des changements fondamentaux et globaux que la société a connus — l'industrialisation à grande échelle conjuguée à la détérioration des réseaux d'aide axés sur la famille, le village et l'Église — il a fallu concevoir des moyens de s'occuper des personnes ayant atteint l'âge de retraite, ce qu'on a fait en créant des régimes de retraite d'employeur privés, auxquels sont par la suite venus s'ajouter les régimes d'État. De nos jours, avec l'épargne personnelle, les régimes de pension privés et publics constituent la principale source de revenu des Canadiens retraités.

There are two main types of pension plans. In the first type, the "defined contribution" plan, the amount paid in by the contributors to the fund is set. The eventual size of the employee's annuity is determined by the rate of return on the invested contributions. It follows that a low rate of return on investment will result in a smaller pension than if the rate of return is high. While the employer contributes to the plan, the employer does not guarantee the amount of the annuity. The employee is not assured of any particular benefit. The 1959 Catalytic plan was this sort of plan.

Il y a deux principaux genres de régimes de retraite. Dans le premier genre, soit le régime «à cotisations déterminées» ou «à formule d'achat», le montant versé par les cotisants est fixe. Le montant éventuel de la rente de l'employé est fonction du revenu de placement du régime. Il s'ensuit que si le taux de rendement des placements est peu élevé, le montant de la prestation sera inférieur à ce qu'il aurait été si le taux de rendement avait été élevé. Même s'il cotise au régime, l'employeur ne garantit pas le montant de la rente. Aucune prestation particulière n'est garantie à l'employé. Le régime de 1959 de Catalytic était un régime de ce genre.

In the other type of pension plan, the "defined benefit" or "money purchase" plan, the employee, who may or may not contribute to the fund, is assured of a certain monetary benefit upon retirement. An actuary is employed to determine the amount of contribution which the employer must make in order to ensure that the plan can meet its present and future obligations. The market risk, assumed by the employee in a defined contribution plan, falls on the employer in a defined benefit plan. If, at any time, the plan is unable to meet its obligations, the employer is liable to make up any shortfall. For these two reasons — the guarantee of

Dans l'autre genre de régime de retraite, soit le régime «à prestations déterminées», l'employé est assuré de toucher certaines prestations au moment de sa retraite, et ce, qu'il cotise ou non à la caisse. On a recours aux services d'un actuaire pour calculer le montant de la cotisation que l'employeur doit verser afin de garantir que le régime puisse satisfaire à ses obligations actuelles et futures. Le risque du marché, qui est assumé par l'employé dans le régime à cotisations déterminées, incombe à l'employeur dans le régime à prestations déterminées. Si, à un moment donné, le régime ne peut pas satisfaire à ses obligations, l'employeur est tenu de

1994 CanLII 104 (SCC)

a certain benefit and the assumption by the employer of the market risk — a defined benefit plan is regarded as more advantageous to employees than a defined contribution plan.

The defined benefit plan possesses a feature which the defined contribution plan does not — a feature which is at the heart of this appeal, the actuarial surplus. A defined contribution plan can never have a surplus; everything, after deduction of taxes and expenses, must be paid out to the pensioners. However a surplus may accumulate in a defined benefit plan when the amount in the fund exceeds the amount required to meet the defined benefits as calculated by the actuary.

In valuing the assets of a pension plan, the actuary must take into account a number of factors and make assumptions about each of them. These factors include the rate of investment return, the rate of price inflation, salary increases, rates of mortality for active and retired members, rates of employee turnover, incidence of disability and utilization of early retirement options. As might be expected, actuaries advising employers tend to err on the side of caution to produce what is called an "experience gain" rather than an "experience deficiency", since the latter would deprive pensioners of the benefits guaranteed to them.

In the early 1980s this actuarial conservatism combined with a particular set of economic factors to produce massive surpluses in many pension funds. These factors included the level of interest rates — as high as 20 percent at one point — which gave returns on investments in fixed value securities far in excess of those predicted. The stock market boom from 1982 to 1987 also resulted in much higher capital gains than were anticipated. Furthermore, the recession of 1981-82 caused widespread layoffs of employees who had no vested right to pension benefits. Money contrib-

combler tout déficit. C'est pour ces deux raisons — la garantie de certaines prestations et le fait que l'employeur assume le risque du marché — que le régime à prestations déterminées est considéré comme plus avantageux pour les employés que le régime à cotisations déterminées.

Le régime à prestations déterminées comporte une caractéristique qui n'existe pas dans le régime à cotisations déterminées — une caractéristique qui constitue le nœud du présent litige: le surplus actuariel. Dans un régime à cotisations déterminées, il ne peut jamais y avoir de surplus: tout l'argent, une fois les impôts et les frais déduits, doit être versé aux pensionnés. Toutefois, dans un régime à prestations déterminées, il peut y avoir un surplus si le montant qui est dans la caisse excède le montant nécessaire pour verser les prestations déterminées calculées par l'actuaire.

En évaluant l'actif d'un régime de retraite, l'actuaire doit tenir compte d'un certain nombre de facteurs et formuler des hypothèses sur chacun d'eux. Ces facteurs comprennent le taux de rendement des placements, le taux d'inflation, les hausses de salaire, le taux de mortalité des participants actifs et retraités, le taux de roulement du personnel, la fréquence des invalidités et le recours aux options de retraite anticipée. Comme on pourrait s'y attendre, les actuaires qui conseillent les employeurs ont tendance à se montrer plutôt prudents, de façon à produire ce qu'on appelle un «gain actuariel» plutôt qu'un «déficit actuariel», étant donné que pareil déficit aurait pour effet de priver les pensionnés des prestations qui leur étaient garanties.

Au début des années 1980, en raison de la prudence dont faisaient preuve les actuaires et d'un ensemble particulier de facteurs économiques, de nombreuses caisses de retraite ont accumulé des surplus considérables. Parmi ces facteurs, il y a les taux d'intérêt qui ont atteint, à un moment donné, les 20 pour 100 et qui ont entraîné des revenus de placement dans les titres à valeur fixe fort supérieurs à ce qu'on avait prévu. De 1982 à 1987, le boom boursier a également entraîné des gains en capital beaucoup plus élevés que prévu. En outre, la récession de 1981-1982 a provoqué de nombreu-

1994 CanLII 104 (SCC)

uted on their account remained in the plan and either reduced unfunded liability for other employees or fell into surplus. At the same time, employers, uncertain as to whether they could use surplus for ongoing funding, often continued to contribute to over-funded plans in years when investment returns were at their highest, increasing existing surpluses: Gary Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in *New Developments in Employment Law* (Meredith Memorial Lectures, 1988), 1989. The result of these events was to increase pension surpluses in Canada which, by 1982, had already been estimated to be between $4 billion and $8 billion: D. Don Ezra, *The Struggle for Pension Fund Wealth* (1983).

So long as a pension plan remains operational, hefty surpluses pose no problem except perhaps to employers wondering whether they can use the surplus for current funding needs, taking a "contribution holiday". When a plan terminates, however, the question arises of who is entitled to the surplus. That is the problem that faces us on this appeal. It is not, we are told, an isolated one. Many plans such as this were set up in the 1960s and the decades that followed. Few contained express provisions as to distribution of surplus.

The Catalytic plan in this appeal was set up in 1959 as a defined contribution plan. As one would expect in that type of plan, all funds would ultimately be paid out to the pensioners or beneficiaries. There could be no surplus.

In 1966, however, the plan was changed to a defined benefit plan and the possibility of a surplus arose. In 1978, the Plan Agreement was redrafted. This restatement raised for the first time the issue of what should be done with any surplus. It empowered the company to use the surplus as it

ses mises à pied d'employés qui n'avaient pas de droits acquis à des prestations de retraite. Les cotisations versées dans leur compte sont demeurées dans le régime et ont servi à réduire le passif non capitalisé pour les autres employés ou ont constitué un surplus. En même temps, les employeurs, qui n'étaient pas certains de pouvoir utiliser le surplus aux fins du financement courant, ont souvent continué de cotiser à des régimes financés en trop pendant les années où les revenus de placement avaient atteint un point culminant, ce qui a eu pour effet d'augmenter les surplus existants: Gary Nachshen, «Access to Pension Fund Surpluses: The Great Debate», dans *New Developments in Employment Law* (Meredith Memorial Lectures, 1988), 1989. Il en est résulté une augmentation des surplus de caisse de retraite au Canada, dont le montant estimatif, en 1982, était déjà de 4 à 8 milliards de dollars: D. Don Ezra, *The Struggle for Pension Fund Wealth* (1983).

Tant qu'un régime de retraite existe, les surplus importants ne posent pas de problèmes, sauf peut-être pour les employeurs qui se demandent s'ils peuvent les utiliser aux fins du financement courant, en s'accordant une «période d'exonération de cotisations». Toutefois, lorsque le régime prend fin, il s'agit de savoir qui a droit au surplus. Tel est le problème qui se pose dans la présente affaire qui, nous dit-on, n'est pas un cas isolé. De nombreux régimes comme celui qui est ici en cause ont été créés pendant les années 1960 et les décennies qui ont suivi. Peu de régimes renfermaient des dispositions expresses au sujet de la répartition des surplus.

Le régime de Catalytic, dont il est question en l'espèce, a été créé en 1959 en tant que régime à cotisations déterminées. Comme on pouvait s'y attendre dans ce genre de régime, tous les fonds seraient ultimement versés aux pensionnés ou aux bénéficiaires. Il ne pouvait pas y avoir de surplus.

Toutefois, en 1966, le régime a été converti en un régime à prestations déterminées et la possibilité d'un surplus est apparue. En 1978, la convention relative au régime a été rédigée de nouveau, de sorte que la question de savoir ce qu'on devait faire d'un surplus s'est posée pour la première fois.

1994 CanLII 104 (SCC)

saw fit after making full provision for the accrued benefits payable to members and beneficiaries. When the plan was terminated in 1988, a large surplus was revealed. The issue was who should have it — the employees and their beneficiaries or the employer?

Implications Flowing from the Nature of the Defined Benefit Plan

As noted, the employer is legally obliged under a defined benefits plan to ensure that all pension benefits owing are paid when they fall due. The employer thus bears the risk that contributions may be insufficient or that investments may not perform as well as predicted. The converse of this proposition is that the employer should be permitted to take advantage of the excess when investments do better than predicted.

From an economic policy perspective, if employers cannot retrieve surpluses, they may be inclined to request that their actuaries take a more optimistic view of the future of their investments and fund existing pensions less generously. Alternatively, they may refuse to enter into new pension regimes or, in some cases, terminate those which already exist. Inability to retrieve surpluses may also lead employers, unwilling to assume the risk of providing guaranteed benefits without the possibility of recovering surplus funding, to choose defined contribution plans rather than defined benefit plans. Employees, no longer assured of a specific pension and required to assume the risk of insufficient funding themselves, would be the losers.

On the other side of the coin, permitting employers to recover surplus in a defined benefit plan is not unfair to employees. It is argued that employees should have the surplus because they have paid for it through direct contributions or by accepting lower wages and fewer fringe benefits. This argument overlooks the nature of the employ-

La convention habilitait la compagnie à utiliser le surplus comme elle le jugerait bon, une fois versées toutes les prestations accumulées payables aux participants et aux bénéficiaires. Lorsque le régime a pris fin, en 1988, on a constaté l'existence d'un surplus important. Il s'agissait de savoir à qui il revenait — aux employés et à leurs bénéficiaires ou à l'employeur?

Conséquences découlant de la nature du régime à prestations déterminées

Tel que souligné, l'employeur est légalement tenu, dans le cadre d'un régime à prestations déterminées, de garantir que toutes les prestations de retraite seront versées lorsqu'elles seront dues. L'employeur assume donc le risque que les cotisations ne soient pas suffisantes ou que les placements ne soient pas aussi fructueux que prévu. À l'inverse, l'employeur devrait être autorisé à profiter de l'excédent lorsque les placements sont plus rentables que prévu.

Sur le plan de la politique économique, si les employeurs ne peuvent pas récupérer les surplus, ils peuvent être portés à demander à leurs actuaires de se montrer plus optimistes à l'égard de leurs placements et à financer moins généreusement les régimes de retraite existants. Subsidiairement, ils peuvent refuser de participer à de nouveaux régimes de retraite ou, dans certains cas, mettre fin à ceux qui existent déjà. L'incapacité de récupérer les surplus peut également amener l'employeur, qui ne veut pas assumer le risque de garantir des prestations sans avoir la possibilité de recouvrer les surplus, à choisir un régime à cotisations déterminées plutôt qu'un régime à prestations déterminées. Les employés, auxquels on ne garantirait plus des prestations précises et qui se verraient obligés d'assumer eux-mêmes le risque d'un financement insuffisant, seraient perdants.

Par contre, permettre aux employeurs de recouvrer le surplus accumulé dans le cadre d'un régime à prestations déterminées n'est pas injuste pour les employés. On soutient que les employés devraient avoir droit au surplus parce qu'ils l'ont payé en versant directement des cotisations ou en acceptant un salaire inférieur et un moins grand nombre

1994 CanLII 104 (SCC)

ees' legitimate expectations under a defined benefit plan. The employees, having bargained for specific benefits, will receive precisely what they bargained for. The benefits, as defined by the plan, are the *quid pro quo* for their services and contributions. Indeed, the intention of the parties — and the very purpose of the plan — is that they receive these benefits. To give the employees the surplus, however, is to give them more than they bargained for. It is a windfall to the employees and a denial of the equitable interest which the employer holds in the surplus.

d'avantages sociaux. Cet argument ne tient pas compte de la nature des attentes légitimes des employés qui participent à un régime à prestations déterminées. Les employés, qui ont négocié des prestations précises, recevront exactement ce qu'ils ont négocié. Les prestations prévues par le régime constituent la contrepartie de leurs services et cotisations. En fait, l'intention des parties — et l'objet même du régime — est que les employés touchent ces prestations. Toutefois, remettre le surplus aux employés revient à leur donner plus que ce qu'ils ont négocié. C'est un gain fortuit pour les employés et une négation du droit d'*equity* qu'a l'employeur sur le surplus.

This practical view of things is supported by the policy of the Minister of National Revenue. Information Circular No. 72-13R7, December 31, 1981, is based on the assumption that surplus is normally returnable to the employer. In order to comply with registration requirements, surplus in excess of the employer's current service funding obligations in the following 24-month period must be either refunded to the employer or applied against the employer's obligations for contributions on account of current or past service in the current and subsequent years. Furthermore, all pension plans are to contain a provision permitting an actuarial surplus to be refunded to contributing employers of the plan. This requirement, it may be noted, may prevent problems such as the one presented on this appeal from arising in plans set up after the Circular.

Cette perception pratique des choses est étayée par la politique du ministre du Revenu national. La circulaire d'information nº 72-13R7 du 31 décembre 1981 est fondée sur l'hypothèse selon laquelle un surplus revient normalement à l'employeur. Pour satisfaire aux exigences en matière d'enregistrement, toute somme qui excède les cotisations pour services courants que l'employeur doit verser au cours des 24 mois qui suivent doit soit lui être remboursée, soit être déduite de ses obligations de verser des cotisations pour services courants ou passés au cours de l'année courante et des années subséquentes. En outre, tous les régimes de retraite doivent comporter une disposition permettant le remboursement d'un surplus actuariel aux employeurs cotisants. On peut souligner que cette exigence peut empêcher que des problèmes, comme celui qui nous est soumis en l'espèce, se posent dans des régimes créés postérieurement à la circulaire.

The Position in Other Jurisdictions

The problem of surplus in defined benefit pension plans is a recent one. The matter has, however, been considered by courts in England and the United States. It is fair to say that they have generally come down on the side of returning the surplus to the employers.

Courts in Great Britain have relied primarily upon principles of trust law when attempting to resolve the question of pension surplus. In *Davis v. Richards & Wallington Industries Ltd.*, [1991] 2

La position adoptée dans d'autres ressorts

Le problème du surplus dans les régimes de retraite à prestations déterminées est récent. Toutefois, la question a été examinée par les tribunaux anglais et américains. Il est juste de dire que ces tribunaux sont généralement favorables au retour du surplus à l'employeur.

Les tribunaux britanniques se sont principalement fondés sur les principes du droit des fiducies lorsqu'ils ont tenté de résoudre la question des surplus de régime de retraite. Par exemple, dans l'af-

1994 CanLII 104 (SCC)

All E.R. 563 (Ch. D.), for example, Scott J. applied the doctrine of resulting trust and concluded that a surplus in a contributory defined benefits pension fund should be paid to the employer. He held that the result could be otherwise only if the plan contained a provision expressly excluding return of the funds to the employer. He rejected the argument that a resulting trust operated in favour of the employees in view of their contributions mainly on the ground that what the employees had paid for was the specific benefit received from the fund. See also, *In re Courage Group's Pension Schemes*, [1987] 1 W.L.R. 495 (Ch.D.).

faire *Davis c. Richards & Wallington Industries Ltd.*, [1991] 2 All E.R. 563 (Ch. D.), le juge Scott a appliqué le principe de la fiducie par déduction et a conclu que le surplus de la caisse de retraite d'un régime contributif à prestations déterminées devait être versé à l'employeur. Il a statué qu'il ne pourrait en être autrement que si le régime renfermait une disposition excluant expressément la remise des fonds à l'employeur. Il a rejeté l'argument selon lequel une fiducie par déduction jouait en faveur des employés, du fait des cotisations qu'ils avaient versées, principalement pour le motif que ce que les employés avaient payé étaient les prestations précises reçues de la caisse. Voir également, *In re Courage Group's Pension Schemes*, [1987] 1 W.L.R. 495 (Ch.D.).

In the United States, the courts look to the terms of the plan documents and the intent of the parties. They also tend to the view that the surplus would represent an unintended windfall profit if it were retained by the employees: *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F.Supp. 257 (D.C. 1983). Provisions to the effect that amendments to the plan or trust documents may not enable an employer to divert or recover any portion of the trust funds are treated as prohibiting diversion prior to satisfaction of the plan's liabilities, but not thereafter. Once the pensioners are assured of their benefits, the surplus is recoverable by the employer: *In re C. D. Moyer Co. Trust Fund*, 441 F.Supp. 1128 (E.D. Pa. 1977); *Pollock v. Castrovinci*, 476 F.Supp. 606 (S.D.N.Y. 1979); *Washington-Baltimore Newspaper Guild*; *Wilson v. Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987). Where courts in the United States have found that a surplus could not be recovered by the employer, they have done so on the basis that the wording of the plan documents unequivocally precluded such recovery: *Bryant v. International Fruit Products Co.*, 793 F.2d 118 (6th Cir. 1986); *Audio Fidelity Corp. v. Pension Benefit Guaranty Corp.*, 624 F.2d 513 (4th Cir. 1980).

De leur côté, les tribunaux américains examinent les modalités du régime et l'intention des parties. Ils ont également tendance à considérer que le surplus représenterait un gain fortuit non intentionnel si les employés le conservaient: *Washington-Baltimore Newspaper Guild Local 35 c. Washington Star Co.*, 555 F.Supp. 257 (D.C. 1983). Les dispositions voulant que les modifications apportées au régime ou aux documents de fiducie ne permettent peut-être pas à l'employeur d'utiliser à d'autres fins ou de recouvrer une partie des fonds en fiducie sont considérées comme interdisant l'utilisation à d'autres fins avant d'avoir satisfait aux obligations du régime, mais non après. Une fois que les prestations sont garanties aux pensionnés, l'employeur peut recouvrer le surplus: *In re C. D. Moyer Co. Trust Fund*, 441 F.Supp. 1128 (E.D. Pa. 1977); *Pollock c. Castrovinci*, 476 F.Supp. 606 (S.D.N.Y. 1979); *Washington-Baltimore Newspaper Guild*; *Wilson c. Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987). Lorsque les tribunaux américains ont conclu que l'employeur ne pouvait pas recouvrer un surplus, ils l'ont fait pour le motif que le texte des documents du régime interdisait clairement pareil recouvrement: *Bryant c. International Fruit Products Co.*, 793 F.2d 118 (6th Cir. 1986); *Audio Fidelity Corp. c. Pension Benefit Guaranty Corp.*, 624 F.2d 513 (4th Cir. 1980).

1994 CanLII 104 (SCC)

Consistency with the Right to Use Surplus for a "Contribution Holiday"

It has repeatedly been held that employers are entitled to use the surplus in defined benefit plans for purposes of funding their actuarially determined contributions: *Maurer v. McMaster University* (1991), 4 O.R. (3d) 139; *Askin v. Ontario Hospital Association* (1991), 2 O.R. (3d) 641; *Re Reevie and Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595. Cory J. arrives at the same conclusion in this case.

The obvious question immediately presents itself. If the employer is entitled to use the surplus to fund future contributions, why should the employer be denied the ability to recoup the surplus from previous funding? If, on the other hand, the fund in equity belongs to the employees in some notional sense, how can the employer usurp that interest by using the surplus to discharge its ongoing funding responsibility? Consistency suggests that both past and present funding and entitlement should be treated in the same way.

Some commentators, while recognizing the anomaly of allowing the employer to use the surplus for a contribution holiday but not to recoup past over-contributions from the surplus, argue that, from a "practical and symbolic" point of view, the two questions may be different since "all funds paid into the pension stay there, at least notionally": Bernard Adell, "Pension Plan Surpluses and the Law: Finding a Path for Reform", *Task Force on Inflation Protection for Employment Pension Plans, Research Studies*, vol. 2 (1988), at p. 242. Cory J. makes a similar point. So, it is suggested, an employer's entitlement to a contribution holiday may "not automatically entitle him to ownership of the actuarial surplus, as well": Nachshen, *supra*, at p. 77.

Nevertheless, it remains true that as a matter of principle, there appears to be no reason why an

Compatibilité avec le droit d'utiliser un surplus aux fins d'une «période d'exonération de cotisations»

Il a été jugé à maintes reprises que l'employeur a le droit de se servir du surplus d'un régime à prestations déterminées pour financer ses cotisations actuarielles: *Maurer c. McMaster University* (1991), 4 O.R. (3d) 139; *Askin c. Ontario Hospital Association* (1991), 2 O.R. (3d) 641; *Re Reevie and Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595. Le juge Cory arrive à la même conclusion en l'espèce.

Une question évidente se pose immédiatement: si l'employeur a le droit d'utiliser le surplus pour financer des cotisations futures, pourquoi ne lui permettrait-on pas de récupérer le surplus découlant d'un financement antérieur? Si, par contre, en *equity*, la caisse appartient théoriquement aux employés, comment l'employeur peut-il s'approprier ce droit en utilisant le surplus pour s'acquitter de l'obligation qui lui incombe en matière de financement? La logique commande de traiter de la même façon le financement tant passé qu'actuel ainsi que les droits y relatifs.

Tout en reconnaissant qu'il n'est pas normal de permettre à l'employeur d'utiliser le surplus aux fins d'une période d'exonération de cotisations et de lui interdire de recouvrer les cotisations versées en trop dans le passé, certains commentateurs soutiennent que, d'un point de vue «pratique et symbolique», il peut s'agir de deux questions différentes, puisque [TRADUCTION] «toutes les sommes versées au régime y demeurent, en théorie du moins»: Bernard Adell, «Pension Plan Surpluses and the Law: Finding a Path for Reform», *Task Force on Inflation Protection for Employment Pension Plans, Research Studies*, vol. 2 (1988), à la p. 242. Le juge Cory fait une remarque similaire. Ainsi, laisse-t-on entendre, il se peut que le droit de l'employeur à une période d'exonération de cotisations [TRADUCTION] «ne lui donne pas droit automatiquement au surplus actuariel également»: Nachshen, *loc. cit.*, à la p. 77.

Néanmoins, il reste qu'en principe il ne semble y avoir aucune raison de ne pas permettre à l'em-

1994 CanLII 104 (SCC)

employer permitted to use surplus for ongoing contributions should not be allowed to reclaim the result of past over-contributions from the same surplus.

ployeur, qui est autorisé à utiliser le surplus aux fins des cotisations courantes, de récupérer sur le même surplus le montant des cotisations passées versées en trop.

Summary

Consideration of the nature of defined benefit plans leads to the conclusion that the normal and just result is that surplus in such plans (as distinguished from defined contribution plans) should revert to the employer. Against this background, I turn to the documents which govern this case and the principles of law applicable to them.

Résumé

L'examen de la nature des régimes à prestations déterminées nous amène à conclure qu'il est juste et normal que le surplus accumulé dans pareils régimes (par opposition aux régimes à cotisations déterminées) revienne à l'employeur. Cela étant, j'examinerai maintenant les documents qui régissent la présente affaire ainsi que les principes juridiques qui leur sont applicables.

Analysis

The Private Regime

Pension plans such as those at issue here are private arrangements bestowed by an employer on employees as a benefit of employment or set up pursuant to agreement between employer and employees. The employees may contribute (contributory plans), or the employer may bear the entire cost (non-contributory plans). The plan may be funded through insurance purchased by the employer for payment of the benefits (an insured plan), or the monies may be placed in a trust (a "trusteed" plan). Whatever form they take, as private contractual or as trust arrangements, the law of contract or trust determines how the funds are distributed. This may be varied by legislation, but in this case that did not occur. We must look to the principles of private law for a solution to the problem of distribution of surpluses. In so far as we are concerned with an agreement, we look to the law of contract; in so far as a trust arises, we look to the law of trusts. We are not concerned with making some new law peculiar to pension surpluses.

Analyse

Le régime privé

Les régimes de retraite comme ceux dont il est ici question sont des ententes privées qui font partie des avantages sociaux que l'employeur accorde aux employés, ou qui sont conclues conformément à une convention entre l'employeur et les employés. Les employés peuvent verser des cotisations (régimes contributifs), ou l'employeur peut assumer tous les coûts (régimes non contributifs). Le régime peut être financé au moyen d'une assurance souscrite par l'employeur en vue du versement de prestations (régime assuré ou garanti), ou les fonds peuvent être détenus en fiducie (régime en fiducie). Quelle que soit la forme du régime, à savoir une entente contractuelle privée ou une fiducie, le droit des contrats ou des fiducies régit la façon dont les fonds sont répartis. Des modifications peuvent être apportées par voie législative, mais cela ne s'est pas produit en l'espèce. Il faut examiner les principes du droit privé pour résoudre le problème de la répartition des surplus. Dans la mesure où une convention est en cause, c'est le droit des contrats qu'il faut examiner; dans la mesure où il existe une fiducie, il faut examiner le droit des fiducies. Nous n'avons pas à établir de nouvelles règles de droit propres aux surplus de caisse de retraite.

The primary rule in construing an agreement or defining the terms of a trust is respect for the

La règle fondamentale qui s'applique à l'interprétation d'une convention ou à la définition des

1994 CanLII 104 (SCC)

intention of the parties or, in the case of a trust, the intention of the settlor. The task of the court is to examine the language of the documents to ascertain what, on a fair reading, the parties intended. Unless there is a legal reason preventing it, the courts will seek to give effect to that intention. The search for an answer to the problem before us must therefore focus primarily on the documents relating to the plans and the intention of the parties, if any, with respect to a surplus arising under a defined benefits plan.

modalités d'une fiducie consiste à respecter l'intention des parties ou, dans le cas d'une fiducie, celle du constituant. Il incombe au tribunal d'examiner le texte des documents pour déterminer, selon une juste interprétation, l'intention des parties. À moins qu'il n'y ait un motif juridique de ne pas le faire, les tribunaux cherchent à mettre à exécution cette intention. Pour répondre au problème qui se pose en l'espèce, il faut donc se concentrer principalement sur les documents relatifs aux régimes et sur l'intention des parties, le cas échéant, en ce qui concerne tout surplus accumulé dans un régime à prestations déterminées.

The Documents

It is my conclusion, after studying the documents and applying them to the plan as it stood at all relevant times, that apart from the reference in the 1978 restatement which provided that surplus should go to the employer, the documents are silent on the question of surplus. There is a dispute about whether the 1978 stipulation was a valid "amendment" to the original trust documents. As I see it, and for the reasons discussed below, it was a valid amendment and, as such, ought to stand. Alternatively, even if the 1978 stipulation were disregarded, the surplus would devolve on the employer under the doctrine of resulting trust.

Les documents

Après avoir étudié les documents et les avoir appliqués au régime qui existait à toute époque pertinente, je conclus qu'à part la disposition de la nouvelle convention de 1978, qui prévoyait qu'un surplus devait revenir à l'employeur, les documents ne disent rien au sujet de la question du surplus. On ne s'entend pas sur la question de savoir si la stipulation de 1978 constituait une «modification» valide des documents de fiducie initiaux. Si je comprends bien et pour les motifs énoncés ci-après, la modification était valide et, partant, elle devrait être maintenue. Subsidiairement, même si on faisait abstraction de la stipulation de 1978, le surplus irait à l'employeur en vertu du principe de la fiducie par déduction.

The crux of the debate is Article V of the 1959 Trust Agreement:

L'article V de l'acte de fiducie de 1959 constitue le nœud du litige:

ARTICLE V

MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to pur-

[TRADUCTION]

ARTICLE V

MODIFICATION ET CESSATION

1. Sous réserve du présent acte et du RÉGIME, la compagnie se réserve le droit de modifier à tout moment, en totalité ou en partie, les dispositions du RÉGIME (dont le présent acte), à condition qu'aucune modification de ce genre qui influe sur les droits, les obligations, la rétribution ou les responsabilités du fiduciaire ne soit effectuée sans son consentement, et à condition que, sauf avec l'approbation du ministre du Revenu national, aucune modification n'autorise ou ne permette qu'une partie de la CAISSE soit utilisée ou affectée à d'autres

1994 CanLII 104 (SCC)

poses other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

Moore C.J. upheld in the Court of Appeal, interpreted the underlined portion of Article V as precluding any amendment of the plan which would have the effect of conferring money in the plan to anyone other than the beneficiaries. Reasoning that the surplus here in issue constituted funds under the plan, he concluded that the 1978 amendment was ineffective and that, consequently, the surplus must go to the employees. Cory J., as I understand his reasons, adopts the same approach.

The problematic step in this logical process is the assumption that the surplus arising after conversion to a defined benefit plan in 1966 forms part of the fund to which Article V is addressed. For the reasons outlined earlier, at the time Article V was drafted, there could never be a surplus. It was simply impossible to have a surplus under the defined contribution plan then in place. The surplus was a new entity, created years later as a consequence of converting the plan to a defined benefits plan. The "FUND" referred to in Article V cannot therefore refer to the surplus with which we are concerned. Rather, it refers to the fund in place under the defined contributions scheme. This is apparent from the latter part of Article V, which permits deductions for only those things which would be deductible under a defined contribution policy: "taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof".

With respect, I think Moore C.J. gave a broader scope to Article V of the 1959 Trust Agreement than it can reasonably be made to bear. In effect,

fins que le bénéfice exclusif des personnes et de leur succession, qui peuvent à l'occasion être désignées dans le RÉGIME tel que modifié à l'occasion, ou conformément à celui-ci, et aux fins du paiement des impôts ou autres cotisations prévus au paragraphe 2 de l'article II des présentes, ainsi que des frais et de la rétribution du fiduciaire, prévus au paragraphe 4 de l'article IV des présentes. [Je souligne.]

Le juge en chef Moore, dont la décision a été confirmée par la Cour d'appel, a interprété la partie soulignée de l'article V comme empêchant toute modification du régime qui aurait pour effet de verser les fonds du régime à une autre personne que les bénéficiaires. Estimant que les sommes excédentaires ici en cause constituaient des fonds au sens du régime, il a conclu que la modification de 1978 était sans effet et que ces sommes excédentaires devaient donc être remises aux employés. Le juge Cory, si je comprends bien, adopte le même point de vue.

Le problème qui se pose dans ce processus logique est l'hypothèse selon laquelle le surplus accumulé après la conversion en un régime à prestations déterminées, en 1966, fait partie de la caisse visée par l'article V. Pour les motifs déjà exposés, au moment où l'article V a été rédigé, il ne pouvait guère y avoir de surplus. Il était tout simplement impossible d'avoir un surplus aux termes du régime à cotisations déterminées alors existant. Le surplus était une nouveauté qui était apparue plusieurs années plus tard, à la suite de la conversion en un régime à prestations déterminées. La «CAISSE» mentionnée à l'article V ne peut donc pas viser le surplus ici en cause. Il s'agit plutôt de la caisse qui existait dans le cadre du régime à cotisations déterminées. C'est ce qui ressort de la dernière partie de l'article V, qui permet de déduire uniquement ce qui serait déductible aux termes d'un régime à cotisations déterminées: «impôts ou autres cotisations prévus au paragraphe 2 de l'article II des présentes, ainsi que [. . .] frais et [. . .] rétribution du fiduciaire, prévus au paragraphe 4 de l'article IV des présentes».

En toute déférence, je crois que le juge en chef Moore a attribué à l'article V de l'acte de fiducie de 1959 une portée plus large que celle qui peut

1994 CanLII 104 (SCC)

he read "FUND", which at the time of drafting could not by definition have included any surplus, as extending to the surplus which later arises under quite a different arrangement.

raisonnablement lui être attribuée. En effet, il a interprété le mot «CAISSE», qui, au moment où l'acte a été rédigé, ne pouvait, par définition, inclure un surplus, comme visant le surplus qui a par la suite été accumulé en vertu d'une entente tout à fait différente.

The problem is a common one. A contract or trust deed is drafted. Later, a new, unanticipated situation arises. The first question is whether the new situation falls within an existing term of the document. Courts facing this question look at the factual context in which it was drafted. They consider the wording against this background to determine whether the new situation can reasonably be said to fall within this clause. If the answer to this question is negative, the court may go on to ask itself whether a term covering the new situation can be implied, whether as a matter of fact, law or custom: see Treitel, *The Law of Contract* (4th ed. 1975), at p. 128. The limiting principle is that the courts will not make a new contract or trust to which the parties have not agreed: *Murphy v. McSorley*, [1929] S.C.R. 542.

Il s'agit d'un problème courant. Un contrat ou un acte de fiducie est rédigé. Par la suite, une nouvelle situation imprévue survient. Il s'agit d'abord de savoir si la nouvelle situation est visée par une modalité existante du document. Les tribunaux qui sont appelés à trancher cette question examinent le contexte factuel dans lequel cette modalité a été rédigée. Ils en examinent le texte en fonction de ce contexte pour déterminer s'il est raisonnablement possible de dire que la nouvelle situation est visée par la modalité en question. Dans la négative, le tribunal peut alors se demander s'il est possible de déduire l'existence d'une modalité applicable à la nouvelle situation, que ce soit sur le plan des faits, du droit ou de la coutume: voir Treitel, *The Law of Contract* (4e éd. 1975), à la p. 128. Le principe restrictif veut que les tribunaux ne créent pas un nouveau contrat ou une nouvelle fiducie n'ayant pas reçu l'adhésion des parties: *Murphy c. McSorley*, [1929] R.C.S. 542.

In the case at bar, there is nothing in the evidence that suggests that the parties who signed Article V intended it to apply to a surplus which might arise under a conversion of the plan to a defined benefit plan. There is no suggestion that conversion of the plan was foreseen, much less that a surplus might arise under such a scheme. Article V by its terms clearly applies to the specific defined contribution plan which the parties were putting in place in 1959. It refers to a specific "PLAN", the 1959 plan, and, consistent with a defined contribution plan, it treats all funds as falling into one of two categories — benefits payable to the employees and expenses. Finally, to apply Article V to a surplus under the unforeseen defined benefit plan would, for the reasons enunciated earlier, produce a result which, if not anomalous, is out of step with the characteristics of a defined benefits plan and the approach which has been taken to this problem in other jurisdictions. It is

En l'espèce, aucun élément de preuve ne laisse entendre que les parties qui ont signé l'article V voulaient qu'il s'applique au surplus qui pourrait exister par suite de la conversion du régime en un régime à prestations déterminées. On ne laisse pas entendre que la conversion du régime était prévue, et encore moins qu'un surplus pourrait être accumulé aux termes d'un tel régime. Il est clair que, de par son texte même, l'article V s'applique au régime à cotisations déterminées précis que les parties ont instauré en 1959. Il parle d'un «RÉGIME» précis, le régime de 1959, et, conformément à un régime à cotisations déterminées, tous les fonds sont considérés comme tombant dans l'une de deux catégories — les prestations payables aux employés et les frais. Enfin, appliquer l'article V au surplus accumulé dans le cadre du régime à prestations déterminées non prévu entraînerait, pour les motifs déjà exposés, un résultat qui, bien que normal, est néanmoins incompati-

1994 CanLII 104 (SCC)

not reasonable, in my opinion, to conclude that Article V applies to the surplus that could only develop after conversion of the plan years later to a defined benefit plan.

The same considerations negate the possibility of implying a term that the provisions of Article V apply to the unforeseen surplus. An attempt to imply a term to cover an unforeseen factual situation will generally fail if it is not clear that the parties would have agreed to the term, or where one or both of the parties is shown not to have known of the new situation at the time of contracting: Treitel, *supra*, at pp. 129-130. There is no suggestion that the parties who signed Article V in 1959 knew about the possibility of a surplus; nor can it be said that they would have agreed that it should go to the employees had they foreseen it. Indeed, the inference from the 1978 provision that surplus go to the employer suggests the contrary.

I am thus led to conclude that Article V, drafted in the context of a defined contribution plan, should not be read as applying to the surplus which arose under the later defined benefit plan. It follows that the 1978 provision stipulating that the surplus should go to the employer is valid and determines the issue.

Express Trust

It is argued that the surplus here in question is impressed with an express trust in favour of the employees which prevents the employer from claiming it.

I note initially that this argument must be distinguished from the argument based on the doctrine of resulting trust. The doctrine of resulting trust does not deal with the classic express trust, but is

ble avec les caractéristiques d'un régime à prestations déterminées et avec la façon dont ce problème a été abordé dans d'autres ressorts. À mon avis, il n'est pas raisonnable de conclure que l'article V s'applique au surplus qui ne pouvait exister qu'après la conversion du régime, plusieurs années plus tard, en un régime à prestations déterminées.

Les mêmes considérations nous empêchent de déduire l'existence d'une modalité voulant que les dispositions de l'article V s'appliquent au surplus imprévu. Toute tentative de déduire l'existence d'une modalité applicable à une situation factuelle imprévue échoue généralement, s'il n'est pas clair que les parties auraient souscrit à cette modalité, ou s'il est démontré que l'une ou l'autre des parties, ou les deux, n'étaient pas au courant de la nouvelle situation au moment de la passation du contrat: Treitel, *op. cit.*, aux pp. 129 et 130. On ne laisse pas entendre que les parties qui ont signé l'article V en 1959 étaient au courant de la possibilité d'un surplus, et on ne peut pas dire non plus qu'elles auraient convenu de le remettre aux employés si elles avaient prévu son existence. En fait, la déduction qui est faite à partir de la disposition de 1978, selon laquelle le surplus revient à l'employeur, laisse entendre le contraire.

J'en arrive donc à conclure que l'article V, rédigé dans le contexte d'un régime à cotisations déterminées, ne devrait pas être interprété comme s'appliquant au surplus accumulé dans le cadre du régime à prestations déterminées subséquent. Il s'ensuit que la disposition de 1978 portant que le surplus devrait revenir à l'employeur est valide et règle la question.

La fiducie expresse

On soutient que le surplus ici en cause est assujetti à une fiducie expresse en faveur des employés, ce qui empêche l'employeur de le réclamer.

Je remarque d'abord qu'il faut faire une distinction entre cet argument et celui fondé sur le principe de la fiducie par déduction. Ce principe ne vise pas la fiducie expresse classique, mais consti-

1994 CanLII 104 (SCC)

rather an equitable doctrine permitting those who have an interest in funds held in the name of another to recover them. In the first case we are concerned with the interpretation of terms of an express trust document; in the latter about the application of a legal (equitable) doctrine to a given situation.

The 1959 plan created a trust. All contributions were made subject to the trust. This did not mean, however, that all contributions were payable to the employees. Under the 1959 plan, expenses and administrative fees were payable to those who earned them, and the balance was payable to the beneficiaries. Consistent with a defined contribution plan, these were the only two classes of disbursements.

When the plan was changed in 1966 to a defined benefits plan, the nature of the trust necessarily changed. For one thing, the two accounts which the trustee was obliged to hold under the 1959 plan, the Employee's Account and the Company Account, no longer made sense and were necessarily collapsed. For another, the benefits payable to the employees were redefined. The trustee's former obligation to pay out the balance in the member's share of the two accounts after expenses, was replaced with a new and different obligation to pay out the defined benefits. And finally, as the fund continued to operate in its new form, there appeared a new element; the surplus which accumulated from year to year.

It appears that when the change was first made from a defined contribution to a defined benefit plan, no thought was given to the question of surplus. Certainly the 1966 plan made no reference to surplus. In theory, the actuarial projections should be so perfect that a surplus does not arise. But in reality, as the years passed, it became evident that a surplus was being generated. This new situation needed to be addressed. The response was the 1978 stipulation that any surplus which existed after all defined benefits and expenses had been met, was payable to the employer.

tue plutôt un principe d'*equity* permettant à ceux qui ont un droit sur des fonds détenus au nom d'une autre personne, de les recouvrer. Il s'agit, dans le premier cas, d'interpréter les modalités d'un document de fiducie expresse et, dans l'autre cas, d'appliquer un principe juridique (d'*equity*) à une situation donnée.

Le régime de 1959 créait une fiducie. Toutes les cotisations étaient assujetties à la fiducie. Toutefois, cela ne voulait pas dire qu'elles étaient toutes payables aux employés. Aux termes du régime de 1959, les dépenses et les frais d'administration devaient être payés à qui de droit, et le solde était payable aux bénéficiaires. Conformément à un régime à cotisations déterminées, c'étaient là les deux seules catégories de débours.

En 1966, lorsque le régime a été converti en un régime à prestations déterminées, la nature de la fiducie a nécessairement changé. D'une part, les deux comptes que le fiduciaire était obligé de tenir aux termes du régime de 1959, à savoir le compte d'employé et le compte de la compagnie, n'avaient plus de raison d'être et ont nécessairement été fermés. Par ailleurs, les prestations payables aux employés ont été redéfinies. L'ancienne obligation qui incombait au fiduciaire de verser le solde dans la partie des deux comptes qui revenait au participant une fois les frais payés, a été remplacée par une nouvelle obligation différente, celle de payer les prestations déterminées. Enfin, au fur et à mesure que le fonds a continué d'exister sous sa nouvelle forme, un nouvel élément est apparu: le surplus qui s'accumulait d'une année à l'autre.

Il appert que lorsque le régime à cotisations déterminées a, pour la première fois, été converti en un régime à prestations déterminées, on n'a pas songé à la question du surplus. Il est sûr que le régime de 1966 ne parlait pas d'un surplus. En théorie, les prévisions actuarielles devaient être si parfaites qu'aucun surplus ne s'accumulerait. Mais, en réalité, au fil des ans, il est devenu évident qu'un surplus était généré. Il fallait remédier à cette nouvelle situation, ce qu'on a fait au moyen de la stipulation de 1978 voulant que tout surplus existant, une fois payés toutes les prestations déterminées et tous les frais, revenait à l'employeur.

1994 CanLII 104 (SCC)

Against this background, we return to the obligations on the trustee. The situation, as I see it, was this. Under the 1966 plan the trustee was obliged to pay defined benefits to each entitled employee. The trustee was further required to pay all administrative expenses of the trust. In addition to these two obligations, however, the trustee, as the years passed, found itself holding a third fund which was attached neither by the obligation to pay out benefits nor the obligation to pay expenses — the accumulating surplus. The original trust documents did not contemplate this fund and gave no guidance as to what to do with it.

The trustee was left with the following options with respect to the surplus. Prior to the 1978 stipulation, the trustee's only option, had the question of distribution of surplus arisen, would have been to apply to the court for a ruling. Had this occurred, the appropriate ruling would have been that it go to the employer on the principles of resulting trust, for the reasons discussed below. As it happened, however, a stipulation that the surplus go to the employer was made before the question of surplus distribution arose. For the reasons discussed earlier, that stipulation was valid. It follows that the surplus goes to the employer pursuant to the 1978 amendment.

It is contended that payment of the surplus to the employer constitutes revocation of a trust and that a trust cannot be revoked without express wording so permitting. This argument, however, fails because the surplus was an unanticipated development which was never contemplated by the original trust and was not addressed by any changes to the trust until 1978. The error in the respondents' submissions, as I see it, lies in assuming that the 1959 trust provisions apply to a surplus. In fact, they do not. All contributions fell into the trust, but to stop the analysis there is to beg the critical question: what was the trustee to do with the portion of the fund which became surplus after conversion of the plan to a defined benefit plan? The answer to that question does not amount to revocation of a

C'est dans ce contexte que nous revenons aux obligations du fiduciaire. À mon avis, la situation était la suivante: aux termes du régime de 1966, le fiduciaire était tenu de verser des prestations déterminées à chaque employé qui y avait droit. Le fiduciaire était en outre tenu de payer tous les frais d'administration de la fiducie. Toutefois, en plus de ces deux obligations, le fiduciaire en est venu, au fil des ans, à détenir un troisième fonds qui n'était assorti ni de l'obligation de verser des prestations ni de l'obligation de payer les frais, soit les sommes excédentaires. Les documents de fiducie initiaux ne prévoyaient pas l'existence de ce fonds et n'indiquaient pas ce qu'on devait en faire.

En ce qui concerne le surplus, le fiduciaire avait les choix suivants: avant la stipulation de 1978, si la question de la répartition du surplus s'était posée, le fiduciaire aurait uniquement pu demander aux tribunaux de rendre une décision à cet égard. Le cas échéant, la décision appropriée aurait été de remettre ce surplus à l'employeur, en vertu des principes de la fiducie par déduction, et ce, pour les motifs exposés plus loin. Toutefois, une stipulation que le surplus revenait à l'employeur a été faite avant que la question de la répartition du surplus ne se pose. Pour les motifs énoncés plus haut, cette stipulation était valide. Il s'ensuit que le surplus revient à l'employeur conformément à la modification de 1978.

On soutient que le versement des sommes excédentaires à l'employeur constitue une révocation de fiducie et qu'en l'absence de disposition expresse, il est impossible de révoquer une fiducie. Toutefois, cet argument doit être rejeté parce que le surplus était imprévu et n'avait jamais été envisagé dans la fiducie initiale, et du fait que ce n'est qu'en 1978 que cette question a été réglée au moyen d'une modification de la fiducie. À mon avis, les arguments des intimés sont erronés en ce sens qu'ils supposent que les dispositions de la fiducie de 1959 s'appliquent à un surplus, alors qu'en réalité ce n'est pas le cas. Toutes les cotisations tombaient dans la fiducie, mais si l'on ne s'en tient qu'à cela, on élude la question cruciale de savoir ce que le fiduciaire devait faire des fonds excéden-

1994 CanLII 104 (SCC)

trust, as the respondents suggest. Rather, it amounts to fulfilling the trust.

taires après la conversion du régime en un régime à prestations déterminées. La réponse à cette question ne revient pas à révoquer une fiducie, comme les intimés le laissent entendre. Elle revient plutôt à exécuter la fiducie.

I conclude that the terms of the trust did not require that the surplus in question be paid to the employees. In 1966, when the possibility of a surplus first arose, the trust provided no guidance as to where a surplus would go in the event of termination. The 1978 amendment made it clear that it was payable to the employer. Therefore, under the terms of the trust, the employer is entitled to the surplus.

Je conclus que les modalités de la fiducie n'exigeaient pas que le surplus en question soit versé aux employés. En 1966, lorsque la possibilité d'un surplus s'est manifestée pour la première fois, la fiducie n'indiquait pas ce qu'il adviendrait d'un surplus en cas de cessation du régime. Il est ressorti clairement de la modification de 1978 qu'il était payable à l'employeur. Par conséquent, aux termes de la fiducie, l'employeur a droit aux sommes excédentaires.

1994 CanLII 104 (SCC)

Resulting Trust

I have argued that under the terms of the governing documentation, and in particular the 1978 amendment which I consider valid, surplus contributions are returnable to the employer. If I were wrong in concluding that the documentation requires this result, the same conclusion would nevertheless flow from application of the doctrine of resulting trust.

Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 299, describes the concept of resulting trust as follows:

> ... a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who *did* give value for it. [Emphasis in original.]

The concept of resulting trust does not depend on there being an express trust in existence. However, one of its applications is in the case where residual monies not designated to a particular person or purposes arise in an express trust. Where this happens in a charitable trust, the courts will order the residual sum *cy-près*, among all the creditors. Where the trust is non-charitable, the sum

La fiducie par déduction

J'ai soutenu qu'en vertu des documents pertinents et, en particulier, de la modification de 1978 que je considère valide, les cotisations excédentaires doivent retourner à l'employeur. Si je commettais une erreur en concluant que les documents commandent ce résultat, la même conclusion découlerait néanmoins de l'application du principe de la fiducie par déduction.

À la page 299 de *Law of Trusts in Canada* (2e éd. 1984), Waters décrit ainsi la notion de fiducie par déduction:

> [TRADUCTION] ... une fiducie par déduction naît dès que le titre de propriété du bien, en common law ou en *equity*, est au nom d'une partie et que cette dernière, parce qu'elle est fiduciaire ou qu'elle n'a pas remis de contrepartie pour le bien, est tenue de restituer le bien en question au détenteur initial du titre, ou à la personne qui *a donné* une contrepartie pour ce bien. [En italique dans l'original.]

La notion de fiducie par déduction ne dépend pas de l'existence d'une fiducie expresse. Toutefois, elle s'applique notamment dans le cas où il y a, dans une fiducie expresse, des sommes restantes non attribuées à une personne ou à des fins particulières. Lorsque cela se produit dans le cadre d'une fiducie caritative, les tribunaux ordonnent que la somme restante soit autant que possible répartie

generally reverts to the settlor: see Waters, *supra*, at p. 322.

If the 1978 amendment as to surplus is invalid, these principles suggest that the doctrine of resulting trust requires that the surplus be available to the employer. The employer was responsible for ensuring a fund sufficient to meet all defined benefits owing to employees. As it turns out, the employer paid more than required for the purpose of the trust, the provision of benefits to all eligible employees. The residual sum should therefore return to the employer.

As noted earlier, the doctrine of resulting trust has been applied to this situation in Great Britain, with the result that surplus funds in defined benefit pension plans have been ordered paid to the employer. It has also been applied in Canada. The case of *Re Canada Trust Co. and Cantol Ltd.* (1979), 103 D.L.R. (3d) 109 (B.C.S.C.), raised similar issues as those before us. The first question was the validity of an amendment directing that surplus should revert to the employer. Gould J. found that the attempted amendment in that case was invalid. However, he went on to hold that the surplus reverted to the employer under the doctrine of resulting trust. He stated, at p. 111:

The method which the board has employed [directors' resolution to allow reversion] does not accomplish the purpose for which it was intended. If this method is ineffectual, how then must the money remaining in the fund be distributed?

. . .

The purposes of this trust simply did not exhaust the fund and the outcome here, *i.e.*, a surplus balance of $31,163.38, was not foreseen by the respondent Dependable. The situation appears to be one where a resulting trust arises by operation of the law. [Emphasis added.]

entre tous les créanciers. Dans les autres cas, la somme revient généralement au constituant: voir Waters, *op. cit.*, à la p. 322.

Si la modification de 1978 concernant le surplus est invalide, ces principes laissent entendre que la règle de la fiducie par déduction exige que l'employeur puisse récupérer le surplus. Ce dernier était chargé de garantir que la caisse serait suffisante pour verser toutes les prestations déterminées qui seraient dues aux employés. En fin de compte, l'employeur a payé plus que ce qui était nécessaire pour réaliser l'objet de la fiducie, soit le versement des prestations à tous les employés admissibles. La somme restante devrait donc lui être remise.

Comme je l'ai déjà mentionné, les tribunaux de Grande-Bretagne ont appliqué, en pareil cas, le principe de la fiducie par déduction, de sorte qu'ils ont ordonné que les fonds excédentaires accumulés dans un régime de retraite à prestations déterminées soient remis à l'employeur. Les tribunaux canadiens ont également appliqué ce principe. L'affaire *Re Canada Trust Co. and Cantol Ltd.* (1979), 103 D.L.R. (3d) 109 (C.S.C.-B.), soulevait des questions semblables à celles qui se posent en l'espèce. La première se rapportait à la validité d'une modification prévoyant que tout surplus devait être remis à l'employeur. Le juge Gould a conclu que la modification que l'on a tenté d'apporter dans ce cas-là n'était pas valide. Toutefois, il a ajouté que le surplus revenait à l'employeur en vertu du principe de la fiducie par déduction. Voici ce qu'il affirme, à la p. 111:

[TRADUCTION] La méthode que le conseil a employée [à savoir la résolution des administrateurs autorisant la réversion] ne permet pas d'atteindre la fin visée. Si cette méthode est inefficace, comment faut-il répartir les sommes qui restent dans la caisse?

. . .

La réalisation des objets de cette fiducie n'a simplement pas permis d'épuiser le fonds et l'intimée Dependable n'avait pas prévu le résultat auquel on est arrivé en l'espèce, c.-à-d. le solde excédentaire de 31 163,38 $. Il paraît s'agir d'une situation où une fiducie par déduction prend naissance en vertu de la loi. [Je souligne.]

1994 CanLII 104 (SCC)

My colleague seeks to distinguish this case on two grounds. He questions Gould J.'s conclusion that there could be a resulting trust in favour of the employer because of a clause in the plan providing that no amendment "shall permit any part of the trust fund to revert to or to be recoverable by the Company" (p. 110). But Gould J. was not talking about reversion under an amendment (having found the attempt to amend had failed), but rather about reversion by operation of law. My colleague also points to the fact that unlike the plan at bar, the plan in *Cantol* was non-contributory. But as we have seen, even where employees contribute to a defined benefit plan, that contribution is taken to be fully satisfied by receipt of the defined benefits: *Davis v. Richards & Wallington Industries Ltd.*, *supra*. Once the defined obligations to the employees have been paid, it is difficult to argue that the employees have an interest in the surplus on the basis of a resulting trust in their favour. It is in the nature of a defined benefit that it represents a fixed amount to which the employee is entitled from the plan. The employee accepts this fixed amount in lieu of the greater or lesser amounts he or she might obtain on a defined contribution plan. Generally, this is thought to be in the employee's interest.

To put it another way, once the stipulated benefit is paid, the employee is no longer a beneficiary — he or she has exhausted his or her rights under the plan. As Gould J. put it in *Cantol*, at p. 111, "[a]ll of the beneficiaries have been paid off in accordance with [the trust] provisions, and no beneficiaries remain in any of the categories". Moreover, the complications of holding otherwise appear significant. As Scott J. points out in *Davis*, *supra*, at p. 595, different employees contribute different amounts, and often receive benefits disproportionate to their contributions, depending on when they started working, how long they have been work-

Mon collègue cherche à faire une distinction d'avec la présente affaire, pour deux motifs. Il remet en question la conclusion du juge Gould qu'il pourrait y avoir une fiducie par déduction en faveur de l'employeur, en raison d'une clause du régime prévoyant qu'aucune modification [TRADUCTION] «ne doit permettre qu'une partie du fonds en fiducie soit retournée à la compagnie ou récupérable par cette dernière» (p. 110). Cependant, le juge Gould ne parlait pas de réversion en vertu d'une modification (puisqu'il avait conclu que la tentative de modification avait échoué), mais plutôt de réversion par application de la loi. Mon collègue souligne également que, contrairement au régime ici en cause, le régime, dans l'affaire *Cantol*, était un régime non contributif. Cependant, comme nous l'avons vu, même lorsque les employés cotisent à un régime à prestations déterminées, leurs cotisations sont considérées comme pleinement remboursées grâce à la réception des prestations déterminées: *Davis c. Richards & Wallington Industries Ltd.*, précité. Une fois qu'on a satisfait aux obligations déterminées envers les employés, on peut difficilement soutenir que les employés ont droit au surplus en raison de l'existence d'une fiducie par déduction en leur faveur. De par sa nature même, une prestation déterminée représente un montant fixe auquel l'employé a droit en vertu du régime. L'employé accepte ce montant fixe au lieu des sommes supérieures ou inférieures qu'il pourrait obtenir dans le cadre d'un régime à cotisations déterminées. En général, on estime que cela est dans l'intérêt de l'employé.

Autrement dit, une fois que les prestations prévues sont versées, l'employé n'est plus un bénéficiaire — il a épuisé les droits que lui conférait le régime. Comme le juge Gould l'affirme dans la décision *Cantol*, à la p. 111, [TRADUCTION] «[t]ous les bénéficiaires ont été payés conformément aux dispositions [de la fiducie] et il ne reste aucun bénéficiaire, quelle que soit la catégorie». En outre, les complications qui résulteraient d'une décision contraire paraissent importantes. Comme le juge Scott le souligne dans la décision *Davis*, précitée, à la p. 595, le montant des cotisations varie d'un employé à l'autre et les prestations tou-

1994 CanLII 104 (SCC)

ing, and other factors. The task of restoring to each employee his or her fair share of any surplus would be impossible. I can do no better than echo the query of Scott J.: "How can a resulting trust work as between the various employees inter se? I do not think it can and I do not see why equity should impute to them an intention that would lead to an unworkable result."

chées sont souvent disproportionnées aux cotisations, selon le moment où l'employé a commencé à travailler, la période pendant laquelle il a travaillé et d'autres facteurs. Il serait impossible de remettre à chaque employé sa juste part de toute somme excédentaire. Je me contenterai de rappeler les remarques du juge Scott: [TRADUCTION] «Comment une fiducie par déduction peut-elle s'appliquer entre les divers employés? Je ne crois pas qu'elle le puisse et je ne vois pas pourquoi l'*equity* devrait leur imputer une intention qui entraînerait un résultat impossible.»

Conclusion

I conclude that the surplus in the Catalytic plan should revert to the employer. It is not touched by Article V of the 1959 agreement, with the result that the 1978 provision for its disposition is determinative. There is nothing in the Trust Agreement which requires its return to the beneficiaries, once their stipulated entitlement under the agreement has been fully met. If, in the alternative, the 1978 provision does not settle the matter, the doctrine of resulting trust would require that the surplus revert to the employer.

I would dispose of the appeals as proposed by Cory J., except on the question of the distribution of surplus in the Catalytic fund, where I would allow the appeal with costs.

The appeal by Air Products Canada Ltd. (File No. 23047) with respect to entitlement to any surplus traceable to the Catalytic fund should be dismissed and its appeal with respect to its entitlement to take a contribution holiday is allowed, SOPINKA *and* MCLACHLIN JJ. dissenting in part.

The cross-appeal by Gunter Schmidt in his personal capacity and on behalf of the beneficiaries of the Stearns plans (File No. 23057) should be dismissed with respect to the entitlement of Air Products Canada Ltd. to all surplus remaining in the pension fund derived from the Stearns plan and to its entitlement to take a contribution holiday.

Conclusion

Je conclus que le surplus du régime de Catalytic devrait retourner à l'employeur. Ce surplus n'est pas visé par l'article V de l'acte de 1959, de sorte que la disposition de 1978 relative à son aliénation est déterminante. Rien dans l'acte de fiducie n'exige la remise du surplus aux bénéficiaires, une fois qu'on a satisfait pleinement au droit que leur confère l'acte. Si, par contre, la disposition de 1978 ne règle pas la question, le surplus devrait retourner à l'employeur selon le principe de la fiducie par déduction.

Je suis d'avis de trancher les pourvois de la façon proposée par le juge Cory, sauf pour ce qui est de la répartition du surplus de la caisse de Catalytic, au sujet de laquelle j'accueillerais le pourvoi avec dépens.

Le pourvoi formé par Air Products Canada Ltd. (nº de greffe 23047) relativement au droit à tout surplus pouvant être attribué à la caisse de Catalytic est rejeté et son pourvoi relatif au droit de s'accorder une période d'exonération de cotisations est accueilli. Les juges SOPINKA *et* MCLACHLIN *sont dissidents en partie.*

Le pourvoi incident formé par Gunter Schmidt personnellement et pour le compte des bénéficiaires des régimes de retraite de Stearns (nº de greffe 23057) est rejeté relativement au droit d'Air Products Canada Ltd. à tout surplus de la caisse de retraite provenant du régime de Stearns et à son droit de s'accorder une période d'exonération de cotisations.

1994 CanLII 104 (SCC)

Solicitors for Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley: Borden & Elliott, Toronto.

Solicitors for the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans: Code, Hunter, Calgary.

Solicitors for Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans: Blake, Cassels & Graydon, Calgary.

Procureurs d'Air Products Canada Ltd., William M. Mercer Limited, La Confédération, Compagnie d'assurance-vie et T. J. Westley: Borden & Elliott, Toronto.

Procureurs des bénéficiaires des régimes de retraite de Stearns Catalytic Ltd.: Code, Hunter, Calgary.

Procureurs de Gunter Schmidt personnellement et pour le compte des bénéficiaires des régimes de retraite de Stearns Catalytic Ltd.: Blake, Cassels & Graydon, Calgary.

1994 CanLII 104 (SCC)

Sun Indalex Finance, LLC *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

United Steelworkers *Appellant*

Sun Indalex Finance, LLC *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7 *Appelant*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

Syndicat des Métallos *Appelant*

2013 SCC 6 (CanLII)

v.

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services *Respondents*

and

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association *Interveners*

Indexed as: Sun Indalex Finance, LLC *v.* United Steelworkers

2013 SCC 6

File No.: 34308.

2012: June 5; 2013: February 1.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Bankruptcy and Insolvency — Priorities — Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Company entering into debtor in possession ("DIP") financing allowing it to continue to operate — CCAA court granting priority to DIP lenders — Proceeds of sale of business insufficient to pay back DIP lenders — Whether pension wind-up deficiencies subject to deemed trust — If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), (4), 75(1)(a), (b) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

c.

Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite) et Surintendant des services financiers *Intimés*

et

Surintendant des services financiers, Institut d'insolvabilité du Canada, Congrès du travail du Canada, Fédération canadienne des retraités, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

Répertorié : Sun Indalex Finance, LLC *c.* Syndicat des Métallos

2013 CSC 6

N° du greffe : 34308.

2012 : 5 juin; 2013 : 1er février.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Abella, Rothstein, Cromwell et Moldaver.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Pensions — Faillite et insolvabilité — Priorités — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la Loi sur les arrangements avec les créanciers des compagnies (« LACC ») — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Financement obtenu par la société à titre de débiteur-exploitant (« DE ») lui ayant permis de poursuivre ses activités — Tribunal chargé d'appliquer la LACC ayant accordé priorité aux prêteurs DE — Insuffisance du produit de la vente pour rembourser les prêteurs DE — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — Dans l'affirmative, la prépondérance fédérale fait-elle en sorte que la priorité issue de l'application de la LACC a préséance sur la fiducie réputée? — Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8, art. 57(3), (4), 75(1)a), b) — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36.

2013 SCC 6 (CanLII)

Pensions — Trusts — Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Whether pension wind-up deficiencies subject to deemed trust — Whether company as plan administrator breached fiduciary duties — Whether pension plan members are entitled to constructive trust.

Civil Procedure — Costs — Appeals — Standard of review — Whether Court of Appeal erred in costs endorsement concerning one party.

Indalex Limited ("Indalex"), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The salaried plan was being wound up when the *CCAA* proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The *CCAA* court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Ultimately, with the approval of the *CCAA* court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The *CCAA* court authorized a payment in accordance with the priority but ordered an amount be held in reserve, leaving the plan members' arguments on their rights to the proceeds of the sale open for determination later.

The plan members challenged the priority granted in the *CCAA* proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from Indalex's alleged breaches

Pensions — Fiducies — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la LACC — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — La société a-t-elle manqué à ses obligations fiduciaires d'administrateur des régimes? — Les participants des régimes de retraite ont-ils droit à une fiducie par interprétation?

Procédure civile — Dépens — Appels — Norme de contrôle — La décision de la Cour d'appel sur les dépens d'une partie est-elle erronée?

Indalex Limited (« Indalex »), le promoteur et l'administrateur de deux régimes de retraite, l'un pour les salariés, l'autre pour les cadres, est devenue insolvable. Elle a demandé la protection contre ses créanciers sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Le régime des salariés était en cours de liquidation lorsque la procédure fondée sur la *LACC* a été engagée. Le régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé. Les deux régimes accusaient un déficit de liquidation.

Une série de mesures avalisées par le tribunal a permis à la société d'obtenir un financement de débiteur-exploitant (« DE ») et de poursuivre ses activités. Le tribunal chargé de l'application de la *LACC* a accordé aux prêteurs DE, un consortium composé de créanciers qui bénéficiaient d'une garantie de premier rang avant le début de la procédure, une priorité sur tous les autres créanciers. Le remboursement des sommes empruntées était garanti par Indalex É.-U.

Finalement, sur approbation du tribunal appliquant la *LACC*, Indalex a vendu son entreprise, mais l'acquéreur n'a pas repris à son compte les engagements de retraite. Le produit de la vente n'étant pas suffisant pour rembourser les prêteurs DE, Indalex É.-U., à titre de caution, a payé la différence et a acquis de ce fait la créance prioritaire des prêteurs DE. Le tribunal a autorisé le paiement conformément à l'ordre de priorité, mais il a également ordonné la retenue de fonds en réserve, remettant à plus tard l'examen de l'argumentation des participants relative à leur droit au produit de la vente.

Les participants des régimes ont contesté la priorité accordée dans le cadre de la procédure fondée sur la *LACC*. Ils ont fait valoir qu'ils avaient priorité pour le montant du déficit de liquidation en raison de la fiducie réputée créée par le par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), et de la fiducie

2013 SCC 6 (CanLII)

of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan wind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) *Statutory Deemed Trust*

Per Deschamps and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is affirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of

par interprétation résultant de manquements allégués d'Indalex à son obligation fiduciaire d'administrateur des régimes. En première instance, le juge a rejeté les motions des participants, concluant que la fiducie réputée ne s'appliquait pas aux déficits de liquidation. Il a conclu que, pour ce qui était du déficit de liquidation, les participants étaient des créanciers chirographaires. La Cour d'appel a infirmé la décision et statué que les déficits de liquidation des régimes de retraite faisaient l'objet d'une fiducie réputée et d'une fiducie par interprétation qui prenaient rang avant la créance des prêteurs DE bénéficiant d'une priorité et celles des autres créanciers garantis. En outre, elle a rejeté la prétention du Syndicat des Métallos, qui représentait quelques-uns des participants du régime des salariés, à savoir qu'il avait droit au paiement de ses dépens par prélèvement sur la caisse de retraite des salariés.

Arrêt (les juges LeBel et Abella sont dissidents) : Les pourvois interjetés par Sun Indalex Finance, George L. Miller et FTI Consulting sont accueillis.

Arrêt : Le pourvoi interjeté par le Syndicat des Métallos est rejeté.

(1) *La fiducie réputée d'origine législative*

Les juges Deschamps et Moldaver : Il est bien établi que la fiducie réputée créée par le par. 57(4) de la *LRR* s'applique aux cotisations visées à l'al. 75(1)a) de la *LRR*. La seule question est de savoir si cette fiducie réputée d'origine législative s'applique aussi aux paiements au titre du déficit de liquidation exigés par l'al. 75(1)b). Dans le cas des salariés, la réponse est oui, compte tenu du texte, du contexte et de l'objet par. 57(4). Il n'en va pas de même pour le régime des cadres étant donné que cette disposition prévoit que la fiducie réputée en cas de liquidation ne prend naissance qu'à la liquidation du régime.

Le paragraphe 57(4) de la *LRR*, qui crée la fiducie réputée en cas de liquidation, ne comporte aucune limite expresse aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». L'alinéa 75(1)a) prévoit expressément que l'employeur verse « un montant égal au total de tous les paiements » *accumulés*, même s'ils ne sont pas encore dus à la date de la liquidation, tandis que l'al. 75(1)b) parle d'un « montant » calculé à partir de la valeur de l'actif et du passif *accumulés*, lorsque le régime est liquidé. Puisque le montant des paiements (al. 75(1)a)) et le montant établi en soustrayant l'actif du passif accumulé à la date de la liquidation (al. 75(1)b)) doivent tous les deux être versés à la liquidation à titre de cotisations de l'employeur, ils entrent tous les deux dans le sens ordinaire des mots

2013 SCC 6 (CanLII)

s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

employés au par. 57(4) de la *LRR* : « montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

La date où s'effectue le calcul est sans importance du moment que le passif est évalué à la date de la liquidation. Le fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable. On peut donc considérer que le passif « accumulé » englobe les cotisations exigées à l'al. 75(1)b) de la *LRR*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection.

L'historique législatif montre que la protection, qui couvrait d'abord (1) uniquement les cotisations dues, s'est étendue (2) aux montants payables calculés comme s'il y avait liquidation du régime, (3) puis aux montants dus ou accumulés à la liquidation, à l'exclusion des paiements au titre du déficit de liquidation (4) et, enfin, à tous les montants dus ou accumulés à la liquidation. L'historique législatif mène donc à la conclusion qu'une interprétation étroite qui dissocierait le paiement requis de l'employeur par l'al. 75(1)b) de la *LRR* de celui exigé à l'al. 75(1)a) irait à l'encontre de la tendance du législateur ontarien à offrir une protection de plus en plus étendue.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

La disposition qui crée une fiducie réputée a une vocation réparatrice. Elle vise à protéger les intérêts des participants. Cette fin réparatrice favorise une interprétation qui inclut tous les paiements à la liquidation dans la valeur de la fiducie réputée. En l'espèce, c'est à bon droit que la Cour d'appel a jugé qu'Indalex était réputée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la question de la fiducie réputée d'origine législative.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is "accrued to the date of the wind up" as required by s. 57(4) of the *PBA*.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Étant donné qu'il ne peut y avoir de fiducie réputée au bénéfice du régime des cadres, celui-ci n'ayant pas été liquidé à la date considérée, il s'agit donc essentiellement — pour ce qui concerne le régime des salariés — d'interpréter une disposition de la loi et de déterminer si le déficit de liquidation décrit à l'al. 75(1)b) est « accumul[é] à la date de la liquidation » comme l'exige le par. 57(4) de la *LRR*.

When the term "accrued" is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable

Lorsque le terme « accumulé » [et plus encore son équivalent anglais « *accrued* »] est employé de pair avec une somme, il renvoie généralement à un élément

2013 SCC 6 (CanLII)

but which may or may not be due. In the present case, s. 57(4) uses the word "accrued" in contrast to the word "due". Given the ordinary meaning of the word "accrued", the wind-up deficiency cannot be said to have "accrued" to the date of wind up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words "accrued to the date of wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind up. Moreover, the legislative evolution and history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up.

The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed

dont la valeur est actuellement mesurée ou mesurable, mais qui peut ou non être dû. Dans la présente affaire, au par. 57(4), le terme « accumulées » [« *accrued* »] est utilisé par opposition à « dues ». Suivant le sens ordinaire du mot « accumulé », on ne peut considérer que le déficit l'était à la date de la liquidation. Le montant du déficit de liquidation dépend de droits qui ne prennent naissance qu'à la liquidation et à l'égard desquels les employés ne font des choix qu'après la liquidation. Le déficit de liquidation n'est donc ni déterminé ni déterminable à la date de liquidation prévue.

Le contexte législatif général appuie la thèse que, suivant leur sens ordinaire et grammatical le plus plausible, les mots « accumulées à la date de la liquidation » renvoient aux sommes déterminées de façon précise immédiatement avant la date de prise d'effet de la liquidation du régime. Qui plus est, il appert de l'évolution et de l'historique des dispositions en cause que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet d'une fiducie réputée d'origine législative. Ils confirment en fait l'intention du législateur d'*exclure* du champ d'application de la fiducie réputée les obligations qui naissent seulement *à la* date même de la liquidation.

La loi établit une distinction entre deux types d'obligation de l'employeur qui sont pertinents en l'espèce. Il y a d'une part les cotisations requises pour acquitter le coût du service courant et d'autres paiements qui sont dus ou qui sont accumulés sur une base quotidienne jusqu'à la date considérée. Il s'agit des paiements prévus à l'actuel al. 75(1)a), à savoir ceux qui sont dus ou accumulés, mais qui n'ont pas été versés. D'autre part, il y a les cotisations supplémentaires exigées lorsque le régime est liquidé (le déficit de liquidation). Ces paiements font l'objet de l'al. 75(1)b). Il appert de l'évolution et de l'historique législatifs que les fiducies réputées des par. 57(3) et (4) devaient seulement englober les cotisations du premier type et que le législateur n'a jamais voulu que les obligations ultérieures éventuelles de l'employeur qui naissent une fois le régime liquidé fassent l'objet d'une fiducie réputée ou d'un privilège.

En l'espèce, la fiducie réputée du par. 57(4) ne vise pas le déficit de liquidation. Pareille exclusion est conforme aux objectifs généraux de la loi. Le législateur a créé des fiducies à l'égard des cotisations qui étaient dues ou accumulées à la date de la liquidation afin de protéger, dans une certaine mesure, les droits des bénéficiaires d'un régime de retraite et ceux des employés contre les réclamations des autres créanciers de l'employeur. Or, il y a de bonnes raisons de penser que c'est en raison d'autres objectifs concurrents que le législateur s'est abstenu d'accroître la portée de la fiducie réputée et d'y

2013 SCC 6 (CanLII)

trust to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) *Priority Ranking*

Per Deschamps and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) *Constructive Trust as a Remedy for Breach of Fiduciary Duties*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs

inclure le déficit de liquidation. La protection des régimes de retraite constitue certes un objectif important, mais il n'appartient pas à la Cour de décider de la mesure dans laquelle cet objectif sera poursuivi ou d'autres intérêts en souffriront. Il appartient à l'Assemblée législative de l'Ontario de décider du degré de protection qu'il convient d'accorder aux bénéficiaires d'un régime de retraite sous le régime de la *LRR*.

(2) *Priorité de rang*

Les juges Deschamps et Moldaver : Une fiducie réputée établie par une loi provinciale comme la *LRR* continue de s'appliquer dans les instances régies par la *LACC*, relevant de la compétence fédérale, sous réserve de la doctrine de la prépondérance fédérale. En l'espèce, accorder priorité aux prêteurs DE relègue à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Malgré le désaccord avec la juge Deschamps sur la portée de la fiducie réputée du par. 57(4), si une fiducie est réputée exister en l'espèce, la créance DE prend rang avant elle en application de la doctrine de la prépondérance fédérale.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la priorité de rang déterminée par application du principe de la prépondérance fédérale.

(3) *La fiducie par interprétation comme réparation du manquement à l'obligation fiduciaire*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il ne saurait y avoir conflit d'intérêts uniquement parce que l'employeur, dans l'exercice de son pouvoir de gérer la société au mieux des intérêts de celle-ci, prend une mesure susceptible d'avoir une incidence sur les bénéficiaires du régime de retraite qu'il administre. Telle est la conclusion qui découle nécessairement du contexte législatif. L'existence de conflits apparents qui sont inhérents à la double fonction d'employeur et d'administrateur de régime exercée par une même personne ne peut constituer un manquement à l'obligation fiduciaire, car ces conflits sont expressément autorisés par la loi, laquelle permet à une personne

2013 SCC 6 (CanLII)

when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

d'exercer les deux fonctions. Il y a en fait conflit d'intérêts lorsqu'il existe un risque important que les obligations de l'employeur-administrateur envers la société nuisent de façon appréciable à la défense des intérêts des bénéficiaires d'un régime.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

À elle seule, la demande initiale de protection de la société contre ses créanciers ne plaçait pas Indalex en situation de conflit d'intérêts ou d'obligations. De même, l'omission de donner avis de la demande initiale présentée sur le fondement de la *LACC* ne constituait pas un manquement à l'obligation fiduciaire d'éviter tout conflit d'intérêts. La décision d'Indalex d'agir à titre d'employeur-administrateur ne peut conférer aux participants plus d'avantages que si l'administration de leurs régimes avait été confiée à un tiers indépendant.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

C'est lors de la demande et de l'obtention des ordonnances DE sans préavis aux bénéficiaires des régimes, ainsi que de la demande et de l'obtention de l'approbation de la vente que les intérêts commerciaux d'Indalex sont entrés en conflit avec ses obligations d'administrateur des régimes de retraite. Cependant, la difficulté résidait en l'espèce non pas dans l'existence du conflit, mais bien dans l'omission d'Indalex de prendre quelque mesure afin que les bénéficiaires des régimes aient la possibilité de veiller à la protection de leurs intérêts dans le cadre de la procédure fondée sur la *LACC* comme si l'administrateur des régimes avait été indépendant. En résumé, le manquement ne tenait pas à l'existence du conflit, mais plutôt à l'omission de prendre les mesures qu'elle commandait.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

L'employeur-administrateur qui se trouve en situation de conflit doit en informer le juge saisi sur le fondement de la *LACC*. Il ne suffit pas d'inscrire les bénéficiaires sur la liste des créanciers; le juge doit être informé que le débiteur, en sa qualité d'administrateur de régime, est en conflit d'intérêts ou susceptible de l'être. En conséquence, Indalex a manqué à son obligation fiduciaire en omettant de faire ce qu'il fallait pour que les bénéficiaires des régimes puissent être dûment représentés dans le cadre de cette procédure comme si l'administrateur des régimes avait été indépendant, en particulier lorsqu'elle a demandé l'approbation du financement DE et de la vente, puis présenté une motion en vue de faire faillite.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings resulted in any such asset. Furthermore, to impose a constructive trust in

Indépendamment de ce manquement, l'imposition d'une fiducie par interprétation ne constitue une réparation appropriée que si un actif déterminable résulte des actes de l'auteur du manquement et qu'il serait injuste que ce dernier ou, parfois, un tiers, conserve cet actif. Aucun élément de preuve n'appuie la prétention qu'un tel actif a résulté de l'omission d'Indalex de pallier véritablement les conflits d'intérêts auxquels a donné lieu

2013 SCC 6 (CanLII)

response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

Per Deschamps and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the plan members' priority. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with Cromwell J. that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

la procédure fondée sur la *LACC*. Qui plus est, imposer une fiducie par interprétation par suite du manquement à l'obligation fiduciaire de veiller à ce que les bénéficiaires des régimes jouissent de garanties procédurales, alors qu'ils en ont joui dans les faits, se révèle inéquitable au vu de l'ensemble des circonstances.

Les juges Deschamps et Moldaver : L'employeur constitué en société qui décide d'agir en qualité d'administrateur d'un régime accepte les obligations fiduciaires inhérentes à cette fonction. Puisque les administrateurs d'une société ont aussi une obligation fiduciaire envers la société, l'employeur doit être prêt à résoudre les conflits lorsqu'ils surgissent. L'employeur qui administre un régime de retraite n'est pas autorisé à négliger ses obligations fiduciaires envers les participants au régime et à favoriser les intérêts concurrents de la société sous prétexte qu'il porte le « chapeau » de dirigeant de la société. Ce sont les conséquences d'une décision, et non sa nature qui doivent être prises en compte.

En l'espèce, il y avait bien conflit entre les obligations fiduciaires qui incombaient à Indalex en sa qualité d'administratrice des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Plus précisément, en demandant au tribunal d'autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d'appliquer la *LACC* de faire échec à la priorité dont bénéficiaient les participants. L'intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d'insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l'administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l'occurrence, ce devoir de l'administrateur des régimes impliquait, plus particulièrement, qu'il donne à tout le moins aux participants la possibilité d'exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l'encontre des intérêts des participants.

En ce qui concerne la fiducie par interprétation, il est bien établi en droit qu'une réparation de la nature d'un droit de propriété n'est généralement accordée qu'à l'égard d'un bien ayant un lien direct avec un acte fautif ou d'un bien qui peut être rattaché à un tel bien. Il y a accord avec le juge Cromwell sur le fait que cette condition n'était pas remplie en l'espèce et il a été souscrit à ses motifs sur cette question. En outre, il était déraisonnable pour la Cour d'appel de modifier l'ordre de priorité.

2013 SCC 6 (CanLII)

Per LeBel and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) *Costs in United Steelworkers Appeal*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be

Les juges LeBel et Abella (dissidents) : Une relation fiduciaire s'entend de la relation factuelle et juridique entre un bénéficiaire vulnérable et un fiduciaire qui détient et peut exercer un pouvoir sur le bénéficiaire dans les situations prévues par la loi. Par conséquent, avant d'analyser les obligations fiduciaires de l'employeur à titre d'administrateur d'un régime de retraite visé par la *LRR*, il faut examiner la situation et les caractéristiques des bénéficiaires du régime. En l'espèce, les bénéficiaires se trouvaient dans une position de grande vulnérabilité par rapport à Indalex.

Rien dans la *LRR* ne permet de conclure que l'employeur, en sa qualité d'administrateur, serait assujetti à une norme moindre ou assumerait des fonctions et des obligations moins strictes qu'un administrateur indépendant. L'employeur n'est pas tenu d'assumer le fardeau de l'administration des régimes de retraite qu'il a convenu d'établir ou qui sont le fruit de décisions antérieures. Par contre, s'il choisit de l'assumer, une relation fiduciaire prend naissance et l'on s'attend à ce que l'employeur soit capable d'éviter ou de régler les conflits d'intérêts susceptibles d'intervenir.

Indalex se trouvait en situation de conflit d'intérêts dès qu'elle a envisagé de demander la protection de la *LACC* et de proposer un arrangement à ses créanciers. Du point de vue de l'entreprise, on ne pourrait guère trouver à redire à cette décision. Il s'agissait d'une décision d'affaires. Cependant, Indalex jouait en même temps le rôle de fiduciaire à l'égard des participants aux régimes et des retraités, et c'est là où le bât blesse. La solution consistait non pas à mettre en veilleuse sa fonction d'administrateur avec les obligations fiduciaires en découlant, mais à y renoncer et à la transférer avec diligence à un administrateur indépendant.

En l'occurrence, l'employeur a non seulement manqué à ses obligations envers les bénéficiaires, mais adopté en fait une démarche qui allait à l'encontre de leurs intérêts. La gravité de ces manquements justifiait amplement la décision de la Cour d'appel d'imposer une fiducie par interprétation.

(4) *Dépens dans le pourvoi du Syndicat des Métallos*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il n'y a en l'espèce aucune raison de revenir sur la décision de la Cour d'appel relative aux dépens en ce qui concerne le Syndicat des Métallos. L'instance engagée portait sur des points de droit nouveaux, son issue était incertaine et les demandeurs couraient le risque d'être déboutés. La Cour d'appel a opiné essentiellement que, représentant seulement 7 des 169 participants du régime des salariés, le syndicat ne devait pas être en

2013 SCC 6 (CanLII)

able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court.

Per Deschamps and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per LeBel and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

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mesure, dans les faits, d'imposer à tous les participants du régime, dont la plupart n'en étaient pas membres, les risques inhérents au litige sans les consulter. Il n'y a aucune erreur de principe dans le refus de la Cour d'appel d'ordonner que les dépens du syndicat soient payés à partir de la caisse de retraite, étant donné surtout l'issue du pourvoi devant notre Cour.

Les juges Deschamps et Moldaver : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

Les juges LeBel et Abella : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

Jurisprudence

Citée par la juge Deschamps

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2013 SCC 6 (CanLII)

v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194; *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII); *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Donkin v. Bugoy*, [1985] 2 S.C.R. 85; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303.

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2013 SCC 6 (CanLII)

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APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 578, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Appeal dismissed.

Benjamin Zarnett, *Frederick L. Myers*, *Brian F. Empey* and *Peter Kolla*, for the appellant Sun Indalex Finance, LLC.

Harvey G. Chaiton and *George Benchetrit*, for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors.

David R. Byers, *Ashley John Taylor* and *Nicholas Peter McHaffie*, for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited.

Darrell L. Brown, for the appellant/respondent the United Steelworkers.

Andrew J. Hatnay and *Demetrios Yiokaris*, for the respondents Keith Carruthers, et al.

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POURVOIS contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Gillese et Juriansz), 2011 ONCA 265, 104 O.R. (3d) 641, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 75 C.B.R. (5th) 19, 89 C.C.P.B. 39, 17 P.P.S.A.C. (3d) 194, [2011] O.J. No. 1621 (QL), 2011 CarswellOnt 2458, qui a infirmé une décision du juge Campbell, 2010 ONSC 1114, 79 C.C.P.B. 301, [2010] O.J. No. 974 (QL), 2010 CarswellOnt 893. Pourvois accueillis, les juges LeBel et Abella sont dissidents.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Gillese et Juriansz), 2011 ONCA 578, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Pourvoi rejeté.

Benjamin Zarnett, *Frederick L. Myers*, *Brian F. Empey* et *Peter Kolla*, pour l'appelante Sun Indalex Finance, LLC.

Harvey G. Chaiton et *George Benchetrit*, pour l'appelant George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7.

David R. Byers, *Ashley John Taylor* et *Nicholas Peter McHaffie*, pour l'appelante FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited.

Darrell L. Brown, pour l'appelant/intimé le Syndicat des Métallos.

Andrew J. Hatnay et *Demetrios Yiokaris*, pour les intimés Keith Carruthers, et autres.

2013 SCC 6 (CanLII)

Hugh O'Reilly and *Amanda Darrach*, for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership).

Hugh O'Reilly et *Amanda Darrach*, pour l'intimée Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite).

Mark Bailey, *Leonard Marsello* and *William MacLarkey*, for the respondent/intervener the Superintendent of Financial Services.

Mark Bailey, *Leonard Marsello* et *William MacLarkey*, pour l'intimé/intervenant le Surintendant des services financiers.

Robert I. Thornton and *D. J. Miller*, for the intervener the Insolvency Institute of Canada.

Robert I. Thornton et *D. J. Miller*, pour l'intervenant l'Institut d'insolvabilité du Canada.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Steven Barrett et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

Kenneth T. Rosenberg, *Andrew K. Lokan* and *Massimo Starnino*, for the intervener the Canadian Federation of Pensioners.

Kenneth T. Rosenberg, *Andrew K. Lokan* et *Massimo Starnino*, pour l'intervenante la Fédération canadienne des retraités.

Éric Vallières, *Alexandre Forest* and *Yoine Goldstein*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Éric Vallières, *Alexandre Forest* et *Yoine Goldstein*, pour l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Mahmud Jamal, *Jeremy Dacks* and *Tony Devir*, for the intervener the Canadian Bankers Association.

Mahmud Jamal, *Jeremy Dacks* et *Tony Devir*, pour l'intervenante l'Association des banquiers canadiens.

The judgment of Deschamps and Moldaver JJ. was delivered by

Version française du jugement des juges Deschamps et Moldaver rendu par

[1] DESCHAMPS J. — Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy; and FTI Consulting Canada ULC.

[1] LA JUGE DESCHAMPS — L'insolvabilité peut entraîner des conséquences catastrophiques. Les créanciers ordinaires sont souvent laissés impayés. En situation d'insolvabilité, les prestations déterminées promises aux employés pendant leur emploi sont mises en péril. Les présents pourvois illustrent ce qui peut se produire lorsque ce péril se matérialise. Bien que l'employeur en l'espèce ait manqué à son obligation fiduciaire envers les participants aux régimes de retraite, le préjudice qu'ils subissent ne résulte pas de son manquement, mais de son insolvabilité. Pour les motifs qui suivent, je suis d'avis d'accueillir les appels de Sun Indalex Finance, LLC; George L. Miller, syndic de faillite d'Indalex É.-U.; et FTI Consulting Canada ULC.

2013 SCC 6 (CanLII)

[2] To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("Indalex"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

[2] Pour améliorer les chances des retraités de recevoir toutes les prestations auxquelles ils ont droit après la liquidation d'un régime de retraite, le législateur ontarien a pourvu à la protection des cotisations accumulées, mais qui ne sont pas encore dues, à la date de la liquidation, au moyen d'une fiducie réputée grevant certains biens des promoteurs des régimes et qui a préséance sur toutes les autres priorités établies par une loi provinciale (par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), et par. 30(7) de la *Loi sur les sûretés mobilières*, L.R.O. 1990, ch. P.10 (« *LSM* »)). Les parties ne s'entendent pas sur la portée de la fiducie réputée. Les dispositions pertinentes et le contexte mènent selon moi à la conclusion qu'elle englobe les cotisations que doit verser l'employeur afin que la caisse de retraite puisse couvrir le passif du régime à la liquidation. En l'espèce, toutefois, la sûreté accordée au créancier ayant prêté des fonds à l'employeur, Indalex Limited (« Indalex »), pendant l'instance en matière d'insolvabilité a priorité sur la fiducie réputée. En outre, bien que l'employeur ait pu se placer en conflit d'intérêts en tant qu'administrateur du régime, en ne donnant pas dûment avis aux participants d'une motion en vue de financer l'exploitation de l'entreprise pendant la restructuration, il n'est pas réaliste de penser que le tribunal chargé d'appliquer la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), aurait établi un ordre de priorité différent si les participants avaient été avisés et si le tribunal avait conclu qu'ils étaient des créanciers garantis. Par conséquent, il n'y a pas lieu d'accorder une réparation en equity, telle que la fiducie par interprétation imposée par la Cour d'appel.

I. Facts

[3] Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

I. Les faits

[3] Indalex est une filiale canadienne en propriété exclusive de la société américaine Indalex Holding Corp. (« Indalex É.-U. »). Indalex et ses sociétés affiliées formaient un groupe (le « Groupe Indalex ») qui fabriquait des extrusions d'aluminium. Les activités des sociétés aux États-Unis et au Canada étaient étroitement liées.

2013 SCC 6 (CanLII)

[4] In 2009, a combination of high commodity prices and the economic recession's impact on the end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

[5] At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

[6] Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at $1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at $3.0 million on a wind-up basis as of January 1, 2008.

[7] From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common agreement for debtor-in-possession ("DIP") financing under which the two companies

[4] En 2009, le prix élevé des produits de base et les effets de la récession sur le marché des utilisateurs finaux des extrusions d'aluminium ont entraîné l'insolvabilité du Groupe Indalex. Le 20 mars 2009, Indalex É.-U. s'est placée sous la protection du chapitre 11, au Delaware. Le 3 avril 2009, Indalex a demandé une suspension sous le régime de la *LACC*. Le même jour, le juge Morawetz a rendu une ordonnance initiale lui accordant cette suspension et il a désigné FTI Consulting Canada ULC (le « contrôleur ») comme contrôleur.

[5] Indalex administrait alors deux régimes de retraite enregistrés, l'un à l'intention des salariés (le « régime des salariés »), et l'autre à l'intention des cadres (le « régime des cadres »). Le régime des salariés comptait sept participants dont l'agent négociateur était le Syndicat des Métallos (le « Syndicat »). Ce régime était en cours de liquidation lorsque les procédures sous le régime de la *LACC* ont été engagées. La date de prise d'effet de la liquidation était le 31 décembre 2006. Le régime des cadres n'acceptait plus de participant, mais il n'était pas liquidé. En tout, les déficits des caisses de retraite touchent 49 personnes (les participants au régime des salariés et au régime des cadres sont collectivement appelés les « participants »).

[6] L'ordonnance initiale prononcée par le juge Morawetz, le 3 avril 2009, a accordé à Indalex la protection de la *LACC*. Les deux régimes de retraite accusaient un déficit de capitalisation au moment où Indalex a demandé la suspension des procédures en vertu de la *LACC*. Le déficit de liquidation du régime des salariés, au 31 décembre 2008, était estimé à 1,8 million de dollars. Quant au régime des cadres, sa sous-capitalisation suivant une approche de liquidation était estimée à 3 millions de dollars au 1er janvier 2008.

[7] Dès le début de la procédure d'insolvabilité, la stratégie de réorganisation poursuivie par le Groupe Indalex consistait à vendre Indalex et Indalex É.-U. comme entreprises en exploitation pendant qu'elles jouissaient de la protection de la *LACC* et du chapitre 11. À cette fin, Indalex et Indalex É.-U. voulaient conclure un accord de financement de débiteur-exploitant (« DE »)

2013 SCC 6 (CanLII)

could draw from joint credit facilities and would guarantee each other's liabilities.

conjoint aux termes duquel elles pourraient bénéficier de facilités de crédit communes et chaque société garantirait les obligations de l'autre.

[8] Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

[8] Les problèmes financiers d'Indalex menaçaient les intérêts de tous les participants. Si la réorganisation échouait et si Indalex était liquidée en application de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), ils ne recouvreraient aucune de leurs créances sur Indalex au titre de la sous-capitalisation des régimes de retraite, parce que la législation fédérale ne permettrait pas que la priorité de rang établie par la loi provinciale soit reconnue : *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453. La *LACC* ne rendait pas la priorité de rang des participants inopérante, mais leur position était incertaine.

[9] The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale could be completed.

[9] Le Groupe Indalex a demandé des offres à divers prêteurs DE et a fini par conclure une entente avec un consortium composé des créanciers qui bénéficiaient d'une garantie de premier rang avant le début de la procédure. Le 8 avril 2009, le tribunal chargé d'appliquer la *LACC* a rendu une ordonnance modifiée et reformulée (l'« ordonnance initiale modifiée ») autorisant Indalex à emprunter 24,4 millions de dollars américains aux prêteurs DE et à leur octroyer une priorité pour le même montant sur tous les autres créanciers (la « charge DE »). Dans les motifs qu'il a déposés au soutien de l'ordonnance, le juge Morawetz a conclu qu'Indalex n'aurait pas pu trouver de solution qui assurait la continuité de l'exploitation sans ce financement DE. Celui-ci était nécessaire pour financer les activités de l'entreprise jusqu'à sa vente.

[10] The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed $5,000 or more within 10 days of the initial order of April 3. As of April 8, when the motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for

[10] Les participants n'étaient pas parties à la procédure initiale. La suspension initiale avait été accordée *ex parte*. Le juge chargé de l'application de la *LACC* avait ordonné à Indalex de faire signifier une copie de l'ordonnance de suspension à chaque créancier ayant une créance minimale de 5 000 $ dans les 10 jours suivant l'ordonnance initiale du 3 avril. Le 8 avril, lors de l'audition de la motion visant la modification de l'ordonnance initiale, aucun des participants au régime des cadres n'avait reçu signification de cette ordonnance ni de l'avis de motion visant sa modification. Le Syndicat

2013 SCC 6 (CanLII)

service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

a reçu un préavis écourté, mais a décidé de ne pas se présenter. Le juge Morawetz a autorisé Indalex à procéder même si le délai de signification avait été écourté. Les participants ont reçu avis de toutes les procédures subséquentes. Aucun des participants n'a interjeté appel de l'ordonnance initiale modifiée pour contester la charge DE.

[11] On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US$29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

[11] Le 12 juin 2009, Indalex a demandé l'autorisation de porter l'emprunt DE à 29,5 millions de dollars américains. À l'audience, les participants au régime des cadres se sont d'abord opposés à la motion en demandant que leurs droits soient réservés. Après confirmation que la motion avait pour unique but d'augmenter le montant de la charge DE (sans modifier les modalités du prêt), ils ont retiré leur opposition et le tribunal a accueilli la motion.

[12] On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

[12] Le 22 avril 2009, le tribunal a prorogé la suspension et approuvé un processus de mise en vente de l'actif d'Indalex. Les participants ne se sont pas opposés à la demande d'approbation du processus de mise en vente. Conformément au processus approuvé de vente par soumission, le Groupe Indalex a sollicité un vaste éventail d'acheteurs potentiels.

[13] Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

[13] Indalex a reçu une soumission de SAPA Holding AB (« SAPA »). Cette soumission s'élevait à environ 30 millions de dollars américains et SAPA ne prenait pas en charge les déficits de liquidation des régimes de retraite. Le contrôleur estimait la valeur de liquidation de l'actif d'Indalex à 44,7 millions de dollars américains. Indalex a demandé une ordonnance approuvant un processus de soumission pour adjudication sur offres concurrentes et déclarant que la soumission de SAPA était réputée acceptable. Les participants au régime des cadres ont contesté cette demande parce qu'ils s'inquiétaient du fait que le passif du régime de retraite ne serait pas pris en charge. Le 2 juillet 2009, le juge Morawetz a néanmoins rendu une ordonnance approuvant le processus de mise en vente par soumission, en soulignant que les participants au régime des cadres pourraient faire valoir leurs objections au moment de l'homologation de la soumission définitive.

2013 SCC 6 (CanLII)

[14] The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

[14] Le processus de mise en vente par soumission n'a pas permis d'obtenir des soumissions concurrentes. Le 20 juillet 2009, Indalex et Indalex É.-U. ont chacune demandé au tribunal dont elles relevaient d'approuver la vente d'essentiellement tous leurs éléments d'actif aux conditions stipulées dans l'offre de SAPA. Indalex a également demandé l'approbation d'une distribution provisoire du produit de la vente aux prêteurs DE. Les participants ont contesté la motion d'Indalex. Ils ont fait valoir, premièrement, que le produit estimatif d'une liquidation forcée serait supérieur à l'offre de SAPA et, deuxièmement, que leur créance avait priorité sur celles des prêteurs DE, parce que le passif non capitalisé au titre des pensions était protégé par une fiducie réputée en vertu de la *LRR*. Ils ont aussi soutenu qu'Indalex avait manqué à ses obligations fiduciaires en ne s'acquittant pas des obligations qui lui incombaient en qualité d'administrateur des régimes de retraite du début à la fin des procédures en matière d'insolvabilité.

[15] The court dismissed the Plan Members' first objection, holding that there was no evidence supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

[15] Le tribunal a écarté la première objection des participants, estimant qu'aucun élément de preuve n'étayait leur prétention que la liquidation forcée serait plus avantageuse pour les fournisseurs, les clients et les 950 employés. Il a approuvé la vente le 20 juillet 2009. Cette ordonnance donnait instruction au contrôleur de procéder à une distribution aux prêteurs DE. Au sujet de la deuxième objection, toutefois, le juge Campbell a ordonné au contrôleur de retenir un fonds de réserve dont le contrôleur déterminerait lui-même le montant, réservant pour plus tard l'examen de l'argumentation des participants fondée sur leur droit au produit de la vente.

[16] The sale to SAPA closed on July 31, 2009. The Monitor collected $30.9 million in proceeds. It distributed US$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained $6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US$27 million to the DIP lenders. The payment of US$17 million left a US$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee

[16] La vente à SAPA s'est conclue le 31 juillet 2009, et le contrôleur a recueilli 30,9 millions de dollars comme produit de la vente. Il a distribué 17 millions de dollars américains aux prêteurs DE, acquitté certains frais, retenu des fonds pour couvrir diverses dépenses et réservé 6,75 millions de dollars en attendant la décision relative aux droits des participants. À la date de la vente, Indalex devait 27 millions de dollars américains aux prêteurs DE, de sorte qu'une créance de 10 millions de dollars américains subsistait après le versement des

2013 SCC 6 (CanLII)

contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US$10 million.

17 millions. Se prévalant de la garantie consentie dans l'accord de financement DE, les prêteurs DE ont demandé à Indalex É.-U. de payer la différence, ce qu'elle a fait. Comme la garantie prévoyait la subrogation d'Indalex É.-U. aux droits de priorité des prêteurs DE, Indalex É.-U. est devenue créancière de premier rang d'Indalex pour la somme de 10 millions de dollars américains.

[17] Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

[17] Le conseil d'administration d'Indalex a démissionné après la vente de l'actif de la société. Indalex É.-U., qui faisait partie du Groupe Indalex, a repris la gestion d'Indalex, dont l'actif se limitait au produit de la vente détenu par le contrôleur. Une convention unanime d'actionnaires nommant M. Keith Cooper comme gestionnaire des affaires d'Indalex a été signée le 12 août 2009. M. Cooper était un employé de FTI Consulting Inc.

[18] In accordance with the right reserved by the court on July 20, 2009, the Plan Members brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors pursuant to s. 57(4) of the *PBA* and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

[18] Les participants ont exercé le droit que leur avait réservé le tribunal le 20 juillet 2009 et ont présenté des motions, le 28 août 2009, en vue d'obtenir un jugement déclaratoire portant que le produit de la vente était grevé d'une fiducie réputée d'un montant équivalent au passif non capitalisé au titre des pensions. Ils ont soutenu que les par. 57(4) de la *LRR* et 30(7) de la *LSM* leur donnaient préséance sur les créanciers garantis. Indalex a présenté une motion pour faire cession de ses biens en faillite afin de bénéficier de la priorité de rang qu'elle invoquait pour contester les motions des participants.

[19] On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

[19] Le 14 octobre 2009, avant le prononcé du jugement, Indalex É.-U. a transformé l'instance en réorganisation fondée sur le chapitre 11 en instance en liquidation fondée sur le chapitre 7. Le 5 novembre 2009, le surintendant des services financiers (le « surintendant ») a nommé le cabinet d'actuaires Morneau Sobeco, société en commandite (« Morneau »), pour remplacer Indalex comme administrateur des régimes.

[20] On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did

[20] Le 18 février 2010, le juge Campbell a rejeté les motions des participants, concluant que la fiducie réputée ne s'appliquait pas aux déficits de liquidation parce que les paiements afférents n'étaient pas [TRADUCTION] « échus » ou « à échoir » à la date de la liquidation. Selon lui, le régime de

2013 SCC 6 (CanLII)

not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301). The Plan Members appealed the dismissal of their motions.

[21] The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641).

[22] The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

[23] The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165).

retraite des cadres n'étant pas encore liquidé, on ne pouvait parler de déficit de liquidation. Il était donc inutile de statuer sur la motion d'Indalex visant à faire cession de ses biens (2010 ONSC 1114, 79 C.C.P.B. 301). Les participants ont interjeté appel du rejet de leurs motions.

[21] La Cour d'appel de l'Ontario a accueilli les appels des participants, estimant que la fiducie réputée créée au par. 57(4) de la *LRR* s'appliquait à toutes les sommes dues au titre des déficits de liquidation des régimes. Signalant que, selon le sens ordinaire de cette disposition, aucune fiducie réputée ne s'appliquerait au régime des cadres, elle a néanmoins refusé de trancher la question parce que les participants à ce régime pouvaient faire valoir une réclamation contre Indalex pour manquement à son obligation fiduciaire de protéger adéquatement leurs intérêts (2011 ONCA 265, 104 O.R. (3d) 641).

[22] La Cour d'appel a jugé qu'une fiducie par interprétation était une réparation appropriée pour le manquement d'Indalex à ses obligations fiduciaires. Selon elle, cette réparation ne causait pas préjudice aux prêteurs DE et n'avait d'effet que sur Indalex É.-U. Elle a donc imposé une fiducie par interprétation grevant le fonds de réserve au profit des participants. Au sujet de la distribution, elle a aussi jugé que la fiducie réputée avait priorité sur la charge DE parce que la question de la prépondérance fédérale n'avait pas été invoquée lorsque l'ordonnance initiale modifiée avait été rendue et qu'Indalex avait déclaré qu'elle allait se conformer à toutes les exigences d'une fiducie réputée. Elle a conclu que rien au dossier n'indiquait que le fait de ne pas appliquer la doctrine de la prépondérance fédérale compromettrait la capacité de restructuration d'Indalex.

[23] La Cour d'appel a ordonné au contrôleur de combler le déficit de chacun des deux régimes par prélèvement sur le fonds de réserve. Dans sa décision relative à l'adjudication des dépens, elle a également approuvé le paiement des dépens des participants au régime des cadres sur leur caisse de retraite, mais elle a refusé d'ordonner que les dépens du Syndicat soient acquittés sur la caisse de retraite du régime des salariés (2011 ONCA 578, 81 C.B.R. (5th) 165).

2013 SCC 6 (CanLII)

[24] The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

[24] Le contrôleur, ainsi que Sun Indalex, créancière garantie d'Indalex É.-U., et George L. Miller, syndic de faillite d'Indalex É.-U., interjettent tous trois appel de l'ordonnance de la Cour d'appel. Le surintendant et Morneau appuient la position des participants en tant qu'intimés au pourvoi. D'autres intéressés prennent également part aux pourvois devant notre Cour. Le Syndicat se pourvoit en outre contre l'adjudication des dépens, mais je n'aborderai pas cette question, car je partage l'opinion du juge Cromwell à ce sujet.

II. Issues

[25] The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?
2. If so, does the deemed trust supersede the DIP charge?
3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?
4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

II. Les questions en litige

[25] Les pourvois soulèvent quatre questions :

1. La fiducie réputée établie par le par. 57(4) de la *LRR* s'applique-t-elle aux déficits de liquidation?
2. Le cas échéant, cette fiducie réputée a-t-elle préséance sur la charge DE?
3. Indalex avait-elle des obligations fiduciaires envers les participants en ce qui concerne les décisions prises dans le contexte des procédures en matière d'insolvabilité?
4. La Cour d'appel a-t-elle exercé son pouvoir discrétionnaire correctement en imposant une fiducie par interprétation à titre de réparation pour les manquements aux obligations fiduciaires?

III. Analysis

A. *Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Wind-up Deficiencies?*

[26] The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

III. Analyse

A. *La fiducie réputée établie par le par. 57(4) de la LRR s'applique-t-elle aux déficits de liquidation?*

[26] Il faut d'abord déterminer si la fiducie réputée établie au par. 57(4) de la *LRR* s'applique aux déficits de liquidation. Il s'agit d'une question d'interprétation législative qui exige l'examen du texte et du contexte des dispositions pertinentes de la *LRR*. Le paragraphe 57(4) de la *LRR* accorde aux participants à un régime de retraite une protection applicable aux cotisations de leur employeur en cas de liquidation du régime :

2013 SCC 6 (CanLII)

57. . . .

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

[27] The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the protection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

[28] The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions — the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

[29] The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be

57. . . .

(4) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

[27] Selon l'interprétation la plus évidente, toutes les cotisations accumulées, mais non encore dues, lorsqu'un régime est liquidé sont protégées. Ce libellé semble inclure les cotisations qu'un employeur est tenu de verser lorsque la caisse de retraite est déficitaire au moment de la liquidation. Pour contester cette interprétation plutôt simple, qui concorde à la fois avec l'élargissement constant de la protection accordée au fil du temps et avec l'objectif réparateur de cette disposition, on invoque une définition étroite du mot « accumulé ». À mon avis, cet argument ne justifie pas la restriction de la protection accordée aux participants par le législateur ontarien.

[28] La *LRR* énonce les règles de fonctionnement des régimes de retraite contributifs capitalisés à prestations déterminées en Ontario. Pendant toute la durée d'un régime, l'employeur doit verser à la caisse de retraite toutes les cotisations qu'il retient sur la rémunération des employés. Tant que le régime demeure en vigueur, il est en outre tenu à deux types de paiements. L'un se rapporte aux cotisations pour service courant — les cotisations que l'employeur doit verser régulièrement à la caisse de retraite suivant les modalités du régime — et l'autre, au maintien d'une caisse de retraite suffisante pour couvrir le passif au titre des pensions. Le droit des employés au versement des cotisations pendant que le régime est en vigueur est protégé par la fiducie réputée instituée au par. 57(3) de la *LRR*.

[29] La *LRR* établit également un régime complet régissant la liquidation d'un régime de retraite. L'alinéa 75(1)a) oblige l'employeur à « verse[r] » un montant égal au total de tous les « paiements » dus ou accumulés qui n'ont pas été versés dans la caisse de retraite, et l'al. 75(1)b) établit la formule servant à calculer le montant du paiement

2013 SCC 6 (CanLII)

paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the contributions owed when a plan is wound up.

[30] It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

[31] It is readily apparent that the wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

75. (1) Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares

à effectuer pour que la caisse de retraite puisse couvrir la totalité du passif à la liquidation. Dans les six mois suivant la date de prise d'effet de la liquidation, l'administrateur du régime doit déposer un rapport de liquidation faisant état de l'actif et du passif du régime à la date de la liquidation. Si le rapport révèle l'existence d'un déficit actuariel, l'employeur doit effectuer des paiements au titre du déficit de liquidation. Par conséquent, les al. 75(1)a) et b) établissent le montant des cotisations dues lors de la liquidation d'un régime.

[30] Il est bien établi que la fiducie réputée en cas de liquidation s'applique aux cotisations visées à l'al. 75(1)a). La seule question à trancher est de savoir si elle s'applique aussi aux paiements au titre du déficit exigés par l'al. 75(1)b). J'y répondrais par l'affirmative, compte tenu du texte, du contexte et de l'objet de cette disposition.

[31] Il est évident que le par. 57(4) de la *LRR* qui crée la fiducie réputée en cas de liquidation ne comporte aucune limite expresse aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues » et je ne vois rien qui justifie d'exclure les cotisations prévues à l'al. 75(1)b). L'alinéa 75(1)a) prévoit expressément que l'employeur verse « un montant égal au total de tous les paiements » *accumulés*, même s'ils ne sont pas encore dus à la date de la liquidation, tandis que l'al. 75(1)b) parle d'un « montant » calculé à partir de la valeur de l'actif et du passif *accumulés*, lorsque le régime est liquidé. Voici le texte du par. 75(1) :

75. (1) Si un régime de retraite est liquidé, l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le

2013 SCC 6 (CanLII)

that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

[32] Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: ". . . amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

[33] The appellant Sun Indalex argues that since the deficiency is not finally quantified until well after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the $1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to $1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

[32] Puisque le montant des paiements (al. 75(1)a)) et le montant établi en soustrayant l'actif du passif accumulé à la date de la liquidation (al. 75(1)b)) doivent tous les deux être versés à la liquidation à titre de cotisations de l'employeur, ils entrent tous les deux dans le sens ordinaire des mots employés au par. 57(4) de la *LRR* : « . . . montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ». Comme je l'ai mentionné, ce raisonnement est contesté en ce qui concerne l'al. 75(1)b), mais non l'al. 75(1)a).

[33] L'appelante Sun Indalex avance que, puisque le montant définitif du déficit n'est établi que longtemps après la date de prise d'effet de la liquidation, on ne peut parler de passif accumulé relativement à cette obligation de l'employeur. Le contrôleur souligne en outre que les paiements qu'un employeur doit effectuer pour honorer ses obligations à la liquidation peuvent changer au cours des cinq ans sur lesquels ils peuvent s'échelonner aux termes de l'art. 31 du règlement général pris en application de la *LRR*, R.R.O. 1990, règl. 909. Pour illustrer leur argument, ces parties donnent l'exemple de ce qui s'est produit dans le cas du régime des salariés. En 2007-8, Indalex a comblé la majeure partie du déficit du régime des salariés, qui était estimé à 1,6 million de dollars en 2006. Toutefois, à la fin de 2008, la diminution de la valeur de l'actif de la caisse de retraite avait fait remonter le déficit de liquidation à 1,8 million de dollars. Selon cet argument, il ne peut s'agir d'un montant accumulé à la date de la liquidation, parce qu'il ne pouvait pas être établi avec certitude.

2013 SCC 6 (CanLII)

[34] Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete — have accrued — before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

[35] In *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306, Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted — and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* — a debt for example which is *debitum in praesenti solvendum in futuro*. [Emphasis added; pp. 312-13.]

[36] Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely

[34] Contrairement à mon collègue le juge Cromwell, j'estime que cet argument n'est pas convaincant. Je souscris plutôt à l'opinion de la Cour d'appel sur ce point. La fiducie réputée s'applique aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ». Puisque les employés cessent d'accumuler des droits lorsque le régime est liquidé, les droits qui servent au calcul des cotisations ont tous été accumulés avant la date de la liquidation. Par conséquent, le passif correspondant aux obligations de l'employeur existe en entier — est accumulé — avant la liquidation. La différence entre le raisonnement que j'applique et celui du juge Cromwell réside dans le fait que le sien exige que le calcul puisse s'établir avant la date de la liquidation, tandis que je suis d'avis que la date où s'effectue le calcul est sans importance du moment que le passif est évalué à la date de la liquidation. Ni la date à laquelle le passif est *déclaré* ni l'*option* de l'employeur d'étaler ses cotisations comme le permet le règlement ne changent la nature juridique des cotisations.

[35] Dans *Hydro-Electric Power Commission of Ontario c. Albright* (1922), 64 R.C.S. 306, le juge Duff a examiné le sens du mot « *accrued* », l'équivalent anglais du mot « accumulé », pour interpréter la portée d'un covenant et il a tiré la conclusion suivante :

> [TRADUCTION] . . . suivant l'usage établi, le mot « accumulé », appliqué à un droit ou une obligation, signifie simplement entièrement constitué — et il peut avoir ce sens bien que le contexte indique que l'exercice de ce droit entièrement constitué ou l'exécution forcée de cette obligation entièrement constituée ne seront possibles que dans l'avenir — une dette, par exemple, qui est *debitum in praesenti solvendum in futuro*. [Je souligne; p. 312-313.]

[36] Ainsi, une cotisation est « accumulée » lorsque le passif est entièrement constitué, même si le paiement lui-même ne devient exigible que plus tard. Cela signifie en l'espèce que le passif au titre des cotisations à la caisse destinée au paiement des prestations de retraite visées à l'al. 75(1)b) est entièrement constitué lorsque la liquidation

2013 SCC 6 (CanLII)

constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

a lieu, parce qu'aucun droit au titre de la pension ne prend naissance après cette date. Autrement dit, aucun passif ne s'accumule pendant ni après la liquidation. Même la portion des cotisations afférente aux options que les participants peuvent exercer lorsqu'il y a liquidation est « accumulé[e] à la date de la liquidation » parce qu'elle est fondée sur des droits que les employés ont acquis avant la date de la liquidation.

[37] The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

[37] Le fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable (*Canadian Pacific Ltd. c. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.), p. 621). L'emploi du mot « accumulé » ne limite pas le passif aux seuls montants qui peuvent être établis avec précision. On peut donc considérer que le passif « accumulé » englobe les cotisations exigées à l'al. 75(1)b) de la *LRR*.

[38] The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

[38] L'historique législatif étaye ma conclusion que la disposition établissant une fiducie réputée en cas de liquidation s'applique aux cotisations au titre du déficit de liquidation. Le législateur ontarien a systématiquement élargi la protection applicable aux cotisations aux régimes de retraite. Je ne puis donc retenir une interprétation qui ferait régresser la protection accordée aux employés. Mon collègue le juge Cromwell ayant cité les dispositions législatives pertinentes, je ne les reproduirai pas ici.

[39] The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23*a*, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

[39] La loi initiale obligeait seulement l'employeur à effectuer les paiements nécessaires pour établir la solvabilité selon la norme applicable (*The Pension Benefits Act, 1965*, S.O. 1965, ch. 96, par. 22(2)), mais le législateur a par la suite protégé les employés au moyen d'une fiducie réputée grevant les biens de l'employeur d'un montant égal aux sommes retenues en tant que cotisations des employés et aux sommes dues par l'employeur (al. 23*a*, ajouté par *The Pension Benefits Amendment Act, 1973*, S.O. 1973, ch. 113, art. 6). Dans une version subséquente, ce ne furent pas que les cotisations exigibles, mais également celles qui étaient accumulées qui ont été protégées, et le calcul s'en effectuait comme s'il y avait liquidation (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, ch. 80).

2013 SCC 6 (CanLII)

[40] Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the wind-up deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind-up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

[40] Alors que *toutes* les cotisations de l'employeur étaient au départ régies par une seule disposition, le législateur a édicté, en 1980, une disposition distincte imposant expressément à l'employeur une obligation de capitalisation du déficit de liquidation. Il ressortait alors du libellé employé que le montant relatif au déficit à la liquidation était exclu de la protection conférée par la fiducie réputée (*The Pension Benefits Amendment Act, 1980*). En 1983, le législateur a établi une distinction entre la fiducie réputée applicable aux cotisations de l'employeur lorsque le régime est en vigueur et celle applicable à certains paiements en cas de liquidation du régime (al. 23(4)a) et 23(4)b), ajoutés par la *Pension Benefits Amendment Act, 1983*, S.O. 1983, ch. 2, art. 3). Dans cette version, les paiements au titre du déficit de liquidation étaient toujours exclus de la fiducie réputée. En 1987, toutefois, le législateur a modifié encore une fois la protection, et c'est cette version qui régit, pour l'essentiel, la présente espèce. La *Loi de 1987 sur les régimes de retraite*, L.O. 1987, ch. 35, crée toujours une fiducie réputée distincte en cas de liquidation, mais cette fiducie n'exclut plus les paiements au titre du déficit parce que la limitation imposée jusqu'alors concernant les paiements dus ou accumulés pendant l'existence du régime a été abolie. Mes commentaires selon lesquels le libellé des anciennes versions excluait les paiements au titre du déficit de liquidation ne s'appliquent donc pas à la loi de 1987, parce que celle-ci est substantiellement différente.

[41] Whereas it is clear from the 1983 amendments that the deemed trust provided for in s. 23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

[41] Alors qu'il ressort clairement des modifications faites en 1983 que la fiducie réputée créée par l'al. 23(4)b) ne visait que les coûts afférents au service courant et les paiements spéciaux, cela n'est pas aussi clair dans les versions subséquentes de la *LRR*. Pour donner un sens aux modifications apportées en 1987, il faut conclure que leur libellé renvoie à une fiducie réputée couvrant *toutes* les « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

[42] The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions

[42] La responsabilité de l'employeur à la liquidation est maintenant établie dans un article unique qui fait élégamment écho à celui qui crée la fiducie réputée à la liquidation. L'historique législatif montre que la protection, qui couvrait d'abord (1)

2013 SCC 6 (CanLII)

that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

uniquement les cotisations dues, s'est étendue (2) aux montants payables calculés comme s'il y avait liquidation du régime, (3) puis aux montants dus ou accumulés à la liquidation, à l'exclusion des paiements au titre du déficit de liquidation (4) et, enfin, à tous les montants dus ou accumulés à la liquidation.

[43] Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

[43] Selon moi, l'historique législatif mène donc à la conclusion qu'une interprétation étroite qui dissocierait le paiement requis de l'employeur par l'al. 75(1)b) de la *LRR* de celui exigé à l'al. 75(1)a) irait à l'encontre de la tendance du législateur ontarien à offrir une protection de plus en plus étendue. Puisque la disposition régissant les paiements à la liquidation décrit les montants qui sont alors dus, je ne vois aucune raison historique, juridique ou logique de conclure que la disposition établissant une fiducie réputée en cas de liquidation ne les englobe pas tous.

[44] Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.

[44] J'estime donc que le texte et le contexte du par. 57(4) se prêtent facilement à une interprétation qui englobe les paiements au titre du déficit de liquidation, et l'objet de cette disposition me conforte dans cette opinion. La disposition qui crée une fiducie réputée a une vocation réparatrice. Elle vise à protéger les intérêts des participants. Cet objet milite contre l'adoption de la portée limitée que proposent Indalex et certains des intervenants. En présence de priorités concurrentes entre créanciers, cette fin réparatrice favorise une interprétation qui inclut tous les paiements à la liquidation dans la valeur de la fiducie réputée pour que les participants bénéficient d'une vaste protection.

[45] In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

[45] En résumé, le texte, l'historique législatif et l'objet des dispositions pertinentes concordent tous avec l'inclusion du déficit de liquidation dans la protection offerte aux participants à l'égard des cotisations de l'employeur à la liquidation des régimes. Je suis donc d'avis que la Cour d'appel a jugé à bon droit qu'Indalex était réputée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés dont la liquidation avait pris effet le 31 décembre 2006.

[46] The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that

[46] Il n'en va pas de même pour le régime des cadres. Contrairement au par. 57(3), selon lequel

2013 SCC 6 (CanLII)

the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.

la fiducie réputée protégeant les cotisations de l'employeur existe pendant que le régime est en vigueur, le par. 57(4) prévoit que la fiducie réputée en cas de liquidation ne prend naissance qu'à la liquidation du régime. C'est ce que le législateur ontarien a décidé, et je n'interviendrai pas dans cette décision. Les droits résultant de la fiducie réputée ne prennent donc naissance que lorsque se réalise la condition préalable, c'est-à-dire lors de la liquidation du régime, et cela, même s'il est certain que le régime sera liquidé plus tard. Au moment de la vente, le régime des cadres était en voie de liquidation, mais non liquidé. La disposition relative à la fiducie réputée ne s'applique donc pas aux cotisations de l'employeur au titre du déficit de liquidation de ce régime.

[47] The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d) *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

[47] La Cour d'appel, ne s'est pas prononcée sur l'existence d'une fiducie réputée à l'égard du régime des cadres, affirmant qu'il n'était pas nécessaire de trancher cette question. Elle a cependant exprimé des réserves au sujet d'un raisonnement qui empêcherait les participants au régime des cadres de bénéficier d'une fiducie réputée, ce qui ferait en sorte qu'une société placée sous la protection de la *LACC* pourrait éviter la priorité établie par la *LRR* à l'égard de la fiducie réputée en s'abstenant simplement de liquider un régime de retraite sous-capitalisé. Indalex aurait ainsi pu tabler sur sa propre inaction pour échapper aux conséquences d'une liquidation. Je ne suis pas convaincue que la crainte exprimée par la Cour d'appel ait une incidence sur la question de savoir si une fiducie réputée existe, et je doute que le simple refus de liquider un régime de retraite puisse permettre à un employeur d'échapper aux conséquences d'une telle sûreté. Le surintendant peut intervenir de diverses façons, notamment en ordonnant la liquidation du régime en application du par. 69(1) de la *LRR* dans diverses circonstances (voir l'al. 69(1)d) de la *LRR*). Le surintendant n'a pas choisi, en l'espèce, d'ordonner la liquidation.

B. *Does the Deemed Trust Supersede the DIP Charge?*

B. *La fiducie réputée a-t-elle préséance sur la charge DE?*

[48] The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a

[48] La conclusion qu'une fiducie réputée protège les droits des participants au régime des salariés à l'égard de toutes les cotisations que l'employeur

2013 SCC 6 (CanLII)

deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

30. . . .

(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

[49] The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

[50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

doit verser au régime de retraite des salariés à la liquidation ne signifie pas qu'une partie des sommes retenues par le contrôleur sur le produit de la vente doit être versée à la caisse de retraite des salariés. Ce sera le cas seulement si la priorité de rang accordée par la province aux participants au régime des salariés, au par. 30(7) de la *LSM*, fait en sorte que leur réclamation a préséance sur la charge DE. Le paragraphe 30(7) prévoit ce qui suit :

30. . . .

(7) La sûreté sur un compte ou un stock et le produit de ceux-ci est subordonnée à l'intérêt du bénéficiaire d'une fiducie réputée telle aux termes de la *Loi sur les normes d'emploi* ou de la *Loi sur les régimes de retraite*.

Le paragraphe 30(7) a pour effet de permettre aux participants au régime des salariés de recouvrer leur créance sur le fonds de réserve, dans la mesure où il se rapporte à un compte ou un stock ou au produit de ceux-ci en Ontario, par préséance sur tous les autres créanciers garantis.

[49] Les appelants avancent que toute fiducie réputée d'origine provinciale est subordonnée à la charge DE autorisée par l'ordonnance fondée sur la *LACC*. Ils invoquent deux arguments principaux à cet égard. Premièrement, la fiducie réputée créée par la *LRR* ne s'appliquerait pas dans une instance relevant de la *LACC* parce que les priorités applicables sont celles qui sont établies par le régime fédéral en matière d'insolvabilité et que les fiducies réputées d'origine provinciale n'en font pas partie. Deuxièmement, ils plaident que, selon la doctrine de la prépondérance fédérale, la charge DE a préséance sur la fiducie réputée créée par la *LRR*.

[50] Le premier argument des appelants élargirait la portée de l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, de façon que les priorités fédérales en matière de faillite s'appliquent aux instances fondées sur la *LACC*, ce qui ferait que les créances seraient traitées de façon identique sous le régime de la *LACC* et de la *LFI*. Dans *Century Services*, la Cour a indiqué qu'il existe des points de convergence entre les deux régimes :

2013 SCC 6 (CanLII)

Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. [par. 23]

[51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

[51] Pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère des droits analogues aux créanciers. Il ne s'ensuit toutefois pas pour autant que les tribunaux peuvent à leur gré inclure par interprétation dans la *LACC* les priorités applicables en matière de faillite. Les priorités dont bénéficient les créanciers sont définies par la législation provinciale, à moins que ces droits soient écartés par une loi fédérale. Le législateur fédéral n'a pas expressément édicté que toutes les priorités établies en matière de faillite s'appliquent aux instances relevant de la *LACC* ou aux propositions régies par la *LFI*. Bien que les créanciers d'une société tentant de se réorganiser puissent, dans leurs négociations, tenir compte des droits qu'ils pourraient exercer en cas de faillite, ces droits ne constituent rien de plus qu'une considération tant que la faillite n'est pas survenue. Au début des procédures en matière d'insolvabilité, Indalex a choisi un processus régi par la *LACC*, ne laissant aucun doute sur le fait que, bien qu'elle cherchât à protéger les emplois, elle ne demeurerait pas leur employeur. Nous ne sommes pas en présence d'un cas où l'échec d'un arrangement a entraîné la liquidation d'une société sous le régime de la *LFI*. Indalex a atteint l'objectif qu'elle poursuivait. Elle a choisi de vendre son actif sous le régime de la *LACC*, et non sous celui de la *LFI*.

[52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

[52] La fiducie réputée créée par la *LRR* continue de s'appliquer dans les instances relevant de la *LACC*, sous réserve de la doctrine de la prépondérance fédérale (*Crystalline Investments Ltd. c. Domgroup Ltd.*, 2004 CSC 3, [2004] 1 R.C.S. 60, par. 43). La Cour d'appel a donc jugé à bon droit que, à l'issue d'un processus de liquidation relevant de la *LACC*, les priorités peuvent être établies selon le régime prévu dans la *LSM*, plutôt que selon le régime fédéral établi dans la *LFI*.

2013 SCC 6 (CanLII)

[53] The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

[53] Selon le deuxième argument des appelants, une ordonnance accordant priorité aux participants en raison de la fiducie réputée créée par le législateur ontarien serait inconstitutionnelle, parce qu'elle entrerait en conflit avec l'ordonnance fondée sur la *LACC* qui donne priorité à la charge DE. La doctrine de la prépondérance fédérale résoudrait ce conflit, en rendant la loi provinciale inopérante dans la mesure de son incompatibilité avec la loi fédérale.

[54] There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

[54] Pour statuer sur l'applicabilité de la doctrine de la prépondérance fédérale dans le présent contexte, il faut d'abord trancher une question préliminaire. Cette question découle de la conclusion de la Cour d'appel selon laquelle, bien que le tribunal fût habilité à autoriser une charge DE ayant priorité de rang sur la fiducie réputée, l'ordonnance du tribunal en l'espèce n'avait pas eu cet effet parce que la doctrine de la prépondérance fédérale n'avait pas été invoquée. Il s'ensuivait que la priorité de rang de la fiducie réputée sur les créanciers garantis établie au par. 30(7) de la *LSM* demeurait applicable et que la créance des participants avait préséance sur celle des prêteurs DE découlant de l'ordonnance rendue sous le régime de la *LACC*.

[55] With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 32 and 69). Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

[55] Avec égards, je ne puis souscrire à cette conception de la doctrine de la prépondérance fédérale. Cette doctrine résout les conflits d'application entre des lois provinciales et fédérales validement adoptées qui empiètent l'une sur l'autre (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 32 et 69). La prépondérance est une question de droit, si bien que, sous réserve de l'application des règles régissant l'admissibilité de nouveaux éléments de preuve, elle peut être soulevée même si elle n'a pas été invoquée dans une procédure initiale.

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a

[56] La partie qui invoque la prépondérance fédérale doit « démontrer une incompatibilité réelle entre les législations provinciale et fédérale, en établissant, soit qu'il est impossible de se conformer aux deux législations, soit que l'application de la loi provinciale empêcherait la réalisation du but de la législation fédérale » (*Banque canadienne de l'Ouest*, par. 75). Notre Cour a déjà appliqué la doctrine de la prépondérance au domaine de la

2013 SCC 6 (CanLII)

provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

faillite et de l'insolvabilité, et elle a conclu que des mesures législatives provinciales, comme la création d'une fiducie réputée, ne peuvent porter atteinte à des priorités établies par le législateur fédéral (*Husky Oil*).

[57] None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

[58] In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;

[57] Ni la validité de la disposition fédérale habilitant le tribunal chargé d'appliquer la *LACC* à rendre une ordonnance autorisant une charge DE, ni celle de la disposition provinciale créant la priorité de rang de la fiducie réputée ne sont contestées. Toutefois, lorsqu'elle examine la validité de l'atteinte portée à une priorité d'origine provinciale par le tribunal chargé d'appliquer la *LACC* dans l'exercice de son pouvoir discrétionnaire d'évaluer une réclamation, la cour siégeant en révision ne doit pas perdre de vue la règle d'interprétation formulée dans *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307 (p. 356), et reproduite dans *Banque canadienne de l'Ouest* (par. 75) :

> Chaque fois qu'on peut légitimement interpréter une loi fédérale de manière qu'elle n'entre pas en conflit avec une loi provinciale, il faut appliquer cette interprétation de préférence à toute autre qui entraînerait un conflit.

[58] En l'espèce, le juge qui a autorisé la charge DE sous le régime de la *LACC* n'a pas pris en compte le fait que les participants au régime des salariés avaient une créance protégée par une fiducie réputée, et il n'a pas non plus mentionné expressément que les créanciers ordinaires, tels les participants au régime des cadres, n'avaient pas reçu avis de la motion en autorisation du prêt DE. Il a toutefois examiné des facteurs se rapportant à la fin réparatrice de la *LACC* et conclu qu'Indalex avait effectivement démontré que la réalisation des objets de la *LACC* serait compromise en l'absence de la charge DE. Je crois utile de citer les motifs qu'il a exprimés à l'appui de sa décision d'autoriser la charge DE le 17 avril 2009 ((2009), 52 C.B.R. (5th) 61) :

> [TRADUCTION]
>
> a) les requérantes ont besoin de fonds supplémentaires pour soutenir l'exploitation pendant leur période de restructuration sur la base de la continuité;

2013 SCC 6 (CanLII)

(b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;

(c) there is no other alternative available to the Applicants for a going concern solution;

(d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;

(e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order . . . ; and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the

b) la marge de manœuvre que le financement DE procurerait aux requérantes aurait l'avantage de leur permettre de trouver une solution préservant la continuité de leur exploitation;

c) les requérantes ne disposent d'aucune autre solution permettant la continuité de l'exploitation;

d) vu le degré d'intégration de l'exploitation d'Indalex Canada et d'Indalex É.-U., une solution indépendante est irréaliste;

e) vu les biens fournis en garantie par Indalex É.-U., le contrôleur juge peu probable qu'il faille réaliser la garantie postérieure au début de l'instance consentie à l'égard des avances supplémentaires aux É.-U. et il est convaincu que les avantages pour les intéressés dépassent de beaucoup le risque associé à cet aspect de la garantie;

f) les avantages du financement DE pour les intéressés et les créanciers l'emportent sur tout préjudice que pourrait causer aux créanciers non garantis l'octroi d'un financement garanti par une superpriorité grevant l'actif des requérantes;

g) l'avocat du contrôleur a examiné la garantie antérieure au début de l'instance, et il appert que la garantie postérieure au début de l'instance ne placera pas les créanciers non garantis des débiteurs canadiens dans une situation pire que celle où ils se trouvaient avant l'introduction de l'instance fondée sur la *LACC*, en raison des restrictions applicables à la garantie canadienne établies dans le projet d'ordonnance initiale modifiée et reformulée . . .

h) la prépondérance des inconvénients favorise l'approbation du financement DE. [par. 9]

[59] Étant donné qu'il n'existait aucune autre solution pour préserver la continuité de l'exploitation, il est difficile d'accepter l'insinuation sans nuance de la Cour d'appel que les prêteurs DE auraient accepté que leur réclamation soit subordonnée à celles fondées sur la fiducie réputée. Rien dans la preuve présentée n'accrédite un tel scénario. Non seulement les conclusions de fait du juge chargé d'appliquer la *LACC* le contredisent, mais il a été démontré maintes et maintes fois que [TRADUCTION] « la priorité accordée au financement DE constitue un élément clé de la capacité du débiteur de tenter de conclure un arrangement » (J. P. Sarra, *Rescue! The Companies' Creditors*

2013 SCC 6 (CanLII)

lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906, at paras. 7-8).

Arrangement Act (2007), p. 97). La dure réalité est que l'octroi de prêts est régi par les impératifs commerciaux des prêteurs, et non par les intérêts des participants ou par les considérations de politique générale qui ont incité les législateurs provinciaux à protéger les bénéficiaires de caisses de retraite. Les motifs exposés par le juge Morawetz lorsque, le 12 juin 2009, les participants au régime des cadres ont demandé pour la première fois que leurs droits soient réservés sont révélateurs. Selon lui, toute incertitude quant à savoir si les prêteurs refuseraient de consentir des avances ou s'ils auraient priorité dans le cas où des avances seraient consenties [TRADUCTION] « n'améliorerait pas la situation ». Il a conclu qu'en l'absence de solution de rechange la réparation demandée était « nécessaire et appropriée » (2009 CanLII 37906, par. 7-8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

[60] En l'occurrence, le respect du droit provincial implique nécessairement le non-respect de l'ordonnance rendue en vertu du droit fédéral. D'un côté, le par. 30(7) de la *LSM* exige qu'une partie du produit de la vente lié aux biens décrits dans la loi provinciale soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis. D'un autre côté, l'ordonnance initiale modifiée accorde à la charge DE priorité sur [TRADUCTION] « toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre » (par. 45). Accorder priorité aux prêteurs DE relègue à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

C. *Did Indalex Have Fiduciary Obligations to the Plan Members?*

C. *Indalex avait-elle des obligations fiduciaires envers les participants?*

[61] The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve

[61] Le fait que la charge DE ait préséance sur la fiducie réputée ou que les intérêts des participants au régime des cadres ne soient pas protégés par la fiducie réputée ne signifient pas que les participants n'ont pas le droit de recevoir un montant prélevé

2013 SCC 6 (CanLII)

fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

sur le fonds de réserve. Il faut encore examiner s'il est possible et s'il y a lieu d'imposer une réparation en equity — pouvant avoir préséance sur toutes les priorités — pour manquement par Indalex à une obligation fiduciaire.

[62] The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

[62] La première étape de l'analyse relative à une obligation fiduciaire consiste à déterminer si de telles obligations existent et dans quel contexte elles s'appliquent. La Cour a reconnu que, dans certaines circonstances, l'administrateur d'un régime de retraite a des obligations fiduciaires envers les participants en vertu tant de la common law que de la législation (*Burke c. Cie de la Baie d'Hudson*, 2010 CSC 34, [2010] 2 R.C.S. 273, par. 41). Il est clair que la relation entre les participants et Indalex, en sa qualité d'administrateur des régimes, présente les caractéristiques d'une relation fiduciaire. Ni Sun Indalex ni le contrôleur ne le contestent.

[63] However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator — when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

[63] Sun Indalex et le contrôleur font cependant valoir que l'employeur n'est tenu à une obligation fiduciaire que lorsqu'il agit en qualité d'administrateur des régimes — lorsqu'il porte son « chapeau » d'administrateur des régimes. Hors du contexte de l'administration des régimes, lorsque le conseil d'administration prend des décisions dans l'intérêt supérieur de la société, il porte uniquement son « chapeau » de gestionnaire de la société. Selon cette optique, les décisions de l'employeur concernant la gestion de l'entreprise ne sont pas assujetties aux obligations fiduciaires de la société envers les participants à son régime de retraite et, par conséquent, ne peuvent entrer en conflit avec les intérêts des participants. Je ne puis accepter cette interprétation lorsqu'il s'agit de déterminer la portée des obligations fiduciaires qui incombent à un employeur en sa qualité d'administrateur d'un régime de retraite.

[64] Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator

[64] Seules peuvent administrer un régime de retraite les personnes ou entités qui y sont autorisées par la *LRR* (par. 1(1) et al. 8(1)a)). L'employeur fait partie de ces personnes ou entités. L'employeur constitué en société qui décide d'agir en qualité d'administrateur d'un régime accepte les obligations fiduciaires inhérentes à cette fonction. Puisque les administrateurs d'une société ont aussi une

2013 SCC 6 (CanLII)

of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

obligation fiduciaire envers la société, le fait que l'employeur puisse agir en qualité d'administrateur d'un régime de retraite signifie que l'al. 8(1)a) de la *LRR* repose sur la prémisse que les décisions de gestion de l'entreprise prises par les administrateurs n'engendreront pas toujours un conflit avec les obligations de la société envers les participants au régime de retraite. L'employeur doit toutefois être prêt à résoudre les conflits lorsqu'ils surgissent. Une procédure de réorganisation impose inévitablement un poids à un débiteur, mais ce fardeau ne libère pas l'employeur qui agit en qualité d'administrateur d'un régime de retraite de ses obligations fiduciaires.

[65] Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

[65] Le paragraphe 22(4) de la *LRR* interdit expressément à l'administrateur d'un régime de permettre que son intérêt entre en conflit avec ses obligations à l'égard du régime de retraite. Par conséquent, l'employeur dont le propre intérêt ne coïncide pas avec celui des participants au régime doit se demander si cette divergence d'intérêts peut susciter un conflit et, le cas échéant, ce qu'il faut faire pour le résoudre. Lorsqu'il y a effectivement conflit, la métaphore des deux « chapeaux » n'est selon moi d'aucun secours. La solution ne consiste pas à déterminer si une décision peut être classifiée comme se rattachant à la gestion de la société ou à l'administration du régime de retraite. L'employeur peut très bien prendre une décision judicieuse concernant la gestion de la société et, néanmoins, porter préjudice aux intérêts des participants au régime. L'employeur qui administre un régime de retraite n'est pas autorisé à négliger ses obligations fiduciaires envers les participants au régime et à favoriser les intérêts concurrents de la société sous prétexte qu'il porte le « chapeau » de dirigeant de la société. Ce sont les conséquences d'une décision, et non sa nature qui doivent être prises en compte.

[66] When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or

[66] Lorsque les intérêts de la société que l'employeur tente de servir se heurtent à ceux que l'employeur a le devoir de protéger en qualité d'administrateur du régime, il faut trouver une façon de veiller sur les intérêts des participants. Cela peut vouloir dire que la société les tiendra informés, qu'elle trouvera un administrateur substitut pour le régime, qu'elle nommera un avocat

2013 SCC 6 (CanLII)

finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

pour représenter les participants ou qu'elle résoudra le conflit par un autre moyen. La solution doit être adaptée au problème, et une solution donnée ne vaudra pas nécessairement pour tous les cas.

[67] In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

[67] En l'espèce, il y avait bien conflit entre les obligations fiduciaires qui incombaient à Indalex en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Indalex avait certaines responsabilités en sa qualité d'administrateur des régimes. Par exemple, le par. 56(1) de la *LRR* l'obligeait à veiller à ce que les cotisations soient payées à leur date d'exigibilité et, si elles ne l'étaient pas, le par. 56(2) exigeait qu'elle en avise le surintendant. Il incombait également à Indalex, aux termes de l'art. 59, d'introduire une instance devant un tribunal compétent pour obtenir le paiement des cotisations dues, mais impayées. Indalex, en tant qu'employeur, a acquitté toutes les cotisations dues. Son insolvabilité compromettait toutefois le paiement des cotisations accumulées à la date de la liquidation. En cas d'insolvabilité, la créance de l'administrateur d'un régime à l'égard des cotisations accumulées constitue une réclamation prouvable.

[68] In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4) *PBA*).

[68] Dans le contexte de la présente affaire, le fait qu'Indalex pouvait, en sa qualité d'administrateur des régimes de retraite, avoir à se réclamer à elle-même les cotisations accumulées l'amènerait à devoir adopter simultanément des positions opposées quant à savoir si des cotisations s'étaient accumulées à la date de la liquidation et si les déficits de capitalisation étaient protégés par une fiducie réputée. Cet exemple démontre qu'il existait manifestement un conflit entre les intérêts d'Indalex et ceux des participants. Indalex aurait dû prendre des mesures pour assurer la protection des intérêts des participants dès qu'elle a constaté, ou qu'elle aurait dû constater, l'existence d'un conflit potentiel. Elle ne l'a pas fait. Elle a, au contraire, contesté la position défendue par les participants. Elle a donc, à tout le moins, manqué à son obligation d'éviter les conflits d'intérêts (par. 22(4) *LRR*).

[69] Since the Plan Members seek an equitable remedy, it is important to identify the point at

[69] Comme les participants demandent une réparation en equity, il importe d'établir à quel moment

2013 SCC 6 (CanLII)

which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

Indalex aurait dû prendre des mesures pour veiller à ce que leurs intérêts soient protégés. Soulignons au préalable que l'analyse d'un conflit d'intérêts doit s'appuyer sur un contexte factuel et qu'il n'est ni nécessaire ni utile de tenter de décrire toutes les situations dans lesquelles un conflit est susceptible de surgir.

[70] As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

[70] L'insolvabilité, comme je l'ai déjà mentionné, met en péril les cotisations de l'employeur. Cela ne signifie pas pour autant que la seule décision d'engager une procédure en matière d'insolvabilité constitue un manquement à une obligation fiduciaire. Le président d'Indalex à l'époque, M. Timothy R. J. Stubbs, a expliqué pourquoi une procédure en matière d'insolvabilité avait été engagée, le 3 avril 2009, dans une situation d'urgence. La dette d'Indalex envers son prêteur était en souffrance, la société s'exposait à des poursuites pour factures impayées, elle avait reçu un avis de résiliation de son assureur qui prenait effet le 6 avril et ses fournisseurs ne lui faisaient plus crédit. Indalex devait donc agir de toute urgence, avant qu'un créancier n'entame une procédure de mise en faillite, ce qui aurait compromis la poursuite de l'exploitation de l'entreprise et le maintien des emplois. Plusieurs raisons m'amènent à conclure que la suspension demandée en l'espèce n'a pas en elle-même placé Indalex en conflit d'intérêts.

[71] First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the

[71] Premièrement, la suspension ne fait que figer les droits des parties. La plupart du temps, elle s'obtient *ex parte*. C'est notamment pour éviter que les créanciers se ruent devant les tribunaux pour tenter d'obtenir des avantages que les procédures en matière d'insolvabilité ne leur procureraient pas qu'on s'abstient de donner avis de la motion initiale en suspension. Il semble plus équitable d'appliquer un processus unique au plus grand nombre possible de créanciers. Dans ce contexte, les participants sont sur le même pied que les autres créanciers, et ils ne bénéficient d'aucun droit spécial de recevoir un avis. Deuxièmement, l'une des conclusions de l'ordonnance demandée par Indalex exigeait que, sous réserve de quelques exceptions, tous les créanciers reçoivent signification de l'ordonnance dans un délai de 10 jours. L'avis permettait à tout intéressé de demander une modification de l'ordonnance.

2013 SCC 6 (CanLII)

merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

Troisièmement, Indalex était autorisée à verser toutes les prestations de retraite. Même si l'ordonnance excluait les paiements spéciaux de solvabilité, elle ne réglait pas les droits concurrents des créanciers, et la suspension permettait aux participants de présenter leurs arguments au sujet de la fiducie réputée, alors qu'ils en auraient tout simplement perdu le bénéfice dans le contexte d'une faillite, qui était la solution de rechange.

[72] Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

[72] Bien que la suspension en elle-même n'ait pas placé Indalex en situation de conflit d'intérêts, les procédures qui ont suivi ont eu des conséquences négatives. Le 8 avril 2009, Indalex a déposé une motion en modification et reformulation de l'ordonnance initiale pour demander un financement DE. Cette motion avait été prévue. M. Stubbs avait mentionné dans son affidavit à l'appui de la demande d'ordonnance initiale que les prêteurs avaient consenti au financement, mais qu'Indalex devrait être autorisée à obtenir le financement pour poursuivre ses activités. Toutefois, le 8 avril, l'ordonnance initiale n'avait pas encore été signifiée aux participants. Un court préavis avait été donné au Syndicat, plutôt qu'à chacun des participants, mais le Syndicat n'a pas comparu. Les participants n'étaient tout simplement pas représentés lors de l'examen de la motion en modification de l'ordonnance initiale de suspension et en autorisation d'accorder la charge DE.

[73] In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty

[73] En demandant au tribunal d'autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d'appliquer la *LACC* de faire échec à la priorité dont bénéficiaient les participants. Il s'agit d'un cas où les administrateurs d'Indalex ont permis que les intérêts de la société l'emportent sur ceux des participants. Ce faisant, ils ont peut-être rempli leurs obligations fiduciaires envers Indalex, mais ils ont fait en sorte qu'Indalex a manqué à ses obligations en tant qu'administrateur des régimes. L'intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d'insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l'administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l'occurrence, ce devoir de l'administrateur des régimes impliquait, plus

2013 SCC 6 (CanLII)

meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

particulièrement, qu'il donne à tout le moins aux participants la possibilité d'exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l'encontre des intérêts des participants. Étant donné qu'Indalex soutenait la motion visant l'octroi d'une priorité à son prêteur, elle ne pouvait pas simultanément défendre l'existence d'une priorité fondée sur la fiducie réputée.

[74] The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

[74] La Cour d'appel a constaté d'autres manquements. Je partage l'opinion du juge Cromwell qu'aucune des procédures subséquentes n'a porté atteinte aux droits des participants. La suite des événements, notamment la deuxième motion en approbation du financement DE et le processus de vente, était prévisible et, à cet égard, typique des réorganisations. Dans tous les cas, des avis ont été donnés. Les participants ont été représentés par des avocats compétents. Fait plus important, le tribunal a ordonné que des fonds soient réservés et qu'une audience soit tenue pour que les questions en litige soient pleinement débattues.

[75] The Monitor and George L. Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order.

[75] Le contrôleur et George L. Miller, le syndic de faillite d'Indalex É.-U., soutiennent que les participants auraient dû interjeter appel de l'ordonnance initiale modifiée autorisant la charge DE et qu'ils ne devaient pas être admis à prétendre plus tard que leur créance avait priorité sur celle des prêteurs DE. Ils plaident que la règle interdisant les contestations indirectes empêche les participants de contester l'ordonnance autorisant le financement DE. Cet argument n'est pas convaincant. Les participants n'ont pas reçu avis de la motion demandant au tribunal d'autoriser le financement DE. L'avocat des participants au régime des cadres a défendu leur position dès qu'il a pu le faire et l'a réitérée chaque fois qu'il en a eu l'occasion. À l'audition de la motion visant l'augmentation du prêt DE, il n'a retiré leur opposition que lorsqu'on lui a dit que son seul objet était d'augmenter le montant du prêt autorisé. Le juge chargé d'appliquer la *LACC* a fixé une date d'audience expressément pour la présentation des arguments qu'Indalex aurait pu faire valoir, en qualité d'administrateur des régimes, lorsqu'elle a demandé la modification de l'ordonnance initiale.

2013 SCC 6 (CanLII)

It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

La règle interdisant les contestations indirectes ne peut donc être invoquée maintenant pour empêcher les participants de défendre leurs intérêts.

D. *Would an Equitable Remedy Be Appropriate in the Circumstances?*

D. *Y a-t-il lieu d'accorder une réparation en equity en l'espèce?*

[76] The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

[76] La définition d'un « créancier garanti » à l'art. 2 de la *LACC* inclut la fiducie relative aux biens du débiteur. L'ordonnance initiale modifiée donne à la créance des prêteurs DE priorité sur toute fiducie [TRADUCTION] « d'origine législative ou autre » (par. 45). Indalex É.-U. a été subrogée aux prêteurs DE en conséquence de la garantie consentie dans la convention de prêt DE.

[77] Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

[77] L'avocat des participants au régime des cadres soutient que, selon le principe de la subordination reconnue en equity, la créance d'Indalex É.-U. fondée sur la subrogation est subordonnée à celle des participants. Dans *Société d'assurance-dépôt du Canada c. Banque Commerciale du Canada*, [1992] 3 R.C.S. 558, notre Cour a examiné le principe de la subordination reconnue en equity. Elle ne l'a toutefois pas entériné, reportant l'examen de cette question à un autre moment (p. 609). Je n'ai pas non plus besoin de l'entériner ici. Il suffit de mentionner que la preuve ne révèle aucune inconduite ni injustice de la part des prêteurs, et qu'aucune partie ne conteste la validité du paiement, par Indalex É.-U., des 10 millions de dollars américains manquants.

[78] This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

[78] Reste donc la fiducie par interprétation imposée par la Cour d'appel. Il est bien établi en droit qu'une réparation de la nature d'un droit de propriété n'est généralement accordée qu'à l'égard d'un bien ayant un lien direct avec un acte fautif ou d'un bien qui peut être rattaché à un tel bien. Je partage l'avis de mon collègue le juge Cromwell que cette condition n'est pas remplie en l'espèce et je souscris à ses motifs sur ce point.

[79] Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held

[79] En outre, je considère qu'il était déraisonnable pour la Cour d'appel de modifier l'ordre de priorité. Le manquement à l'obligation fiduciaire constaté en l'espèce consiste essentiellement en l'absence d'avis. Puisque les participants ont été autorisés à présenter leurs arguments lors d'une

2013 SCC 6 (CanLII)

to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

[80] It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

[81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

audience spécialement tenue pour statuer sur leurs droits, le tribunal chargé d'appliquer la *LACC* était pleinement en mesure d'évaluer la position des parties.

[80] De plus, je vois difficilement comment les participants auraient pu améliorer leur position même s'ils avaient reçu avis de la motion en modification de l'ordonnance initiale. Le juge chargé d'appliquer la *LACC* a clairement indiqué que la seule solution permettant la vente de l'actif en tant qu'entreprise en exploitation était le financement DE — et la logique appuie cette conclusion. Les participants n'ont présenté aucune preuve contraire. Leur argumentation est uniquement fondée sur des conjectures. Ils invoquent d'autres affaires où des participants à des régimes ont reçu un avis et ont pu défendre pleinement leur position. Or, dans aucun des exemples qu'ils citent, les intéressés n'ont pu obtenir d'avantages additionnels. Qui plus est, les participants en l'espèce ont pu faire valoir pleinement leur position. Par conséquent, bien qu'Indalex ait manqué à son obligation fiduciaire d'informer les participants de la motion en modification de l'ordonnance initiale, leur créance demeure subordonnée à celle d'Indalex É.-U.

IV. Conclusion

[81] Il existe des raisons valables d'accorder une protection spéciale aux participants à un régime de retraite lors de procédures en matière d'insolvabilité. Le législateur a envisagé la possibilité de leur accorder cette protection lorsqu'il a édicté les modifications les plus récentes à la *LACC*, mais il a décidé de s'en abstenir (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)*, L.C. 2007, ch. 36, entrée en vigueur le 18 septembre 2009, TR/2009-68; voir aussi le projet de loi C-501, *Loi modifiant la Loi sur la faillite et l'insolvabilité et d'autres lois (protection des prestations)*, 3e sess., 40e lég., 24 mars 2010 (modifié par la suite par le Comité permanent de l'industrie, des sciences et de la technologie, 1er mars 2011)). Un rapport du Comité sénatorial permanent des banques et du commerce a expliqué ainsi le choix fait par le législateur :

2013 SCC 6 (CanLII)

Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency – at its essence – is characterized by insufficient assets to satisfy everyone, and choices must be made.

The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

(*Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

[82] In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

[83] In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

[84] I would therefore allow the main appeals without costs in this Court, set aside the orders

Conscients de la vulnérabilité des actuels retraités, nous n'estimons toutefois pas qu'il faudrait modifier pour le moment les dispositions de la LFI concernant les créances liées à des retraites. Actuellement les retraités peuvent recevoir des prestations des Régimes de pensions du Canada et de rentes du Québec, de la Sécurité de la vieillesse et du Supplément de revenu garanti et disposent souvent d'économies personnelles et de REER pouvant leur assurer un revenu à la retraite. Il faut trouver un juste équilibre entre, d'une part, le souhait exprimé par certains de nos témoins de mieux protéger les retraités et les actuels cotisants à un régime de retraite professionnel et, d'autre part, les intérêts des autres. Nous le répétons, l'insolvabilité se caractérise de par sa nature même par des actifs insuffisants pour répondre aux besoins de chacun, et il faut faire des choix.

Le Comité estime que, si l'on accordait la protection qu'ont demandée certains témoins, cela serait tellement injuste pour les autres intervenants qu'il ne peut le recommander. Par exemple, nous estimons qu'une superpriorité ou un fonds pourraient indûment réduire les fonds à répartir entre les créanciers. La disponibilité et le coût du crédit pourraient être touchés, de même que, par ricochet, tous les demandeurs de crédit au Canada.

(*Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2003), p. 109-110; voir aussi p. 98.)

[82] Dans une procédure en matière d'insolvabilité, le tribunal chargé d'appliquer la *LACC* doit prendre en compte les obligations fiduciaires de l'employeur envers les participants en sa qualité d'administrateur de leurs régimes de retraite. Il doit accorder une réparation lorsque cette mesure est indiquée. Cependant, le tribunal ne doit pas utiliser l'equity pour accomplir ce qu'il aurait souhaité que le législateur fît.

[83] Les participants ayant obtenu gain de cause sur les questions de la fiducie réputée et des obligations fiduciaires, je suis d'avis de ne les condamner aux dépens ni devant la Cour d'appel, ni devant notre Cour.

[84] Je suis donc d'avis d'accueillir les pourvois principaux sans dépens devant notre Cour, d'annuler

2013 SCC 6 (CanLII)

made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

CROMWELL J. —

I. Introduction

[85] When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

[86] Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of

les ordonnances rendues par la Cour d'appel, à l'exception de celles figurant aux par. 9 et 10 du jugement de la Cour d'appel concernant l'appel des anciens cadres, et de rétablir les ordonnances du juge Campbell datées du 18 février 2010. Je suis d'avis de rejeter sans dépens le pourvoi du Syndicat des Métallos sur la question des dépens.

Version française des motifs de la juge en chef McLachlin et des juges Rothstein et Cromwell rendus par

LE JUGE CROMWELL —

I. Introduction

[85] L'insolvabilité d'une entreprise met en péril de nombreux intérêts. Le créancier pourrait ne pas recouvrer sont dû, l'investisseur, perdre la somme investie et l'employé, se retrouver sans emploi. Lorsque l'entreprise est le promoteur du régime de retraite de ses employés, les prestations promises par le régime ne sont pas à l'abri du risque couru. Les faits à l'origine des présents pourvois illustrent la concrétisation de ce risque. Régimes de retraite et créanciers se retrouvent dans une situation où, à cause de l'insuffisance de l'actif, les uns sauvent leur mise, les autres non. De manière très générale, le présent pourvoi soulève la question de savoir de quelle manière le droit pondère les intérêts des bénéficiaires d'un régime de retraite et ceux d'autres créanciers.

[86] Devenue insolvable, Indalex Limited, le promoteur et l'administrateur des régimes de retraite des salariés, a demandé la protection contre ses créanciers en application de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Toutes les cotisations pour service courant avaient alors été perçues, mais l'actif des régimes de retraite de la société ne permettait pas de verser aux participants les prestations de retraite promises. La société a pris une série de mesures, avalisées par le tribunal et jugées servir au mieux les intérêts de tous les intéressés, dont l'emprunt d'importantes sommes pour la poursuite de ses activités. Les personnes qui ont alors injecté les sommes nécessaires ont

2013 SCC 6 (CanLII)

jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance, LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George L. Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

obtenu une superpriorité sur toutes les réclamations des autres créanciers. La vente de l'entreprise a permis la préservation de centaines d'emplois, mais le produit touché était inférieur à la dette. Le rang des réclamations des bénéficiaires des régimes de retraite a dès lors fait l'objet d'un litige. L'appelante, Sun Indalex Finance, LLC, a soutenu que sa créance avait préséance sur toutes les autres du fait de la superpriorité obtenue dans le cadre de la procédure fondée sur la *LACC*. Le syndic de faillite des débitrices américaines (George L. Miller) et le contrôleur (FTI Consulting) se sont constitués parties appelantes. Les bénéficiaires des régimes de retraite ont fait valoir qu'ils avaient priorité en raison de la fiducie qui est réputée exister suivant la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* ») et de la fiducie par interprétation qui résultait des manquements allégués de la société à ses obligations fiduciaires.

[87] The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?

B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?

C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?

D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("USW")?

[87] La Cour d'appel de l'Ontario a donné raison aux bénéficiaires des régimes de retraite, et Sun Indalex, le syndic de faillite et le contrôleur se pourvoient aujourd'hui devant notre Cour. Voici les points de droit précis qui sont en litige :

A. La Cour d'appel a-t-elle eu tort de conclure que la fiducie réputée du par. 57(4) de la *LRR* s'appliquait au déficit de liquidation du régime des salariés?

B. A-t-elle eu tort de conclure qu'Indalex avait manqué à ses obligations fiduciaires envers les bénéficiaires en tant qu'administrateur des régimes de retraite et d'imposer une fiducie par interprétation à titre de réparation?

C. A-t-elle eu tort de conclure que la superpriorité accordée dans le cadre de la procédure fondée sur la *LACC* ne conférait pas de préséance par application de la prépondérance fédérale?

D. Sa décision sur les dépens du Syndicat des Métallos (le « Syndicat ») est-elle entachée d'une erreur?

[88] My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that

[88] J'estime que la fiducie réputée ne vise pas les fonds en cause et, même si elle les visait, la superpriorité l'emporterait sur elle. Je conclus que la

2013 SCC 6 (CanLII)

the corporation failed in its duty to the plan beneficiaries as their administrator and that the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

société a manqué à ses obligations d'administrateur des régimes et que les bénéficiaires auraient dû obtenir de meilleures garanties procédurales dans le cadre de la procédure fondée sur la *LACC*. Cependant, j'estime que la Cour d'appel a tort de recourir à la fiducie par interprétation — une réparation en equity — pour écarter la superpriorité accordée par le tribunal saisi sur le fondement de la *LACC*. Je suis donc d'avis d'accueillir les principaux pourvois.

II. Facts and Proceedings Below

A. *Overview*

[89] These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

[90] Indalex Limited is the parent company of three non-operating Canadian companies. I will refer to both Indalex Limited individually and to the group of companies collectively as "Indalex", unless the context requires further clarity. Indalex Limited is the wholly owned subsidiary of its U.S. parent, Indalex Holding Corp. which owned and conducted related operations in the U.S. through its U.S. subsidiaries which I will refer to as the "U.S. debtors".

[91] In late March and early April of 2009, Indalex and the U.S. debtors were insolvent and sought protection from their creditors, the former under the Canadian *CCAA*, and the latter under the United States Bankruptcy Code, 11 U.S.C., Chapter 11. The dispute giving rise to these appeals concern the priority granted to lenders in the *CCAA* process for funds advanced to Indalex and whether that priority overrides the claims of two of Indalex's pension plans for funds owed to them.

[92] Indalex was the sponsor and administrator of two registered pension plans relevant to these proceedings, one for salaried employees and

II. Faits et jugements dont appel

A. *Aperçu*

[89] Les présents pourvois ont pour objet les sommes que les participants des régimes de retraite réclament au promoteur et administrateur des régimes, lequel est devenu insolvable.

[90] Indalex Limited est la société mère de trois sociétés canadiennes inactives. Dans les présents motifs, Indalex Limited s'entend de la société à titre individuel, et « Indalex » du groupe de sociétés collectivement, sauf lorsque le contexte commande plus de précision. Indalex Limited est la filiale à cent pour cent de sa société mère américaine, Indalex Holding Corp., qui possédait et exploitait des entreprises connexes aux États-Unis par l'intermédiaire de ses filiales américaines (ci-après, les « débitrices américaines »).

[91] Fin mars et début avril 2009, Indalex et les débitrices américaines sont devenues insolvables et ont demandé la protection contre leurs créanciers en application de la *LACC*, dans le cas d'Indalex, et du *United States Bankruptcy Code*, 11 U.S.C., chap. 11, dans le cas des débitrices américaines. Le litige à l'origine des pourvois porte sur la priorité accordée aux prêteurs dans le cadre de la procédure fondée sur la *LACC* en contrepartie des fonds avancés à Indalex et sur la question de savoir si cette priorité vaut à l'égard des réclamations de deux des régimes de retraite d'Indalex quant aux sommes qui leur sont dues.

[92] Indalex était le promoteur et l'administrateur de deux régimes enregistrés de retraite touchés par cette procédure, l'un pour les salariés, l'autre pour

2013 SCC 6 (CanLII)

the other for executive employees. At the time of seeking *CCAA* protection, the salaried plan was being wound up (with a wind-up date of December 31, 2006) and was estimated to have a wind-up deficiency (as of the end of 2007) of roughly $2.252 million. The executive plan, while it was not being wound up, had been closed to new members since 2005. It was estimated to have a deficiency of roughly $2.996 million on wind up. At the time the *CCAA* proceedings were started, all regular current service contributions had been made to both plans.

les cadres. Au moment où la protection a été demandée sous le régime de la *LACC*, le régime des salariés était en cours de liquidation — celle-ci devant avoir lieu le 31 décembre 2006 —, et on estimait qu'il en résulterait un déficit (fin 2007) d'environ 2,252 millions de dollars. Le régime des cadres, qui n'était pas en voie de liquidation, n'admettait plus de nouveaux participants depuis 2005. On estimait que son déficit de liquidation s'élèverait à environ 2,996 millions de dollars. Au moment d'engager la procédure fondée sur la *LACC*, toutes les cotisations normales pour service courant avaient été versées aux deux régimes.

[93] Shortly after Indalex received *CCAA* protection, the *CCAA* judge authorized the company to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (Joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

[93] Peu de temps après qu'Indalex eut obtenu la protection prévue par la *LACC*, le juge saisi l'a autorisée à obtenir un financement à titre de débiteur-exploitant (« DE ») afin qu'elle puisse poursuivre ses activités. Le tribunal a alors accordé aux prêteurs DE, un groupe de banques, une sûreté ayant priorité sur [TRADUCTION] « toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre » (ordonnance initiale, par. 35 (d.a. conjoint, vol. I, p. 123-124)). Les débitrices américaines garantissaient le remboursement de ces sommes.

[94] Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

[94] Finalement, sur approbation du tribunal saisi sur le fondement de la *LACC*, Indalex a vendu son entreprise, mais l'acquéreur n'a pas repris à son compte les engagements de retraite. Le contrôleur nommé en vertu de la *LACC* a établi un fonds de réserve pour donner suite aux réclamations formulées dans l'éventualité où il y serait fait droit. Le produit de la vente n'étant pas suffisant pour rembourser les prêteurs DE, les débitrices américaines, qui s'étaient portées cautions, ont payé la différence et acquis de ce fait la créance prioritaire des prêteurs DE.

[95] The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that

[95] L'appelante, Sun Indalex, était un créancier garanti d'Indalex et des débitrices américaines avant l'entrée en jeu de la *LACC*. Elle prétend avoir droit à l'attribution du fonds de réserve au motif que, à titre de créancier garanti des débitrices américaines dans le cadre de la procédure de faillite engagée aux États-Unis, n'eût été leur versement, elle aurait pu toucher les 10,75 millions de dollars

2013 SCC 6 (CanLII)

they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

américains payés par elles à titre de cautions. Les bénéficiaires des régimes de retraite intimés prétendent que le fonds de réserve leur revient puisque leur déficit de liquidation est protégé par la fiducie réputée du par. 57(4) de la *LRR*. Cette fiducie réputée est constituée d'« un montant égal aux cotisations de l'employeur qui sont accumulées [en anglais, « *accrued* »] à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements » (par. 57(4)). Ils invoquent également à l'appui de leur prétention l'existence d'une fiducie par interprétation découlant de l'omission d'Indalex de s'acquitter de ses obligations fiduciaires en tant qu'administrateur des régimes.

[96] The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

[96] Les sommes contenues dans le fonds de réserve ne permettent pas de rembourser à la fois Sun Indalex et les régimes de retraite. La principale question que soulèvent les principaux pourvois est donc celle de savoir quel créancier a priorité.

[97] The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114, 79 C.C.P.B. 301). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

[97] Le juge de première instance a rejeté la thèse de la fiducie réputée avancée par les bénéficiaires des régimes et conclu que, pour ce qui concerne le déficit de liquidation, les bénéficiaires des régimes de retraite sont des créanciers chirographaires prenant rang après les créanciers bénéficiant d'une superpriorité et les créanciers garantis (2010 ONSC 1114, 79 C.C.P.B. 301). La Cour d'appel de l'Ontario a infirmé cette décision et conclu que les déficits des régimes de retraite faisaient l'objet d'une fiducie réputée et d'une fiducie par interprétation qui prenaient rang avant les prêteurs DE et les autres créanciers garantis (2011 ONCA 265, 104 O.R. (3d) 641). Sun Indalex, le syndic de faillite et le contrôleur se pourvoient aujourd'hui en appel.

B. *Indalex's CCAA Proceedings*

B. *La procédure engagée par Indalex sous le régime de la LACC*

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

(1) L'ordonnance initiale (d.a. conjoint, vol. I, p. 112)

[98] As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the *CCAA*. The order (which I will refer to as the initial order) also contained directions for service on creditors and

[98] Comme je l'indique précédemment, Indalex connaissait des difficultés financières et, le 3 avril 2009, elle a obtenu d'être protégée contre ses créanciers en application de la *LACC*. L'ordonnance (appelée ci-après « ordonnance initiale »)

2013 SCC 6 (CanLII)

others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order but the *CCAA* court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

comportait entre autres des directives pour la signification aux créanciers et aux autres parties (par. 39-41). Elle prévoyait également que toute partie intéressée pouvait demander sa modification, à condition de signifier un avis à toute autre partie susceptible d'être touchée par la mesure (par. 46). Les parties reconnaissent que l'avis relatif à la demande présentée en vue d'obtenir l'ordonnance initiale n'a pas été signifié aux bénéficiaires des régimes de retraite, mais le tribunal saisi sous le régime de la *LACC* a néanmoins approuvé le mode et le délai de signification. Toutes les données sur les déficits des régimes de retraite figuraient dans les documents présentés au tribunal à l'appui de la demande, et l'ordonnance initiale faisait mention du paiement aux régimes des cotisations pour service courant de l'employeur.

(2) The DIP Order (Joint A.R., vol. I, at p. 129)

(2) L'ordonnance relative au financement DE (d.a. conjoint, vol. I, p. 129)

[99] On April 8, 2009, in what I will refer to as the DIP order, the *CCAA* judge, Morawetz J., authorized Indalex to borrow funds pursuant to a DIP credit agreement. The judge ordered among many other things, the following:

- He approved abridged notice: para. 1;
- He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);
- He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or leave of the court, until May 1, 2009: para. 15;
- He granted the DIP lenders a so-called super priority:

THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise

[99] Le 8 avril 2009, dans cette ordonnance appelée ci-après « ordonnance DE », le juge saisi en application de la *LACC* — le juge Morawetz — a autorisé Indalex à obtenir un financement DE. Il a notamment ordonné ce qui suit :

- l'abrègement du délai d'avis (par. 1);
- la faculté d'Indalex de continuer de verser aux régimes de retraite les cotisations pour service courant, à l'exclusion de tout paiement spécial (al. 7a) et 9b));
- la mise à l'abri d'Indalex contre toute procédure, sauf consentement d'Indalex ou du contrôleur ou autorisation du tribunal, jusqu'au 1er mai 2009 (par. 15);
- l'octroi aux prêteurs DE de ce qu'on appelle une superpriorité :

[TRADUCTION] LA COUR ORDONNE que chacune des charges relatives à l'administration, aux administrateurs et aux prêteurs DE (constituées et définies aux présentes) grève les biens, et que toutes aient priorité sur toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative

2013 SCC 6 (CanLII)

(collectively, "Encumbrances") in favour of any Person. [Emphasis added; para. 45.]

– He required Indalex to send notice of the order to all known creditors, other than employees and creditors to which Indalex owed less than $5,000 and stated that Indalex and the Monitor were "at liberty" to serve the Initial Order to interested parties: paras. 49-50.

[100] In his endorsement for the DIP order, Morawetz J. found that "there is no other alternative available to the Applicants [Indalex] for a going concern solution" and that DIP financing was necessary: (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J.), at para. 9(c). He noted that the Monitor in its report was of the view that approval of the DIP agreement was both necessary and in the best interests of Indalex and its stakeholders, including its creditors, employees, suppliers and customers: paras. 14-16.

[101] The USW, which represented some of the members of the salaried plan, was served with notice of the motion that led to the DIP order, but did not appear. Morawetz J. specifically ordered as follows with regard to service:

> THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof. [DIP order, at para. 1]

(3) The DIP Extension Order (Joint A.R., vol. I, at p. 156)

[102] On June 12, 2009, Morawetz J. heard and granted an application by Indalex to allow them to borrow approximately $5 million more from the DIP lenders, thus raising the allowed total to US$29.5 million.

[103] Counsel for the former executives received the motion material the night before. Counsel for

ou autre (collectivement les « grèvements »), détenus par quiconque. [Je souligne; par. 45.]

– l'obligation d'Indalex de donner avis de l'ordonnance initiale à tous les créanciers connus, autres que les employés et les créanciers auxquels Indalex devait moins de 5 000 $, et la « faculté » qu'ont Indalex et le contrôleur de signifier l'ordonnance initiale aux parties intéressées (par. 49-50).

[100] Dans ses motifs à l'appui de l'ordonnance DE, le juge Morawetz conclut que [TRADUCTION] « les requérantes [Indalex] ne disposent d'aucune autre solution permettant la continuité de l'exploitation » et que le financement DE s'impose ((2009), 52 C.B.R. (5th) 61 (C.S.J. Ont.), al. 9c)). Il signale que, dans son rapport, le contrôleur tient l'approbation de l'accord de financement pour nécessaire et conforme à l'intérêt supérieur d'Indalex et des intéressés, dont ses créanciers, ses employés, ses fournisseurs et ses clients (par. 14-16).

[101] Un avis de la motion qui a mené à l'ordonnance DE a été signifié au Syndicat représentant certains des participants des régimes des salariés, mais celui-ci n'a pas comparu. Le juge Morawetz ordonne expressément ce qui suit au sujet de la signification :

> [TRADUCTION] LA COUR ORDONNE l'abrègement du délai imparti pour signifier l'avis et le dossier de demande, de sorte que la demande puisse être régulièrement entendue ce jour même, et elle dispense la demanderesse de la signification de tout autre document s'y rapportant. [Ordonnance DE, par. 1]

(3) L'ordonnance modifiant l'ordonnance DE (d.a. conjoint, vol. I, p. 156)

[102] Le 12 juin 2009, le juge Morawetz a accueilli après audition la demande présentée par Indalex en vue d'être autorisée à emprunter une nouvelle tranche d'environ 5 000 000 $ aux prêteurs DE, ce qui portait l'emprunt total approuvé à 29 500 000 $ US.

[103] L'avocat des anciens cadres a reçu les documents relatifs à l'instance la veille de l'audience.

2013 SCC 6 (CanLII)

USW was also served with notice. At the motion, the former executives (along with second priority secured noteholders) sought to "reserve their rights with respect to the relief sought": 2009 CanLII 37906 (Ont. S.C.J.), at para. 4. Morawetz J. wrote that any "reservation of rights" would create uncertainty for the DIP lenders with regard to priority, and may prevent them from extending further advances. Moreover, the parties had presented no alternative to increased DIP financing, which was both "necessary and appropriate" and would, it was to be hoped, "improve the position of the stakeholders": paras. 5-9.

L'avocat du Syndicat a également reçu signification d'un avis. À l'audition de la demande, les anciens cadres (ainsi que les détenteurs de billets garantis de deuxième rang) ont demandé que [TRADUCTION] « leurs droits soient réservés quant à la réparation demandée » (2009 CanLII 37906 (C.S.J. Ont.), par. 4). Le juge Morawetz a opiné que toute [TRADUCTION] « réserve de droits » créerait de l'incertitude chez les prêteurs relativement au rang prioritaire de leur créance et pourrait inciter ces derniers à refuser d'avancer des fonds supplémentaires. En outre, les parties n'avaient proposé aucun autre mode d'accroissement du financement DE, lequel était à la fois [TRADUCTION] « nécessaire et opportun » et devait permettre, du moins l'espérait-on, « d'améliorer la situation des intéressés » (par. 5-9).

(4) The Bidding Order ((2009), 79 C.C.P.B. 101 (Ont. S.C.J.))

(4) L'ordonnance relative à la vente par soumission ((2009), 79 C.C.P.B. 101 (C.S.J. Ont.))

[104] On July 2, 2009, Indalex brought a motion for approval of proposed bidding procedures for Indalex's assets. Morawetz J. decided that a stalking horse bid by SAPA Holding AB ("SAPA") for Indalex's assets could count as a qualifying bid. Counsel on behalf of the members of the executive plan appeared, with the concern that "their position and views have not been considered in this process": para. 8. In his decision, Morawetz J. decided that these arguments could be dealt with later, at a sale approval motion: para. 10. The judge said:

> The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants' insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders. [Emphasis added; para. 9.]

[104] Le 2 juillet 2009, Indalex a demandé l'approbation de la procédure projetée de vente par soumission de l'actif d'Indalex. Le juge Morawetz a jugé que l'offre-paravent de SAPA Holding AB (« SAPA ») pouvait être tenue pour valable. L'avocat des participants du régime des cadres a fait valoir que [TRADUCTION] « ni la situation ni le point de vue de ses clients n'avaient été pris en compte dans le cadre de la procédure » (par. 8). Le juge Morawetz a statué que ces éléments pourraient être examinés ultérieurement, lorsque l'approbation de la vente serait demandée (par. 10). Voici ce qu'il dit :

> [TRADUCTION] La situation des retraités est malheureuse. À l'heure actuelle, ils ne touchent pas ce qu'ils ont obtenu à l'issue de négociations. Or, la réalité demeure incontournable et la nature de l'insolvabilité des demanderesses fait en sorte que l'actif ne permet pas d'acquitter le passif. Les retraités ne sont pas les seuls à subir un préjudice. La présente instance vise à obtenir le meilleur résultat possible pour les intéressés. [Je souligne; par. 9.]

2013 SCC 6 (CanLII)

(5) The Sale Approval Order (Joint A.R., vol. I, at p. 166)

[105] On July 20, 2009, Indalex brought two motions before Campbell J.

[106] The first motion sought approval for the sale of Indalex's assets as a going concern to SAPA. SAPA was not to assume any pension liabilities. Campbell J. granted an order approving this sale.

[107] The second motion sought approval for an interim distribution of the sale proceeds to the DIP lenders. Counsel on behalf of the executive plan members and the USW, representing some of the salaried employees, objected to the planned distribution of the sale proceeds on grounds that a statutory deemed trust applied to the deficiencies in their plans and that Indalex had breached fiduciary duties that it owed to them. Campbell J. ordered the Monitor to pay the DIP agent from the sale proceeds, but also ordered the Monitor to set up a reserve fund in an amount sufficient to answer, among other things, the claims of the plan beneficiaries pending resolution of those matters. Campbell J. ordered that the U.S. debtors be subrogated to the DIP lenders to the extent that the U.S. debtors were required under the guarantee to satisfy the DIP lenders' claims: para. 14.

(6) The Sale and Distribution of Funds

[108] SAPA bought Indalex's assets on July 31, 2009. Taking the reserve fund into account, the sale did not produce sufficient funds to repay the DIP lenders in full and so the U.S. debtors paid US$10,751,247 as guarantor to the DIP lenders: C.A. reasons, at para. 65.

(7) The Order Under Appeal

[109] On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some members of the salaried plan) and counsel appearing on behalf of the executive plan members that the

(5) L'ordonnance d'approbation de la vente (d.a. conjoint, vol. I, p. 166)

[105] Le 20 juillet 2009, Indalex a saisi le juge Campbell de deux motions.

[106] Dans la première, Indalex demandait au tribunal d'approuver la vente à SAPA de son actif d'entreprise en exploitation, l'acquéreur ne reprenant à son compte aucun des engagements de retraite. Le juge Campbell a approuvé la vente.

[107] Dans la deuxième motion, Indalex a demandé au tribunal d'approuver la distribution provisoire du produit de la vente aux prêteurs DE. L'avocat des participants du régime des cadres et le Syndicat, qui représentait certains des salariés, se sont opposés à cette distribution au motif qu'une fiducie d'origine législative protégeait les déficits de leurs régimes et qu'Indalex avait manqué à ses obligations fiduciaires envers eux. Le juge Campbell a ordonné au contrôleur de payer l'agent administratif des prêteurs DE par prélèvement sur le produit de la vente, mais également d'établir un fonds de réserve suffisant pour donner suite, entre autres choses, aux réclamations des bénéficiaires des régimes dans l'éventualité où il y serait fait droit. Il a ordonné que les débitrices américaines soient subrogées dans les droits des prêteurs DE jusqu'à concurrence du montant qu'elles avaient dû leur verser aux termes de la garantie (par. 14).

(6) La vente et la distribution des fonds

[108] SAPA a acheté l'actif d'Indalex le 31 juillet 2009. Compte tenu du fonds de réserve, la vente n'a pas généré de fonds suffisants pour rembourser intégralement les prêteurs DE, de sorte que les débitrices américaines ont versé à titre de cautions 10 751 247 $ US à ces derniers (motifs de la C.A., par. 65).

(7) L'ordonnance visée par l'appel

[109] Le 28 août 2009, le juge Campbell a entendu la thèse du Syndicat (qui représentait certains des participants du régime des salariés) et de l'avocat des participants du régime des cadres, à savoir que

2013 SCC 6 (CanLII)

wind-up deficiency was subject to a deemed trust. He rejected these claims in a written decision on February 18, 2010. He decided that the s. 57(4) *PBA* deemed trust did not apply to wind-up deficiencies. The executive plan had not been wound up, and therefore there was no wind-up deficiency to be the subject of the deemed trust. As for the salaried plan, Campbell J. held that the wind-up deficiency was not an obligation that had "accrued to the date of the wind up" and as a result did not fall within the terms of the s. 57(4) deemed trust.

le déficit de liquidation était réputé détenu en fiducie. Dans une décision motivée par écrit datée du 18 février 2010, il rejette cette prétention et conclut que la fiducie réputée du par. 57(4) de la *LRR* ne vise pas le déficit de liquidation. Le régime des cadres n'ayant pas été liquidé, il n'y avait donc pas de déficit de liquidation susceptible de faire l'objet d'une fiducie réputée. S'agissant du régime des salariés, le juge Campbell conclut que le déficit de liquidation n'équivaut pas à des cotisations qui sont « accumulées à la date de la liquidation », de sorte qu'il n'est pas réputé détenu en fiducie suivant le par. 57(4).

[110] Indalex had asked for the stay granted under the initial order to be lifted so that it could assign itself into bankruptcy. Because he did not find a deemed trust, Campbell J. did not feel that he needed to decide on the motion to lift the stay.

[110] Indalex a demandé la levée de la suspension accordée dans l'ordonnance initiale afin de pouvoir faire cession de ses biens. Ne concluant pas à l'existence d'une fiducie réputée, le juge Campbell ne juge pas nécessaire de statuer sur la demande visant à faire lever la suspension.

(8) The Decision of the Ontario Court of Appeal

(8) L'arrêt de la Cour d'appel de l'Ontario

[111] The Ontario Court of Appeal allowed an appeal from the decision of Campbell J.

[111] La Cour d'appel de l'Ontario accueille l'appel interjeté contre la décision du juge Campbell.

[112] Writing for a unanimous panel, Gillese J.A. decided that the s. 57(4) deemed trust is applicable to wind-up deficiencies. She took the view that s. 57(4)'s reference to "employer contributions accrued to the date of the wind up but not yet due" included all amounts that the employer owed on the wind-up of its pension plan: para. 101. In particular, she concluded that the deemed trust applied to the wind-up deficiency in the salaried plan. Gillese J.A. declined, however, to decide whether the deemed trust also applied to deficiencies in the executive plan, which had not been wound up by the relevant date: paras. 110-12. A decision on this latter point was unnecessary given her finding on the applicability of a constructive trust in this case.

[112] Au nom d'une formation unanime, la juge Gillese estime que la fiducie réputée du par. 57(4) s'applique au déficit de liquidation. Les « cotisations de l'employeur qui sont accumulées [en anglais, « *accrued* »] à la date de la liquidation, mais qui ne sont pas encore dues » dont fait mention cette disposition englobent selon elle toutes les sommes que l'employeur devait au moment de la liquidation de son régime de retraite (par. 101). Plus particulièrement, elle conclut que la fiducie réputée du par. 57(4) s'applique au déficit de liquidation du régime des salariés. Elle refuse cependant de se prononcer sur l'application de la fiducie réputée au déficit du régime des cadres, lequel n'était pas liquidé à la date considérée (par. 110-112), ce qui n'était pas nécessaire puisqu'elle conclut à l'applicabilité de la fiducie par interprétation dans ce cas.

[113] Gillese J.A. found that the super priority provided for in the DIP order did not trump the

[113] La juge Gillese conclut que la superpriorité accordée dans l'ordonnance DE ne prime pas la

2013 SCC 6 (CanLII)

deemed trust over the salaried plan's wind-up deficiency. Morawetz J. had not "invoked" the issue of paramountcy or made an explicit finding that the requirements of federal law required that the provincially created deemed trust must be overridden: paras. 178-79. Gillese J.A. also took the view that this Court's decision in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, did not mean that provincially created priorities that would be ineffective under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), were also ineffective under the *CCAA*: paras. 185-96. The deemed trust therefore ranked ahead of the DIP security.

fiducie qui est réputée exister à l'égard du déficit de liquidation du régime des salariés. Le juge Morawetz n'a pas [TRADUCTION] « invoqué » la prépondérance fédérale ni conclu expressément que le droit fédéral écartait la fiducie réputée de droit provincial (par. 178-179). La juge Gillese opine également que, dans l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, notre Cour ne statue pas que l'ordre de priorité établi par la province qui est sans effet aux fins de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), ne s'applique pas non plus pour les besoins de la *LACC* (par. 185-196). La fiducie réputée prend donc rang avant la sûreté DE.

[114] In addition to her findings regarding deemed trusts, Gillese J.A. granted the plan beneficiaries a constructive trust over the amount of the reserve fund on the ground that Indalex, as pension plan administrator, had breached fiduciary duties that it owed to the plan beneficiaries during the *CCAA* proceedings.

[114] Outre ses conclusions sur la fiducie réputée, la juge Gillese tranche que le fonds de réserve fait l'objet d'une fiducie par interprétation car, dans son rôle d'administrateur des régimes de retraite, Indalex a manqué à ses obligations fiduciaires envers les bénéficiaires dans le cadre de la procédure fondée sur la *LACC*.

[115] She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras. 132-33. Gillese J.A. enumerated the many ways in which she thought Indalex subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted:

[115] Elle conclut qu'à titre d'administrateur de régime qui était également employeur, Indalex avait des obligations fiduciaires tant envers les bénéficiaires des régimes qu'envers la société (par. 129). À son avis, Indalex était tenue de respecter ses obligations envers les premiers et la seconde tout au long de la procédure fondée sur la *LACC* et elle a manqué à ses obligations envers les bénéficiaires des régimes de différentes manières. Indalex avait certes le droit d'engager une procédure sous le régime de la *LACC*, mais une telle mesure rendait les bénéficiaires des régimes vulnérables, ce qui lui imposait donc des obligations fiduciaires en tant qu'administrateur des régimes (par. 132-133). La juge Gillese impute à Indalex de nombreuses erreurs subséquentes commises dans l'administration des régimes : Indalex n'a pris aucune mesure dans le cadre de la procédure fondée sur la *LACC* pour renflouer les régimes sous-capitalisés; elle a demandé la protection de la *LACC* sans en informer les bénéficiaires au préalable; elle a obtenu du financement DE en accordant à la créance des prêteurs une superpriorité sur toute « fiducie d'origine législative »; elle a obtenu ce financement sans en

2013 SCC 6 (CanLII)

para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the beneficiaries.

informer au préalable les bénéficiaires des régimes; elle a vendu son actif tout en sachant que l'acquéreur ne reprendrait à son compte aucun de ses engagements de retraite; elle a tenté de faire cession volontaire de ses biens, ce qui aurait fait échec aux prétentions des bénéficiaires relatives à la fiducie réputée (par. 139). La juge Gillese relève également que tout au long de la procédure fondée sur la *LACC*, Indalex était en conflit d'intérêts, car elle représentait à la fois la société et les bénéficiaires.

[116] Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

[116] Va l'omission d'Indalex de s'acquitter de ses obligations fiduciaires, le fonds de réserve fait l'objet d'une fiducie par interprétation (par. 204). De plus, comme les bénéficiaires ont été lésés par Indalex, et que les débitrices américaines ne sont pas des [TRADUCTION] « tiers sans lien de dépendance » avec Indalex, la solution qui s'impose est de reconnaître l'existence d'une fiducie par interprétation en faveur des bénéficiaires (par. 204). Sa conclusion sur ce point vaut à la fois pour le régime des salariés et pour celui des cadres.

III. Analysis

III. Analyse

A. *First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?*

A. *Première question en litige : La Cour d'appel a-t-elle tort de conclure que la fiducie réputée du par. 57(4) de la LRR s'applique au déficit de liquidation du régime des salariés?*

(1) Introduction

(1) Introduction

[117] The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

[117] Le principal point considéré en l'espèce est l'application ou l'inapplication de la fiducie réputée du par. 57(4) de la *LRR* au déficit de liquidation, dont l'al. 75(1)b) prévoit le paiement.

[118] The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree with my colleagues that there can be no deemed trust

[118] La fiducie réputée du par. 57(4) vise les « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ». Pour qu'il y ait fiducie réputée, le régime de retraite doit donc être liquidé et les sommes en question doivent remplir trois conditions. Il doit s'agir de (1) « cotisations de l'employeur », (2) « qui sont accumulées à la date de liquidation », (3) « mais qui ne sont pas encore dues ». Il y a déficit de liquidation « [lorsqu']un régime de retraite est liquidé »

2013 SCC 6 (CanLII)

for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

[119] The wind-up deficiency payments are "employer contributions" which are "not yet due" as of the date of wind up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the wind up".

[120] Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4) "applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

[121] I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind up. The wind up deficiency only arises upon wind up and it is neither ascertained nor ascertainable on the date fixed for wind up. Second, the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). Finally, the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

(par. 75(1)). Je conviens avec mes collègues qu'il ne peut y avoir de fiducie réputée au bénéfice du régime des cadres, car celui-ci n'avait pas encore été liquidé à la date considérée. Par conséquent, les motifs qui suivent ne valent que pour le régime des salariés.

[119] Les versements effectués pour combler le déficit de liquidation constituent des « cotisations de l'employeur [. . .] qui ne sont pas encore dues » au moment de la liquidation au sens de la *LRR*. Il s'agit donc essentiellement d'interpréter une disposition de la loi et de déterminer seulement si le déficit de liquidation décrit à l'al. 75(1)b) est « accumul[é] à la date de la liquidation ».

[120] En première instance, le juge Campbell conclut qu'il ne l'est pas, alors que la Cour d'appel arrive à la conclusion contraire. La Cour d'appel estime essentiellement que la fiducie réputée du par. 57(4) [TRADUCTION] « vise toutes les cotisations de l'employeur qui sont exigibles suivant l'art. 75 », à savoir « toute somme due par l'employeur à la liquidation de son régime de retraite » (par. 101).

[121] Sauf le respect qui lui est dû, je suis en désaccord avec la Cour d'appel pour trois raisons principales. Premièrement, suivant son sens ordinaire et grammatical le plus plausible, l'expression « accumulées à la date de la liquidation » renvoie aux sommes déterminées de façon précise immédiatement avant la date de prise d'effet de la liquidation du régime. Le déficit de liquidation n'est constaté qu'à l'issue de la liquidation, et il n'est ni déterminé ni déterminable à la date de liquidation prévue. Deuxièmement, le contexte législatif général me conforte dans ce point de vue. Le texte des par. 57(3) et (4) qui dispose qu'il y a fiducie réputée est repris presque en tous points à l'al. 75(1)a), ce qui permet de conclure que, dans les deux cas de fiducie réputée, le législateur renvoie à l'obligation qui existe à la liquidation suivant l'al. 75(1)a) et non à celle, supplémentaire et distincte, qui est liée au déficit de liquidation et qui découle de l'al. 75(1)b). Enfin, il appert à mon sens de l'évolution et de l'historique de ces dispositions que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet d'une fiducie réputée d'origine législative.

2013 SCC 6 (CanLII)

[122] Before turning to the precise interpretative issue, it will be helpful to provide some context about the employer's wind-up obligations and the deemed trust provisions that are the subject of this dispute.

(2) Employer Obligations on Wind Up

[123] A "wind up" means that the plan is terminated and the plan assets are distributed: see *PBA*, s. 1(1), definition of "wind up". The employer's liability on wind-up consists of two main components. The first is provided for in s. 75(1)(a) and includes "an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund". This liability applies to contributions that were due as at the wind-up date but does *not* include payments required by s. 75(1)(b) that arise as a result of the wind up: A. N. Kaplan, *Pension Law* (2006), at pp. 541-42. This second liability is known as the wind-up deficiency amount. The employer must pay all additional sums to the extent that the assets of the pension fund are insufficient to cover the value of all immediately vested and accelerated benefits and grow-in benefits: Kaplan, at p. 542. Without going into detail, there are certain statutory benefits that may arise only on wind up, such as certain benefit enhancements and the potential for acceleration of pension entitlements. Thus, wind up will usually result in additional employer liabilities over and above those arising from the obligation to pay all benefits provided for in the plan itself: see, e.g., ss. 73-74; Kaplan, at p. 542. As the Court of Appeal concluded, the payments provided for under s. 75(1)(a) are those which the employer had to make while the plan was ongoing, while s. 75(1)(b) refers to the employer's obligation to make up for any wind-up deficiency: paras. 90-91.

[124] For convenience, the provision as it then stood is set out here.

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

[122] Avant d'interpréter le libellé en cause, il vaut la peine de situer dans leur contexte les obligations de l'employeur en cas de liquidation, ainsi que les dispositions sur la fiducie réputée qui font l'objet du présent litige.

(2) Les obligations de l'employeur à la liquidation

[123] La « liquidation » s'entend de la cessation d'un régime et de la répartition de son actif (voir la définition de « liquidation » au par. 1(1) de la *LRR*). L'obligation de l'employeur comporte alors deux volets principaux. Premièrement, suivant l'al. 75(1)a), son obligation correspond au versement d'« un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés et qui n'ont pas été versés à la caisse de retraite ». Sont visées les cotisations dues à la date de la liquidation, mais *non* les paiements exigés à l'al. 75(1)b) par suite de la liquidation (A. N. Kaplan, *Pension Law* (2006), p. 541-542). La seconde obligation vise le déficit de liquidation. L'employeur est tenu de verser toute somme supplémentaire requise du fait que la valeur de l'actif du régime de retraite est inférieure à celle de la totalité des droits à pension acquis de manière immédiate, accélérée ou réputée (Kaplan, p. 542). Sans entrer dans le détail, certains droits d'origine législative ne naissent qu'en cas de liquidation, tels certains enrichissements des prestations et la possibilité d'accélérer l'acquisition du droit à pension. La liquidation fait donc à l'employeur d'autres obligations en sus de celle de verser toutes les prestations prévues par le régime lui-même (voir, p. ex., art. 73-74; Kaplan, p. 542). Ainsi que le conclut la Cour d'appel, les paiements visés à l'al. 75(1)a) sont ceux que l'employeur devait verser pendant l'application du régime, tandis que l'al. 75(1)b) renvoie à son obligation de combler tout déficit de liquidation (par. 90-91).

[124] Pour faciliter sa consultation, voici le libellé qui s'appliquait au moment considéré :

75. (1) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur verse à la caisse de retraite :

2013 SCC 6 (CanLII)

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées [en anglais, « *accrued* »] à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

[125] While a wind up is effective as of a fixed date, a wind up is nonetheless best thought of not simply as a moment or a single event, but as a process. It begins by a triggering event and continues until all of the plan assets have been distributed. To oversimplify somewhat, the wind-up process involves the following components.

[126] The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the

[125] Bien que la liquidation prenne effet à une date déterminée, il s'agit d'un processus, et non d'un moment ou d'une étape en particulier. Un événement la déclenche et elle se poursuit jusqu'à la répartition de la totalité de l'actif du régime. Au risque de trop simplifier, voici quelles sont les étapes du processus de liquidation.

[126] L'actif et le passif du régime existant à la date de la liquidation doivent être établis. Rappelons que la valeur exacte du passif, bien que *circonscrite à cette date*, n'est ni déterminée ni déterminable *cette date-là*. La valeur du passif peut dépendre des choix qui s'offrent aux bénéficiaires dans le cadre du régime, ainsi que de l'exercice par ces derniers de certains droits légaux et de la levée des options que prévoit le régime. Les participants du régime doivent être avisés de la liquidation, ainsi que de leurs droits et de leurs options, et ils doivent avoir la possibilité d'effectuer leurs choix. L'administrateur du régime doit déposer un rapport de liquidation qui fait état de l'actif et du passif du régime, des prestations payables en application du régime et du

2013 SCC 6 (CanLII)

terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA* Regulations").

mode d'attribution et de répartition de l'actif, y compris les priorités de paiement des prestations (*LRR*, par. 70(1), et R.R.O. 1990, règl. 909, art. 29 (le « règlement de la *LRR* »)).

[127] Benefits to members may take the form of "cash refunds, immediate or deferred annuities, transfers to registered retirement saving plans, ... In principle, the value of these benefits is the present value of the benefits accrued to the date of plan termination": *The Mercer Pension Manual* (loose-leaf), vol. 1, at p. 10-41. That present value is an actuarial calculation performed on the basis of various assumptions including assumptions about investment return, mortality and so forth.

[127] Les prestations versées aux participants peuvent revêtir la forme de [TRADUCTION] « remboursements en espèces, de rentes immédiates ou différées, de transferts dans un régime enregistré d'épargne-retraite, [. . .]. La valeur de ces prestations correspond en principe à la valeur actuelle des prestations accumulées à la date de cessation du régime » (*The Mercer Pension Manual* (feuilles mobiles), vol. 1, p. 10-41). La valeur actuelle est obtenue au moyen d'un calcul actuariel qui tient compte de différentes hypothèses, notamment quant au rendement et à l'espérance de vie.

[128] If, when the assets and liabilities are calculated, the assets are insufficient to satisfy the liabilities, the employer (i.e. the plan sponsor) must make up for any wind-up deficiency: *PBA*, s. 75(1)(b). An employer can elect to space these payments out over the course of five years: *PBA* Regulations, s. 31(2). Because these payments are based on the extent to which there is a deficit between assets in the pension plan and the benefits owed to beneficiaries, their amount varies with the market and other assumed elements of the calculation over the course of the permitted five years.

[128] Lorsque, après avoir calculé l'actif et le passif, le premier est inférieur au second, l'employeur (à savoir le promoteur du régime) comble le déficit de liquidation (*LRR*, al. 75(1)b)). Il peut étaler les versements sur une période de cinq ans (règlement de la *LRR*, par. 31(2)). Puisque le montant de ces versements tient à la différence entre l'actif du régime de retraite et les prestations dues aux bénéficiaires, il varie en fonction du marché et d'autres variables considérées dans le calcul sur la période autorisée de cinq ans.

[129] To take the salaried plan as an example, at the time of wind-up, all regular current service contributions had been made: C.A. reasons, at para. 33. The wind-up deficiency was initially estimated to be $1,655,200. Indalex made special wind-up payments of $709,013 in 2007 and $875,313 in 2008, but as of December 31, 2008, the wind-up deficiency was $1,795,600 — i.e. higher than it had been two years before, notwithstanding that payments of roughly $1.6 million had been made: C.A. reasons, at para. 32. Indalex made another payment of $601,000 in April 2009: C.A. reasons, at para. 32.

[129] Dans le cas du régime des salariés, par exemple, toutes les cotisations normales pour service courant avaient été versées au moment de la liquidation (motifs de la C.A., par. 33). Le déficit de liquidation a été estimé au départ à 1 655 200 $. Indalex a effectué des paiements spéciaux de 709 013 $ en 2007, puis de 875 313 $ en 2008. Or, le 31 décembre 2008, le déficit de liquidation s'établissait à 1 795 600 $, de sorte qu'il s'était accru au cours des deux ans écoulés, malgré les quelque 1,6 million de dollars versés (motifs de la C.A., par. 32). Indalex a versé en sus 601 000 $ en avril 2009 (motifs de la C.A., par. 32).

2013 SCC 6 (CanLII)

(3) The Deemed Trust Provisions

[130] The *PBA* contains provisions whose purpose is to exempt money owing to a pension plan, and which is held or owing by the employer, from being seized or attached by the employer's other creditors: Kaplan, at p. 395. This is accomplished by creating a "deemed trust" with respect to certain pension contributions such that these amounts are held by the employer in trust for the employees or pension beneficiaries.

[131] There are two deemed trusts that we must examine here, one relating to employer contributions that are *due but have not been paid* and another relating to employer contributions *accrued but not due*. This second deemed trust is the one in issue here, but it is important to understand how the two fit together.

[132] The deemed trust relating to employer contributions "due and not paid" is found in s. 57(3). The *PBA* and *PBA* Regulations contain many provisions relating to contributions required by employers, the due dates for which are specified. Briefly, the required contributions are these.

[133] When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA* Regulations, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency" deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA* Regulations, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA* Regulations, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA* Regulations,

(3) Les dispositions relatives à la fiducie réputée

[130] La *LRR* renferme des dispositions visant à soustraire à la saisie par les autres créanciers de l'employeur les sommes dues à un régime de retraite que détient ou que doit l'employeur (Kaplan, p. 395). Ainsi, certaines cotisations au régime de retraite sont dont « réputées » détenues « en fiducie » par l'employeur pour le compte des employés ou des bénéficiaires du régime de retraite.

[131] Deux fiducies réputées doivent être examinées en l'espèce, l'une visant les cotisations de l'employeur qui sont *dues, mais impayées*, l'autre les cotisations de l'employeur qui sont *accumulées, mais qui ne sont pas dues*. Cette seconde fiducie réputée est celle qui nous intéresse dans le présent pourvoi, mais il importe de comprendre la complémentarité des deux fiducies réputées.

[132] La fiducie dont sont réputées faire l'objet les cotisations de l'employeur qui sont « dues et impayées » est créé au par. 57(3). La *LRR* et le règlement de la *LRR* renferment de nombreuses dispositions sur les cotisations de l'employeur et le moment de leur exigibilité. Voici quelles sont, en résumé, les cotisations exigées.

[133] Pendant la durée du régime de retraite, l'employeur verse chaque mois les cotisations normales pour service courant dans les 30 jours qui suivent le mois pour lequel elles sont exigibles (règlement de la *LRR*, par. 4(4)3). Des paiements spéciaux sont également effectués pour combler un déficit entre l'actif et le passif du régime. Il peut y avoir « déficit à long terme » et « déficit de solvabilité », mais la distinction entre les deux n'importe pas pour les besoins des présents pourvois. L'administrateur du régime dépose périodiquement un rapport actuariel, lequel est susceptible de révéler un déficit (règlement de la *LRR*, art. 14). Pour combler un déficit à long terme, l'employeur effectue des versements mensuels égaux sur une période de 15 ans (règlement de la *LRR*, al. 5(1)b)). Dans le cas d'un déficit de solvabilité, l'employeur effectue des versements

2013 SCC 6 (CanLII)

s. 5(1)(e). Once these regular or special payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

[134] I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound up . . ., an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan <u>an amount of money equal to employer contributions accrued to the date of the wind up but not yet due</u> under the plan or regulations".

[135] When a pension plan is wound up there will be an interrupted monthly payment period, which is sometimes referred to as the stub period. During this stub period regular and special liabilities will have accrued but not yet become due. Section 58(1) provides that money that an employer is required to pay "accrues on a daily basis". Because the amounts referred to in s. 57(4) are not yet due, they are not covered by the s. 57(3) deemed trust, which applies only to payments that are *due*. The two provisions, then, operate in tandem to create a trust over an employer's unfulfilled obligations, which are "due and not paid" as well as those which have "accrued to the date of the wind up but [are] not yet due".

(4) <u>The Interpretative Approach</u>

[136] The issue we confront is one of statutory interpretation and the well-settled approach is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. Taking this approach it is clear to me that the

mensuels égaux pendant cinq ans (règlement de la *LRR*, al. 5(1)e)). Dès que ces versements normaux ou spéciaux sont dus, mais impayés, ils sont réputés faire l'objet de la fiducie créée au par. 57(3).

[134] Je passe maintenant à la fiducie réputée du par. 57(4), celle sur laquelle nous sommes appelés à nous prononcer en l'espèce. Suivant cette disposition, « [s]i un régime de retraite est liquidé [. . .], l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite <u>un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues</u> aux termes du régime ou des règlements ».

[135] Lorsqu'un régime de retraite est liquidé, il y a interruption des versements mensuels (intervalle appelé parfois « période tampon »). Au cours de cette période, des dettes ordinaires ou spéciales ont été contractées sans qu'elles soient immédiatement payables. Le paragraphe 58(1) dispose que l'argent qu'un employeur est tenu de verser « s'accumule sur une base quotidienne ». Puisque les sommes mentionnées au par. 57(4) ne sont pas encore dues, elles ne font pas l'objet de la fiducie dont l'existence est réputée au par. 57(3), laquelle ne vise que les paiements qui sont *dus*. Les deux dispositions s'appliquent donc de concert pour créer une fiducie à l'égard des obligations non exécutées de l'employeur qui sont « dues et impayées », ainsi qu'à l'égard des obligations qui ont pour objet des cotisations « accumulées à la date de la liquidation, mais qui ne sont pas encore dues ».

(4) <u>La méthode d'interprétation</u>

[136] Nous sommes aux prises avec l'interprétation de dispositions législatives et, suivant le principe bien établi, [TRADUCTION] « il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » (E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 26). Dès lors, il ne fait aucun

2013 SCC 6 (CanLII)

sponsor's obligation to pay a wind-up deficiency is not covered by the statutory deemed trust provided for in s. 57(4) of the *PBA*. In my view, the deficiency neither "accrued", nor did it arise within the period referred to by the words "to the date of the wind up".

doute que l'obligation du promoteur de combler un déficit de liquidation échappe à la fiducie réputée du par. 57(4) de la *LRR*. À mon avis, le déficit n'est pas « accumulé » [« *accrued* », en anglais] et n'est pas survenu pendant la période à laquelle renvoie l'expression « à la date de la liquidation ».

(a) *Grammatical and Ordinary Sense of the Words "Accrued" and "to the Date of the Wind Up"*

a) *Le sens ordinaire et grammatical des termes « accumulées » [« accrued », en anglais] et « à la date de la liquidation »*

[137] The Court of Appeal failed to take sufficient account of the ordinary and grammatical meaning of the text of the provisions. It held that "the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75": para. 101 (emphasis added). However, the plain words of the section show that this conclusion is erroneous. Section 75(1)(a) refers to liability for employer contributions that "are due . . . and that have not been paid". These amounts are thus *not* included in the s. 57(4) deemed trust, because it addresses only amounts that have "accrued to the date of the wind up but [are] not yet due". Amounts "due" are covered by the s. 57(3) deemed trust and not, as the Court of Appeal concluded by the deemed trust created by s. 57(4). The Court of Appeal therefore erred in finding, in effect, that amounts which "are due" could be included in a deemed trust covering amounts "not yet due".

[137] La Cour d'appel ne tient pas suffisamment compte du sens ordinaire et grammatical du libellé des dispositions en cause. Elle conclut que [TRADUCTION] « la fiducie réputée du par. 57(4) vise toutes les cotisations que l'employeur est tenu de verser suivant l'art. 75 » (par. 101 (je souligne)). Or, il ressort du libellé explicite de cette dernière disposition qu'il s'agit d'une conclusion erronée. L'alinéa 75(1)a) établit l'obligation de l'employeur à l'égard des paiements qui « sont dus [. . .] et qui n'ont pas été versés ». Ces paiements *ne* font donc *pas* l'objet de la fiducie réputée du par. 57(4), car celle-ci ne vise que les cotisations qui sont « accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». Les cotisations « dues » sont réputées détenues en fiducie suivant le par. 57(3), et non le par. 57(4) comme le conclut la Cour d'appel. Cette dernière estime en effet à tort que les cotisations qui « sont dues » peuvent être réputées détenues en fiducie comme celles qui « ne sont pas encore dues ».

[138] In my view, the most plausible grammatical and ordinary sense of the phrase "accrued to the date of the wind up" in s. 57(4) is that it refers to the sums that are ascertained immediately before the effective wind-up date of the plan.

[138] À mon avis, suivant son sens ordinaire et grammatical le plus plausible, l'expression « accumulées à la date de la liquidation » employée au par. 57(4) renvoie aux sommes déterminées immédiatement avant la date de prise d'effet de la liquidation du régime.

[139] In the context of s. 57(4), the grammatical and ordinary sense of the term "accrued" is that the amount of the obligation is "fully constituted" and "ascertained" although it may not yet be payable. The amount of the wind-up deficiency is not fully constituted or ascertained (or even ascertainable) before or even on the date fixed for wind up and therefore cannot fall under s. 57(4).

[139] Dans le contexte du par. 57(4), le sens ordinaire et grammatical d'« accumulées » veut que l'obligation soit « entièrement constituée » et que son montant soit « déterminé», même si elle peut ne pas être encore payable. Le déficit de liquidation n'est pas entièrement constitué ni son montant déterminé (ou déterminable) avant la date prévue pour la liquidation, ou le jour même, et ne peut donc pas être visé au par. 57(4).

2013 SCC 6 (CanLII)

[140] Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53. However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

[141] In some contexts, a liability is said to accrue when it becomes due. An accrued liability is said to be "properly chargeable" or "owing on a given day" or "completely constituted": see, e.g., *Black's Law Dictionary* (9th ed. 2009), at p. 997, "accrued liability"; D. A. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 13, "accrued liability"; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306, at p. 312.

[142] In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed. 2010), at s. 6.5(b); see

[140] Certes, le sens du terme « accumulées » [et plus encore celui de son équivalent anglais « *accrued* »] peut varier selon le contexte. En général, lorsque ce terme est employé de pair avec des droits légaux, son sens courant veut que le droit soit entièrement constitué, même si les répercussions financières de son exécution ne sont pas encore connues et ne peuvent l'être. Ainsi, en responsabilité délictuelle, on parle d'accumulation (au sens d'acquisition ou de naissance) de la cause d'action lorsque tous ses éléments sont réunis, même lorsque l'étendue du préjudice n'est pas encore connue ou ne peut l'être (voir, p. ex., *Ryan c. Moore*, 2005 CSC 38, [2005] 2 R.C.S. 53). Toutefois, lorsque le terme qualifie une somme, il renvoie généralement à un élément dont la valeur est actuellement mesurée ou mesurable, mais qui peut ou non être dû.

[141] Dans certains contextes, il y a accumulation [en anglais, « *accrual* »] lorsque l'obligation vient à échéance. On dit du passif accumulé qu'il est [TRADUCTION] « dûment imputable » ou « exigible à une date prévue », ou encore, « entièrement constitué » (voir, p. ex., la définition d'« *accrued liability* » [passif accumulé] dans le *Black's Law Dictionary* (9e éd. 2009), p. 997; D. A. Dukelow, *The Dictionary of Canadian Law* (4e éd. 2011), p. 13; *Hydro-Electric Power Commission of Ontario c. Albright* (1922), 64 R.C.S. 306, p. 312).

[142] Dans d'autres cas, la somme qui s'est accumulée [en anglais, « *accrued* »] peut ne pas être encore exigible. Par exemple, on parle d'« intérêts accumulés » [« *accrued interest* »] au sens du montant précis des intérêts qui sont courus, mais qui ne sont pas encore exigibles. En anglais, *accrual* est utilisé dans le même sens dans l'expression « *accrual accounting* » (en français, « comptabilité d'exercice »). Suivant cette méthode, les [TRADUCTION] « opérations qui génèrent des revenus ou occasionnent des dépenses sont comptabilisées lorsque les revenus sont gagnés ou que les dépenses sont engagées » (B. J. Arnold, *Timing and Income Taxation : The Principles of Income Measurement for Tax Purposes* (1983), p. 44). Le revenu est gagné lorsque le bénéficiaire [TRADUCTION] « a essentiellement accompli tout ce qu'il devait accomplir, à condition que la somme

2013 SCC 6 (CanLII)

also Canadian Institute of Chartered Accountants, *CICA Handbook — Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

due puisse être déterminée et que sa perception ne fasse l'objet d'aucune incertitude » (P. W. Hogg, J. E. Magee et J. Li, *Principles of Canadian Income Tax Law* (7e éd. 2010), al. 6.5b); voir également le manuel de l'Institut canadien des comptables agréés, *Manuel de l'ICCA — Comptabilité*, partie II, ch. 1000, par. 41-44). La somme en cause doit alors être déterminée au moment où le droit de la toucher est acquis [« *accrued* »].

[143] The *Hydro-Electric Power Commission* case offers a helpful definition of the word "accrued" in this sense. On a sale of shares, the vendor undertook to provide on completion "a sum estimated by him to be equal to sinking fund payments [on the bonds and debentures] which shall have accrued but shall not be due at the time for completion": p. 344 (emphasis added). The bonds and debentures required the company to pay on July 1 of each year a fixed sum for each electrical horsepower sold and paid for during the preceding calendar year. A dispute arose as to what amounts were payable in this respect on completion. Duff J. held that in this context accrued meant "completely constituted", referring to this as a "well recognized usage": p. 312. He went on:

> Where . . . a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment. [p. 316]

Thus, at every point at which a liability to pay a fixed sum arose under the terms of the contract, that liability accrued. It was fully constituted even though not yet due because the obligation to make the payment was in the future. In reaching this conclusion, Duff J. noted that the bonds and debentures used the word "accrued" in contrast to

[143] Dans l'arrêt *Hydro-Electric Power Commission*, la Cour, qui se prononçait uniquement sur le terme anglais « *accrued* », opine opportunément que ce terme se définit ainsi. Lors de la vente d'actions, le vendeur s'était engagé à remettre, une fois l'opération conclue, [TRADUCTION] « une somme équivalant selon lui aux sommes versées au fonds d'amortissement [des obligations et des débentures] qui sont alors accumulées [*accrued*], mais qui ne sont pas exigibles » (p. 344 (je souligne)). Suivant les conditions des obligations et des débentures, la société était tenue de payer, le 1er juillet de chaque année, un montant déterminé pour chacun des chevaux-vapeur électriques vendus et payés au cours de l'année civile précédente. Le litige portait sur le montant des sommes payables à ce titre une fois la vente conclue. Le juge Duff statue que, dans ce contexte, et selon un [TRADUCTION] « usage largement reconnu », le mot « *accrued* » renvoie au droit ou à l'obligation « entièrement constitué » (p. 312). Il ajoute :

> [TRADUCTION] Lorsqu'une somme forfaitaire doit être versée à une date déterminée et que, vu l'objet du paiement ou les clauses du contrat, la somme en question doit être considérée comme résultant de l'accumulation de sommes pour lesquelles le droit au paiement est entièrement constitué avant la date de paiement convenue, il est tout à fait conforme à l'usage des avocats qui consiste à voir dans chacun de ces éléments accumulés une somme « *accrued* » ou devenue exigible avant la date du paiement. [p. 316]

Par conséquent, chaque fois que naissait, suivant le contrat, l'obligation de verser une somme précise, le droit à l'exécution de cette obligation était acquis (ou « *accrued* »). Le droit était entièrement constitué, même s'il n'y avait pas encore exigibilité, car l'obligation d'effectuer le versement naissait ultérieurement. Pour arriver à cette conclusion, le

2013 SCC 6 (CanLII)

"due" and that this strengthened the interpretation of "accrued" as an obligation fully constituted but not yet payable. Similarly in s. 57(4), the word "accrued" is used in contrast to the word "due".

juge Duff fait remarquer que le terme « *accrued* » (par opposition à « *due* ») est employé dans les obligations et les débentures, ce qui confirme l'interprétation selon laquelle « *accrued* » renvoie à une obligation entièrement constituée, mais dont l'exécution n'est pas encore exigible. De même, au par. 57(4), le terme « accumulées » [« *accrued* »] est utilisé par opposition à « dues ».

[144] Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37, referring to *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.)).

[144] Selon ce que j'estime être le sens ordinaire du mot « accumulé » (en anglais, « *accrued* ») et sauf le respect que je porte à la juge Deschamps, je ne crois pas que l'on puisse considérer que le déficit de liquidation était « accumulé » à la date de la liquidation. De l'avis de ma collègue, « [p]uisque les employés cessent d'accumuler des droits lorsque le régime est liquidé, les droits qui servent au calcul des cotisations ont tous été accumulés avant la date de la liquidation » (par. 34) et « aucun passif ne s'accumule pendant ni après la liquidation » (par. 36). Pour elle, « [l]e fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable » (par. 37, citant *Canadian Pacific Ltd. c. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.)).

[145] I cannot agree that no new liability accrues on or after the wind up. As discussed in more detail earlier, the wind-up deficiency in s. 75(1)(b) is made up of the difference between the plan's assets and liabilities calculated as of the date of wind up. On wind up, the *PBA* accords statutory entitlements and protections to employees that would not otherwise be available: Kaplan, at p. 532. Wind up therefore gives rise to new liabilities. In particular, on wind up, and only on wind up, plan beneficiaries are entitled, under s. 74, to make elections regarding the payment of their benefits. The plan's liabilities cannot be determined until those elections are made. Contrary to what my colleague Justice Deschamps suggests, the extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up.

[145] Je ne saurais convenir qu'aucune obligation ne s'accumule pendant ou après la liquidation. Comme je le précise précédemment, le déficit de liquidation s'entend à l'al. 75(1)b) de la différence entre l'actif du régime et son passif calculé à la date de la liquidation. En cas de liquidation, la *LRR* confère aux employés des droits et des garanties dont ils ne bénéficieraient pas en d'autres circonstances (Kaplan, p. 532). La liquidation impose donc des obligations nouvelles à l'employeur. Plus particulièrement, en cas de liquidation, et seulement dans ce cas, l'art. 74 permet aux bénéficiaires de faire des choix quant au paiement de leurs prestations. Le passif du régime ne peut être établi avant ces choix. Contrairement à ce que laisse entendre ma collègue la juge Deschamps, le montant du déficit de liquidation dépend de droits qui ne prennent naissance qu'à la liquidation et à l'égard desquels les employés ne font des choix qu'après la liquidation.

2013 SCC 6 (CanLII)

[146] Moreover, the wind-up deficiency will vary after wind up because the amount of money necessary to provide for the payment of the plan sponsor's liabilities will vary with the market. Section 31 of the *PBA* Regulations allows s. 75 payments to be spaced out over the course of five years. As we have seen, the amount of the wind-up deficiency will fluctuate over this period (I set out earlier how this amount in fact fluctuated markedly in the case of the salaried plan in issue here). Thus, while estimates are periodically made and reported after the wind up to determine how much the employer needs to pay, the precise amount of the wind-up deficiency is not ascertained or ascertainable on the date of the wind up.

[146] En outre, le déficit de liquidation diffère après la liquidation puisque la somme à verser pour acquitter les obligations du promoteur du régime dépend du marché. L'article 31 du règlement de la *LRR* permet de répartir sur cinq ans les versements exigés à l'art. 75. Rappelons que le montant du déficit de liquidation fluctuera au cours de cette période (j'ai déjà fait état de la manière dont il a considérablement varié dans le cas du régime des salariés visé en l'espèce). C'est pourquoi, malgré les estimations effectuées périodiquement après la liquidation pour déterminer le montant que l'employeur doit verser, le montant du déficit de liquidation n'est ni déterminé ni déterminable à la date de la liquidation.

[147] I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up — that is, the wind-up deficiency — are included.

[147] J'examine maintenant le sens ordinaire et grammatical des mots « à la date de la liquidation » (en anglais, « *to the date of the wind up* ») employés au par. 57(4). À mon avis, cette expression fait en sorte que seules sont visées les cotisations accumulées avant la date de la liquidation, et non les sommes qui font l'objet d'une obligation qui ne prend naissance que le jour de la liquidation (en anglais, « *on the date of the wind up* ») et qui correspondent au déficit de liquidation.

[148] Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

> **68.** . . .
>
> (2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,
>
> . . .
>
> (c) each trade union that represents members of the pension plan or that, on the date of the wind up, represented the members, former members or retired members of the pension plan;

[148] Si l'intention du législateur avait été d'englober la date de la liquidation, il aurait employé le libellé voulu. Par exemple, l'al. 68(2)c) de la *LRR*, modifié en 2010 (ch. 24, par. 21(2)), précise dans sa version anglaise quels syndicats doivent recevoir avis de la liquidation :

> **68.** . . .
>
> (2) *If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,*
>
> . . .
>
> (c) *each trade union that represents members of the pension plan or that, on the date of the wind up* [à la date de la liquidation], *represented the members, former members or retired members of the pension plan*;

2013 SCC 6 (CanLII)

In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.O. 2010, c. 9, s. 52(5)), read as follows:

70. . . .

(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up. This conclusion is further supported by the structure of the *PBA* and its legislative history and evolution, to which I will turn shortly.

[149] To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-up deficiency obligation set out in s. 75(1)(b) has not "accrued to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued to the date of the wind up" (s. 57(4)).

Contrairement à la formule « *to the date of wind up* », l'expression « *on the date of wind up* » englobe clairement la date de la liquidation. (La version française ne se prête pas à une autre interprétation.) De même, le par. 70(6), qui figurait dans la *LRR* jusqu'en 2012 (abr. L.O. 2010, ch. 9, par. 52(5)), énonce ce qui suit :

70. . . .

(6) À la liquidation partielle d'un régime de retraite, les participants, les anciens participants et les autres personnes qui ont droit à des prestations en vertu du régime de retraite ont des droits et prestations qui ne sont pas inférieurs aux droits et prestations qu'ils auraient à la liquidation totale du régime de retraite à la date de prise d'effet de la liquidation partielle [*on the effective date of the partial wind up*].

Il appert de l'expression anglaise « *on the effective date of the partial wind up* » que les participants ont droit aux prestations à compter de la date de la liquidation partielle, c'est-à-dire qu'ils peuvent les réclamer à compter de la liquidation elle-même. Le législateur s'exprime ainsi lorsqu'il veut qu'une période englobe une date précise. À l'opposé, lorsqu'il dit en anglais « *to the date of the wind up* » (en français, « à la date de la liquidation »), il n'entend pas englober la date où survient la liquidation. Cette conclusion prend en outre appui sur l'architecture de la *LRR*, ainsi que sur son évolution et son historique. J'y reviendrai brièvement.

[149] Bref, le sens ordinaire et grammatical le plus plausible d'« accumulées à la date [*to the date*] de la liquidation » veut que soient visées les sommes entièrement constituées et déterminées immédiatement avant la date prévue de liquidation. Ainsi, l'obligation liée au déficit de liquidation visé à l'al. 75(1)b) n'est donc pas « accumul[é] à la date [*to the date*] de la liquidation » comme l'exige le par. 57(4). De plus, comme cette obligation naît lorsque le régime de retraite est liquidé (al. 75(1)b)), son objet ne peut donc pas être « accumul[é] à la date de la liquidation » (par. 57(4)).

2013 SCC 6 (CanLII)

(b) *The Scheme of the Act*

[150] As discussed earlier, s. 57 establishes deemed trusts over funds which must be contributed to a pension plan, including the one in s. 57(4), which is at issue here. It is helpful to consider these deemed trusts in the context of the obligations to pay funds which give rise to them. Specifically, the relationship between the deemed trust provisions in s. 57(3) and (4), on one hand, and s. 75(1), which sets out liabilities on wind up on the other. According to my colleague Justice Deschamps, s. 75(1) "elegantly parallels the wind-up deemed trust provision" (para. 42) such that the deemed trusts must include the wind-up deficiency. I disagree. In my view, the deemed trusts parallel only s. 75(1)(a), which does not relate to the wind-up deficiency. The correspondence between the deemed trusts and s. 75(1)(a), and the absence of any such correspondence with s. 75(1)(b), makes it clear that the wind-up deficiency is not covered by the deemed trust provisions.

[151] I would recall here the difference between the deemed trusts created by s. 57(3) and (4). While a plan is ongoing, there may be payments which the employer is required to, but has failed to make. The s. 57(3) trust applies to these payments because they are "<u>due and not paid</u>". When a plan is wound up, however, there will be payments that are outstanding in the sense that they are fully constituted, but not yet due. This occurs with respect to the so-called stub period referred to earlier. During this stub period, regular and special liabilities will accrue on a daily basis, as provided for in s. 58(1), but may not be due at the time of wind up. While s. 57(3) cannot apply to these payments because they are not yet due, the deemed trust under s. 57(4) applies to these payments because liability for them has "accrued to the date of the wind up" and they are "<u>not yet due</u>".

[152] The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b).

b) *Le régime de la Loi*

[150] Je le répète, l'art. 57 dispose que les sommes dues à un régime de retraite sont réputées détenues en fiducie. La disposition applicable en l'espèce est le par. 57(4). Il est utile de se pencher sur ces fiducies réputées en liaison avec les obligations de versement qui les font naître. Plus précisément, il s'agit de considérer la relation entre, d'une part, les fiducies dont l'existence est réputée aux par. 57(3) et (4) et, d'autre part, le par. 75(1), qui prescrit certains versements à la liquidation. Selon ma collègue la juge Deschamps, le libellé du par. 75(1) « fait élégamment écho à celui qui crée la fiducie réputée à la liquidation » (par. 42), de sorte que la fiducie réputée doit englober le déficit de liquidation. Je ne suis pas d'accord. À mon avis, la fiducie réputée ne fait écho qu'à l'al. 75(1)a), lequel ne porte pas sur le déficit de liquidation. Il ressort de la correspondance existant entre les fiducies créées et l'al. 75(1)a), et de l'absence d'une telle correspondance avec l'al. 75(1)b) que le déficit de liquidation ne fait pas l'objet d'une fiducie réputée.

[151] Je rappelle la différence entre les fiducies réputées des par. 57(3) et (4). Pendant la durée du régime, l'employeur peut omettre d'effectuer les versements auxquels il est tenu. La fiducie créée au par. 57(3) vise ces versements, car il s'agit de sommes « <u>dues et impayées</u> ». Cependant, lorsque le régime est liquidé, des versements demeurent en suspens en ce sens que le droit y afférent est entièrement constitué, mais que les sommes en cause ne sont pas encore dues. La situation se présente pendant la période tampon mentionnée précédemment où les paiements normaux et spéciaux s'accumulent chaque jour conformément au par. 58(1), mais peuvent ne pas être dus au moment de la liquidation. Bien que le par. 57(3) ne puisse s'appliquer à ces paiements parce qu'ils ne sont pas encore dus, la fiducie créée au par. 57(4) les englobe, car l'obligation s'y rapportant est « accumulé[e] à la date de la liquidation », mais les sommes en question ne sont « <u>pas encore dues</u> ».

[152] L'élément important réside dans le rapport entre ces deux dispositions créant une fiducie et les versements exigés aux al. 75(1)a) et 75(1)b) en cas

2013 SCC 6 (CanLII)

The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

[153] It is striking how closely the text of s. 75(1)(a) — which does not relate to the wind-up deficiency — tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s. 57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) includes both of these types of employer contributions. It refers to "payments that . . . are due . . . and that have not been paid" (i.e. subject to the deemed trust under s. 57(3)) or that have "accrued and that have not been paid" (i.e. subject to the deemed trust under s. 57(4) to the extent that these payments accrued to the date of wind up). This very close tracking of the language between s. 57(3) and (4) on the one hand and s. 75(1)(a) on the other, and the absence of any correspondence between the language of these deemed trust provisions with s. 75(1)(b), suggests that the s. 57(3) and (4) deemed trusts refer to the liability described in s. 75(1)(a) and not to the wind-up deficiency created by s. 75(1)(b). It is difficult to understand why, if the intention had been for s. 57(4) to capture the wind-up deficiency liability under s. 75(1)(b), the legislature would have so closely tracked the language of s. 75(1)(a) alone in creating the deemed trusts. Thus, in my respectful view, the elegant parallel to which my colleague, Justice Deschamps refers exists only between the deemed trust and s. 75(1)(a), and not between the deemed trust and the wind-up deficiency.

de liquidation. Ces deux alinéas visent des sommes de nature différente. L'alinéa 75(1)a) renvoie au passif accumulé avant la liquidation et qui résulte de l'application d'autres dispositions de la Loi, alors que l'al. 75(1)b) crée un passif entièrement nouveau qui naît seulement une fois le régime liquidé. Nul ne conteste, pour autant que je sache, que les deux alinéas renvoient à des passifs différents et que le déficit de liquidation visé en l'espèce correspond à l'obligation prévue à l'al. 75(1)b). Les parties ne contestent pas que l'al. 75(1)a) *ne* vise *pas* les paiements visant à combler le déficit de liquidation.

[153] Il est frappant de constater à quel point le libellé de l'al. 75(1)a) — qui ne porte pas sur le déficit de liquidation — s'apparente à celui des par. 57(3) et (4), qui créent des fiducies. Le paragraphe 57(3) vise les « cotisations de l'employeur qui sont dues et impayées », alors que le par. 57(4) a pour objet les « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». Les deux types de cotisations de l'employeur entrent dans le champ d'application de l'al. 75(1)a), lequel renvoie aux « paiements qui [. . .] sont dus [. . .] et qui n'ont pas été versés » (qui sont donc réputés détenus en fiducie suivant le par. 57(3)) ou qui sont « accumulés, et qui n'ont pas été versés » (qui sont donc réputés détenus en fiducie suivant le par. 57(4), dans la mesure où ils sont accumulés à la date de la liquidation). La grande ressemblance du libellé des par. 57(3) et (4), d'une part, et du texte de l'al. 75(1)a), d'autre part, et l'absence de toute correspondance entre le libellé de ces dispositions créant une fiducie et le texte de l'al. 75(1)b) donnent à penser que l'objet des fiducies dont l'existence est réputée aux par. 57(3) et (4) s'entend de l'obligation faite à l'al. 75(1)a), et non du déficit de liquidation visé à l'al. 75(1)b). On comprend difficilement que le législateur, s'il a voulu que l'obligation de combler le déficit de liquidation visé à l'al. 75(1)b) bénéficie de l'application du par. 57(4), ait repris le seul libellé de l'al. 75(1)a) pour créer les fiducies. En toute déférence, si comme le dit ma collègue la juge Deschamps, des libellés se font élégamment écho, ce sont ceux de la fiducie réputée et de l'al. 75(1)a), et non ceux de la fiducie réputée et du déficit de liquidation.

2013 SCC 6 (CanLII)

[154] I conclude that the scheme of the *PBA* reinforces my conclusion that the ordinary grammatical sense of the words in s. 57(4) does not extend to the wind-up deficiency provided for in s. 75(1)(b).

(c) *Legislative History and Evolution*

[155] Legislative history and evolution may form an important part of the overall context within which a provision should be interpreted. Legislative evolution refers to the various formulations of the provision while legislative history refers to evidence about the provision's conception, preparation and enactment: see, e.g., *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43.

[156] Both the legislative evolution and history of the *PBA* show that it was never the legislature's intention to include the wind-up deficiency in the deemed trust. The evolution and history of the *PBA* are rather intricate and sometimes difficult to follow so I will review them briefly here before delving into a more detailed analysis.

[157] The deemed trust was first introduced into the *PBA* in 1973. At that time, it covered employee contributions held by the employer and employer contributions that were due but not paid. In 1980, the *PBA* was amended so that the deemed trust was expanded to include employer contributions whether they were due or not. Also, new provisions were added allowing for employee elections and requiring additional payments by the employer where a plan was wound up. The 1980 amendments gave rise to confusion on two fronts: first, it was unclear whether the payments that were required on wind up were subject to the deemed trust; second, it was unclear whether a lien over some employer contributions covered the same amount as the deemed trust. In 1983, both these points were clarified. The sections were reworded and rearranged to make it clear that the wind-up deficiency was distinct from the amounts covered by the deemed trust, and that the lien and the

[154] L'architecture de la *LRR* me conforte dans l'opinion que le sens ordinaire et grammatical des termes qui y sont employés n'emporte pas l'application du par. 57(4) au déficit de liquidation visé à l'al. 75(1)b).

c) *L'évolution et l'historique législatifs*

[155] L'évolution et l'historique législatifs peuvent constituer un élément important du contexte global dans lequel une disposition législative doit être interprétée. L'évolution législative s'entend des diverses formulations successives du texte de loi, alors que l'historique législatif s'entend des éléments touchant à sa conception, à son élaboration et à son adoption (voir, p. ex., *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471, par. 43).

[156] Il appert tant de l'évolution de la *LRR* que de son historique que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet de la fiducie réputée. L'évolution et l'historique de la *LRR* étant plutôt complexes et parfois difficiles à suivre, je les examine brièvement avant de me livrer à une analyse plus approfondie.

[157] La fiducie réputée a fait son apparition dans la *LRR* en 1973. À cette époque, elle visait les cotisations des salariés que détenait l'employeur et les cotisations de l'employeur qui étaient dues, mais impayées. En 1980, la *LRR* a été modifiée de sorte que la fiducie réputée englobe toutes les cotisations de l'employeur, qu'elles soient dues ou non. En outre, de nouvelles dispositions permettaient aux salariés de faire des choix et exigeaient des versements supplémentaires de l'employeur lorsque le régime était liquidé. La réforme de 1980 a créé de l'incertitude sous deux rapports. Premièrement, on se demandait si les versements requis à la liquidation faisaient l'objet de la fiducie réputée et, deuxièmement, si certaines cotisations de l'employeur faisaient l'objet d'un privilège à raison du montant visé par la fiducie réputée. En 1983, ces deux points ont été clarifiés. Les articles ont été remaniés et leur libellé reformulé afin de préciser que le déficit de liquidation était distinct des

2013 SCC 6 (CanLII)

deemed trust covered the same amount. A statement by the responsible Minister in 1982 confirms that *the deemed trusts were never intended to cover the wind-up deficiency*.

sommes réputées détenues en fiducie, et que le privilège et la fiducie réputée portaient sur un même montant. En 1982, le ministre responsable a confirmé que *la fiducie réputée n'a jamais été censée s'appliquer au déficit de liquidation*.

[158] My colleague, Justice Deschamps maintains that this history suggests an evolution in the intention of the legislature from protecting "only the service contributions that were due . . . to all amounts due and accrued upon wind up" (para. 42). I respectfully disagree. In my view, the history and evolution of the *PBA* leading up to and including 1983 show that the legislature never intended to include the wind-up deficiency in the deemed trust. Moreover, legislative evolution after 1983 confirms that this intention did not change.

[158] Pour ma collègue la juge Deschamps, cet historique reflèterait l'évolution de l'intention du législateur que la protection couvre d'abord « uniquement les cotisations dues [puis s'étende à tous] les montants dus ou accumulés à la liquidation » (par. 42). Soit dit en tout respect, je ne suis pas d'accord. À mon avis, l'historique et l'évolution de la *LRR* jusqu'en 1983 inclusivement montrent que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet de la fiducie réputée. Qui plus est, il appert de l'évolution de la *LLR* postérieure à 1983 que cette intention demeure inchangée.

(i) *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113

(i) *The Pension Benefits Amendment Act, 1973*, S.O. 1973, ch. 113

[159] So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6. Those amendments created deemed trusts over two amounts: employee pension contributions received by employers (s. 23*a*(1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen due under the plan (s. 23*a*(3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

[159] Aussi loin que je puisse remonter, la fiducie réputée a vu le jour dans la *LRR* par suite de l'adoption de la *Pension Benefits Amendment Act, 1973*, S.O. 1973, ch. 113, art. 6. L'existence d'une fiducie a été réputée à l'égard, d'une part, des cotisations des salariés au régime de retraite touchées par les employeurs (par. 23*a*(1), ce qui s'apparente à la fiducie prévue au par. 57(1) actuel) et, d'autre part, des cotisations de l'employeur devenues exigibles aux termes du régime (par. 23*a*(3), ce qui s'apparente aux cotisations de l'employeur « qui sont dues et impayées » et qui sont réputées détenues en fiducie en application du par. 57(3) actuel). Le texte intégral de ces dispositions et de celles mentionnées ci-après, jusqu'à la version actuelle datant de 1990, figure en annexe.

(ii) *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80

(ii) *The Pension Benefits Amendment Act, 1980*, S.O. 1980, ch. 80

[160] Ontario undertook significant pension reform leading to *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80; see Kaplan, at pp. 54-56. I will concentrate on the deemed trust provisions and how they related to the liabilities on

[160] L'Ontario a entrepris une réforme majeure des régimes de retraite qui a débouché sur l'adoption de la *Pension Benefits Amendment Act, 1980*, S.O. 1980, ch. 80 (voir Kaplan, p. 54-56). Je m'attacherai aux dispositions sur la fiducie réputée et à

2013 SCC 6 (CanLII)

wind up and, for ease of reference, I will refer to the sections as they were renumbered in the 1980 consolidation: R.S.O. 1980, c. 373. The 1980 legislation expanded the deemed trust relating to employer contributions. Although far from clear, the new provisions appear to have created a deemed trust and lien over the employer contributions whether otherwise payable or not and calculated as if the plan had been wound up on the relevant date.

leur interaction avec le passif issu de la liquidation. Pour faciliter la consultation, je renvoie aux dispositions selon leur nouvelle numérotation datant de la refonte de 1980 (R.S.O. 1980, ch. 373). La loi de 1980 a accru la portée de la fiducie réputée quant aux cotisations de l'employeur. Même si elles ne sont pas du tout claires, les nouvelles dispositions semblent faire en sorte que les cotisations de l'employeur, qu'elles soient exigibles ou non, dont le montant est établi comme si le régime avait été liquidé à la date considérée, fassent l'objet d'une fiducie réputée et d'un privilège.

[161] It was unclear after the reforms of 1980 whether the deemed trust applied to all employer contributions that arose on wind up. According to s. 23(4), on any given date, the trust extended to an amount to be determined "as if the plan had been wound up on that date". However, the provisions of the 1980 version of the Act did not explicitly state what such a calculation would include. Under s. 21(2) of the 1980 statute, the employer was obligated to pay on wind up "all amounts that would otherwise have been required to be paid to meet the tests for solvency . . . , up to the date of such termination or winding up". Under s. 32, however, the employer had to make a payment on wind up that was to be "[i]n addition" to that due under s. 21(2). Whether the legislature intended that the trust should cover this latter payment was left unclear.

[161] Après la réforme de 1980, l'incertitude persistait quant à savoir si la fiducie réputée visait toutes les cotisations exigibles de l'employeur une fois le régime liquidé. Suivant le par. 23(4), était détenu en fiducie, à une date donnée, un montant devant être déterminé [TRADUCTION] « comme si le régime avait été liquidé à cette date ». Or, les dispositions de 1980 ne précisaient pas expressément les éléments à inclure dans ce calcul. Aux termes du par. 21(2) de la loi de 1980, à la liquidation, l'employeur était tenu de verser « les sommes dont le versement aurait été par ailleurs requis pour satisfaire aux critères de solvabilité [. . .] jusqu'à la date de la cessation ou de la liquidation du régime ». L'article 32 disposait cependant que, à la liquidation, l'employeur effectuait un versement « [e]n plus » de celui exigé au par. 21(2). Restait à savoir si l'intention du législateur était que ce dernier paiement soit détenu en fiducie.

[162] It was also unclear whether the lien applied to a different amount than was subject to the deemed trust. According to s. 23(3), "the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not". This comes in the middle of two portions of the provision which explicitly refer to the deemed trust, but it is not clear whether the legislature intended to refer to the same amount throughout the provision.

[162] Il n'était pas clair non plus que l'objet du privilège était le même que celui de la fiducie réputée. Suivant le par. 23(3), [TRADUCTION] « les participants ont un privilège sur l'actif de l'employeur à raison du montant qui, dans le cours normal des affaires, serait consigné dans les livres de comptes, qu'il y soit consigné ou non ». Ce passage figure entre deux parties de la disposition qui renvoient expressément à la fiducie réputée, mais l'intention du législateur demeure incertaine quant à savoir si c'est le même montant qui est visé chaque fois.

2013 SCC 6 (CanLII)

(iii) *The Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2

[163] The 1983 amendments substantially clarified the scope of the deemed trust and lien for employer contributions. They make clear that neither the deemed trust nor the lien applied to the wind-up deficiency; the responsible Minister confirmed that this was the intention of the amendments.

[164] The new provision was amended by s. 3 of the 1983 amendments and is found in s. 23(4) which provided:

23. . . .

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Section 21(2)(a) provides that on wind up, the employers must pay an amount equal to *the current service cost and the special payments* that "have accrued to and including the date of the termination winding up but, under the terms of the pension plan or the regulations, are not due on that date"; the provision adds that these amounts shall be deemed to accrue on a daily basis. These provisions make it clear that the s. 23(4) deemed trust applies only to the special payments and current service costs that have accrued, on a daily basis, up to and including

(iii) *The Pension Benefits Amendment Act, 1983*, S.O. 1983, ch. 2

[163] Les modifications de 1983 ont considérablement précisé la portée de la fiducie réputée et du privilège et elles ont circonscrit les cotisations de l'employeur qui en faisaient l'objet. Il en ressort que ni la fiducie réputée ni le privilège n'ont pour objet le déficit de liquidation; le ministre responsable a confirmé que telle était l'intention du législateur en apportant les modifications.

[164] La nouvelle disposition a été modifiée par l'art. 3 de la loi de 1983 pour devenir le par. 23(4), lequel disposait dès lors ce qui suit :

[TRADUCTION]

23. . . .

(4) L'employeur qui, dans le cadre d'un régime de retraite, est tenu de cotiser à ce régime est réputé détenir en fiducie pour le compte des participants du régime une somme égale au total

(a) de toutes les sommes que l'employeur est tenu de verser au régime pour acquitter

(i) le coût du service courant et

(ii) les paiements spéciaux prescrits par règlement,

qui sont dus aux termes du régime ou du règlement, et qui n'ont pas été versés;

(b) lors de la cessation ou de la liquidation du régime, toute autre somme que l'employeur est tenu de payer en vertu de l'alinéa 21 (2) a).

Suivant l'alinéa 21(2)a), l'employeur est tenu, lors de la liquidation, de verser un montant égal au *coût du service courant et aux paiements spéciaux* qui [TRADUCTION] « sont accumulés à la date de la cessation ou de la liquidation, celle-ci comprise, mais qui, suivant les conditions du régime et le libellé du règlement, ne sont pas encore dus ». La disposition prévoit en outre que ces postes sont réputés s'accumuler sur une base quotidienne. Il est donc clair, suivant le par. 23(4), que seuls sont détenus en fiducie les paiements spéciaux et le coût

2013 SCC 6 (CanLII)

the date of wind up. The deemed trust clearly does not extend to the wind-up deficiency.

du service courant qui sont accumulés, sur une base quotidienne, jusqu'à la date de la liquidation, celle-ci comprise. Le déficit de liquidation ne fait manifestement pas l'objet de la fiducie réputée.

[165] The provision referring to the additional payments required on wind up also makes clear that those payments are not within the scope of the deemed trust. These additional liabilities were described by s. 32, a provision very similar to s. 75(1)(b). These amounts are first, the amount guaranteed by the Guarantee Fund and, second, the value of pension benefits vested under the plan that exceed the value of the assets of the plan. Section 32(2) specifies that these amounts *are* "in addition to the amounts that the employer is liable to pay under subsection 21 (2)" (which are the payments comparable to the current s. 75(1)(a) payments) and that *only the latter* fall within the deemed trust. The inevitable conclusion is that, in 1983, the wind-up deficiency was not included in the scope of the deemed trust.

[165] La disposition relative au versement supplémentaire exigé à la liquidation établit aussi clairement que ce versement n'est pas réputé détenu en fiducie. Le montant de ce versement supplémentaire est précisé à l'art. 32, dont le libellé est très semblable à celui de l'al. 75(1)b). Il s'agit premièrement de la somme garantie par le Fonds de garantie et, deuxièmement, de l'excédent des prestations de retraite acquises en vertu du régime sur l'actif du régime. Le paragraphe 32(2) dispose que le versement exigé de l'employeur *s'ajoute* à celui exigé au par. 21(2) (lequel s'apparente à celui que vise l'actuel al. 75(1)a) et donc que *seul ce dernier* est réputé détenu en fiducie. Force est de conclure que, en 1983, le déficit de liquidation échappait à la fiducie réputée.

[166] The 1983 amendments also clarified the scope of the lien. They indicated that the scope of the lien was identical to the scope of the deemed trust. Section 23(5) specified that the lien extended only to the amounts that were deemed to be held in trust under s. 23(4) (i.e. the *current service costs and special payments that had accrued to and including the date of the wind up but are not yet due*).

[166] Les modifications de 1983 ont également clarifié la portée du privilège en précisant qu'elle était identique à celle de la fiducie réputée. Le paragraphe 23(5) précisait que le privilège ne valait que pour les sommes réputées détenues en fiducie suivant le par. 23(4) (à savoir le *coût du service courant et les paiements spéciaux accumulés à la date de la liquidation, celle-ci comprise, mais qui ne sont pas encore dus*).

[167] This makes two things clear: that the lien covers the same amounts as the deemed trust, and that neither covers the wind-up deficiency.

[167] Deux choses sont donc claires. L'objet du privilège et de la fiducie réputée est le même et il exclut le déficit de liquidation.

[168] A brief, but significant piece of legislative history seems to me to dispel any possible doubt. In speaking at first reading of the 1983 amendments, the Minister responsible, the Honourable Robert Elgie said this:

[168] L'historique législatif renferme un passage bref mais important qui me paraît dissiper tout doute éventuel à cet égard. Lors de la première lecture du projet de modification de 1983, le ministre responsable, l'honorable Robert Elgie, a déclaré ce qui suit :

> The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension

> [TRADUCTION] La première série de modifications examinée aujourd'hui apporte les changements administratifs nécessaires pour atteindre l'objectif que nous avons fixé vers la fin de 1980,

2013 SCC 6 (CanLII)

benefit plan. These amendments will clarify the ways in which we can attain that goal.

In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions. . . .

Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarifies the intent of Bill 214. [Emphasis added.]

(Ontario (Hansard), No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

The 1983 amendments made the scope of the lien correspond precisely to the scope of the deemed trust over the employer's accrued contributions. It is thus clear from this statement that it was never the legislative intention that either should apply to "an employer's potential future liability" on wind up (i.e. the wind-up deficiency). In 1983, there is therefore, in my view, virtually irrefutable evidence of legislative intent to do exactly the opposite of what the Court of Appeal held in this case had been done.

[169] Subsequent legislative evolution shows no change in this legislative intent. In fact, subsequent amendments demonstrate a clear legislative intent to exclude from the deemed trust employer liabilities that arise only upon wind up of the plan.

(iv) *Pension Benefits Act, 1987*, S.O. 1987, c. 35

[170] Amendments to the *PBA* in 1987 resulted in it being substantially in its current form. With those amendments, the extent of the deemed trusts was further clarified. The provision in the 1983

à savoir garantir les prestations de retraite après la liquidation d'un régime de retraite à prestations déterminées. Ces modifications préciseront les moyens grâce auxquels cet objectif pourra être atteint.

Dans le projet de loi 214 [la réforme de 1980], les employés bénéficiaient d'un privilège sur l'actif de l'employeur à l'égard des cotisations versées au régime de retraite et perçues par l'employeur, ainsi que des cotisations de l'employeur accumulées. . .

Malheureusement, la portée du privilège fait l'objet de différentes interprétations juridiques. On a fait valoir que le montant protégé grâce au privilège comprenait toute somme éventuelle due par l'employeur à la liquidation du régime, ce qui n'a jamais été voulu par le législateur et n'était pas nécessaire pour assurer la protection souhaitée. La modification apportée à l'article 23 précise l'intention qui sous-tend le projet de loi 214. [Je souligne.]

(Ontario (Hansard), n° 99, 2e sess., 32e lég., 7 juillet 1982, p. 3568)

Les modifications de 1983 ont fait en sorte que la portée du privilège corresponde exactement à celle de la fiducie réputée en ce qui a trait aux cotisations accumulées de l'employeur. Il ressort donc de l'extrait qui précède que le législateur n'a jamais voulu que la fiducie réputée ou le privilège s'appliquent à « toute somme éventuelle due par l'employeur » lors de la liquidation (à savoir, le déficit de liquidation). À mon sens, il est donc pour ainsi dire établi que, en 1983, le législateur entendait accomplir précisément le contraire de ce qui, selon la Cour d'appel, aurait résulté de ces modifications.

[169] L'évolution législative ultérieure montre que l'intention du législateur n'a pas changé. En fait, les modifications subséquentes révèlent clairement son intention d'exclure de la fiducie réputée les obligations de l'employeur qui naissent seulement lors de la liquidation du régime.

(iv) *Loi de 1987 sur les régimes de retraite*, L.O. 1987, ch. 35

[170] Les modifications apportées à la *LRR* en 1987 l'ont essentiellement fait évoluer jusqu'à sa version actuelle. Elles ont précisé davantage la portée des fiducies réputées. Dans la Loi de 1983,

2013 SCC 6 (CanLII)

version of the Act combined within a single subsection a deemed trust for employer contributions that were due and not paid (s. 23(4)(a)) and employer contributions that had accrued to and including the date of wind up but which were not yet due (s. 23(4)(b), referring to s. 21(2)(a)). In the 1987 amendments, these two trusts were each given their own subsection and their scope was further clarified. Moreover, after the 1987 revision, one no longer had to refer to a separate provision (formerly s. 21(2)(a)) to determine the scope of the trust covering payments that were accrued but not yet due. Thus, while the substance of the provisions did not change in 1987, their form was simplified.

un même paragraphe créait une fiducie réputée pour les cotisations de l'employeur qui étaient dues mais impayées (al. 23(4)a)) et une autre pour les cotisations de l'employeur qui étaient accumulées jusqu'à la date de la liquidation, celle-ci comprise, mais qui n'étaient pas encore dues (al. 23(4)b), qui renvoyait à l'al. 21(2)a)). Dès 1987, les deux fiducies ont fait l'objet de paragraphes distincts et leur portée a été davantage circonscrite. En outre, après la réforme de 1987, il n'était plus nécessaire de renvoyer à une autre disposition (l'ancien al. 21(2)a)) pour déterminer la portée de la fiducie créée pour les paiements accumulés, mais non encore dus. Par conséquent, si le fond des dispositions n'a pas été modifié en 1987, leur forme a été simplifiée.

[171] The new s. 58(3) (which is exactly the same as the current s. 57(3)) replaced the former s. 23(4)(a). This created a trust for employer contributions due and not paid. Section 58(4) (which is exactly the same as s. 57(4) as it stood at the time) replaced the former s. 23(4)(b) and part of s. 21(2)(a) and created a trust that arises on wind up and covers "employer contributions accrued <u>to the date of the wind up</u> but not yet due".

[171] Le nouveau par. 58(3) (identique au par. 57(3) actuel) a remplacé l'ancien al. 23(4)a), lequel créait une fiducie pour les cotisations de l'employeur dues mais impayées. Le paragraphe 58(4) (identique au par. 57(4) actuel) a remplacé l'ancien al. 23(4)b) et, en partie, l'al. 21(2)a), et dispose que, dès la liquidation, les « cotisations de l'employeur qui sont accumulées <u>à la date de la liquidation</u>, mais qui ne sont pas encore dues » sont détenues en fiducie.

[172] The 1987 amendment also shows that the legislature adverted to the difference between "to the date of the wind up" and "to and including" the date of wind up and chose the former. This is reflected in a small but significant change in the wording of the relevant provisions. The former provision, s. 23(4)(b), by referring to s. 21(2)(a) captured current service costs and special payments that "have <u>accrued to and including</u> the date of the termination or winding up." The new version in s. 58(4) deletes the words "and including", putting the section in its present form. This deletion, to my way of thinking, reinforces the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up. Respectfully, the legislative record does not support Deschamps J.'s view that there was a legislative evolution towards a more expanded deemed trust. Quite the opposite.

[172] La modification de 1987 montre également que le législateur était conscient de la différence entre « à la date de la liquidation » et « à la date [de la liquidation], celle-ci comprise » et qu'il a choisi la première formule. C'est ce qui appert d'un changement léger, mais important, apporté au libellé des dispositions en cause. L'ancienne disposition, l'al. 23(4)b), par son renvoi à l'al. 21(2)a), englobait le coût du service courant et les paiements spéciaux [TRADUCTION] « accumulés <u>à la date</u> de cessation ou de liquidation, <u>celle-ci comprise</u> ». Dans la nouvelle disposition, le par. 58(4), les mots « celle-ci comprise » sont supprimés pour donner le libellé actuel. À mon sens, cette suppression appuie l'intention du législateur d'*exclure* du champ d'application de la fiducie réputée les obligations qui naissent seulement *à la* date même de la liquidation. En toute déférence, l'historique législatif n'étaye pas le point de vue de ma collègue la juge Deschamps selon lequel il y aurait eu, au fil de l'évolution législative, accroissement de la portée de la fiducie réputée. C'est plutôt le contraire.

2013 SCC 6 (CanLII)

[173] To sum up, I draw the following conclusions from this review of the legislative evolution and history. The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

[173] En résumé, voici ce que je conclus de l'évolution et de l'historique législatifs. La loi établit une distinction entre deux types d'obligation de l'employeur qui sont pertinents en l'espèce. Il y a d'une part les cotisations requises pour acquitter le coût du service courant et d'autres paiements qui sont dus ou qui sont accumulés sur une base quotidienne jusqu'à la date considérée. Il s'agit des paiements prévus à l'actuel al. 75(1)a), à savoir les paiements qui sont dus ou accumulés, mais qui n'ont pas été versés. Et d'autre part, il y a les cotisations supplémentaires exigées lorsque le régime est liquidé (ou, comme j'y renvoie précédemment, le déficit de liquidation). Ces paiements font l'objet de l'al. 75(1)b). Il appert de l'évolution et de l'historique législatifs que les fiducies réputées des par. 57(3) et (4) devaient seulement englober les cotisations du premier type et que le législateur n'a jamais voulu que les obligations ultérieures de l'employeur qui naissent une fois le régime liquidé fassent l'objet d'une fiducie réputée ou d'un privilège.

(d) *The Purpose of the Legislation*

d) *L'objet de la loi*

[174] Excluding the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. Pension legislation aims at important protective purposes. These protective purposes, however, are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at paras. 13-14.

[174] L'exclusion du déficit de liquidation de la fiducie réputée est conforme aux objectifs généraux de la loi. Les dispositions sur les régimes de retraite ont une importante vocation de protection. Or, le législateur n'entend pas atteindre son objectif de protection à n'importe quel prix, son intention étant clairement de le mettre en balance avec d'autres intérêts importants dans le cadre d'un régime soigneusement conçu (*Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152, par. 13-14).

[175] In this instance, the legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency.

[175] Dans le cas qui nous intéresse, le législateur a créé des fiducies à l'égard des cotisations qui sont dues ou accumulées à la date de la liquidation afin de protéger, dans une certaine mesure, les droits des bénéficiaires d'un régime de retraite et ceux des employés contre les réclamations des autres créanciers de l'employeur. Or, il y a de bonnes raisons de penser que c'est en raison d'autres objectifs concurrents que le législateur s'est abstenu d'accroître la portée de la fiducie réputée et d'y inclure le déficit de liquidation.

2013 SCC 6 (CanLII)

[176] First, if there were to be a deemed trust over all employer liabilities that arise when a plan is wound up, much simpler and clearer words could readily be found to achieve that objective.

[176] Premièrement, si le législateur avait voulu créer une fiducie applicable à la totalité des obligations de l'employeur qui découlent de la liquidation d'un régime, il lui aurait été aisé de s'exprimer beaucoup plus simplement et clairement.

[177] Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

[177] Deuxièmement, si on considère la situation avec un certain recul, il pourrait fort bien être néfaste de protéger le déficit de liquidation au moyen de la fiducie réputée. Il pourrait en effet en résulter une grande incertitude pour les autres créanciers et prêteurs éventuels, une incertitude qui pourrait non seulement compliquer l'exercice des droits des créanciers, mais aussi compromettre l'accès d'une entreprise en difficulté aux fonds des prêteurs. L'ampleur des obligations à la liquidation peut être considérable et, lorsque l'entreprise demeure en exploitation, on ne peut savoir quelle sera cette ampleur sur une période de cinq ans. Le quantum de ces obligations peut, comme le montrent les faits de la présente espèce, fluctuer radicalement pendant cet intervalle. De telles obligations peuvent rendre très difficile l'évaluation de la solvabilité de l'emprunteur et plus difficile encore la juste répartition des paiements entre les créanciers.

[178] While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are equally applicable to the policy decisions reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended.

[178] Je conviens certes que la protection des régimes de retraite constitue un objectif important, mais il n'appartient pas à la Cour de décider de la mesure dans laquelle cet objectif sera poursuivi ou d'autres intérêts en souffriront. Dans sa conclusion, la juge Deschamps souligne que même si la protection des régimes de retraite constitue un objectif valable, les tribunaux ne doivent pas recourir à l'equity pour modifier les priorités du législateur qui sous-tendent la *LACC*. Il s'agit d'une question de politique générale, et les tribunaux doivent déférer à la décision du législateur (motifs de la juge Deschamps, par. 82). À mon avis, les propos de ma collègue sur ce point valent également pour les décisions de politique générale qui sous-tendent le texte de la *LRR*. Il appartient à l'Assemblée législative de l'Ontario de décider du degré de protection qu'il convient d'accorder aux bénéficiaires d'un régime de retraite. Au vu du

2013 SCC 6 (CanLII)

In short, the interpretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

libellé de la *LRR*, j'hésite à inférer que le législateur a voulu conférer une vaste protection avec tous les inconvénients que cela pouvait comporter. En somme, l'interprétation que je préconise s'accorde avec l'approche équilibrée du législateur dans la protection du droit à des prestations.

[179] For these reasons, I am of the respectful view that the Court of Appeal erred in finding that the s. 57(4) deemed trust applied to the wind-up deficiency.

[179] C'est pourquoi j'estime que la Cour d'appel a tort de conclure que la fiducie réputée du par. 57(4) vise le déficit de liquidation.

B. *Second Issue: Did the Court of Appeal Err in Finding That Indalex Breached the Fiduciary Duties it Owed to the Pension Beneficiaries as the Plans' Administrator and in Imposing a Constructive Trust as a Remedy?*

B. *Deuxième question en litige : La Cour d'appel a-t-elle tort de conclure qu'Indalex a manqué à ses obligations fiduciaires envers les bénéficiaires en tant qu'administrateur des régimes de retraite et d'imposer une fiducie par interprétation à titre de réparation?*

(1) Introduction

(1) Introduction

[180] The Court of Appeal found that during the *CCAA* proceedings Indalex breached its fiduciary obligations as administrator of the pension plans: para. 116. As a remedy, it imposed a remedial constructive trust over the reserve fund, effectively giving the plan beneficiaries recovery of 100 cents on the dollar in priority to all other creditors, including creditors entitled to the super priority ordered by the *CCAA* court.

[180] La Cour d'appel conclut que, dans le cadre de la procédure fondée sur la *LACC*, Indalex a manqué à ses obligations fiduciaires d'administrateur des régimes de retraite (par. 116). En guise de réparation, elle impose une fiducie par interprétation à l'égard du fonds de réserve et permet ainsi aux bénéficiaires des régimes de retraite de recouvrer l'intégralité de leur créance de préférence à tous les autres créanciers, notamment ceux auxquels le tribunal a accordé une superpriorité sous le régime de la *LACC*.

[181] The breaches identified by the Court of Appeal fall into three categories. First, Indalex breached the prohibition against a fiduciary being in a position of conflict of interest because its interests in dealing with its insolvency conflicted with its duties as plan administrator to act in the best interests of the plans' members and beneficiaries: para. 142. According to the Court of Appeal, the simple fact that Indalex found itself in this position of conflict of interest was, of itself, a breach of its fiduciary duty as plan administrator. Second, Indalex breached its fiduciary duty by applying, without notice to the plans' beneficiaries, for *CCAA* protection: para. 139. Third, Indalex

[181] Les manquements relevés par la Cour d'appel sont de trois ordres. D'abord, Indalex n'a pas respecté l'interdiction faite au fiduciaire de se trouver en conflit d'intérêts car, dans le cadre de la procédure fondée sur la *LACC*, ses intérêts d'entreprise insolvable s'opposaient à son obligation d'administrateur d'agir au mieux des intérêts des participants et des bénéficiaires des régimes (par. 142). Selon la Cour d'appel, ce conflit d'intérêts constituait à lui seul un manquement d'Indalex à ses obligations fiduciaires d'administrateur des régimes. Deuxièmement, Indalex a manqué à ses obligations fiduciaires en demandant, sans en informer au préalable les

2013 SCC 6 (CanLII)

breached its fiduciary duty by seeking and/or obtaining various relief in the *CCAA* proceedings including the "super priority" in favour of the DIP lenders, approval of the sale of the business knowing that no payment would be made to the underfunded plans over the statutory deemed trusts and seeking to be put into bankruptcy with the intention of defeating the deemed trust claims: para. 139. As a remedy for these breaches of fiduciary duty the court imposed a constructive trust.

bénéficiaires des régimes, la protection offerte par la *LACC* (par. 139). Troisièmement, Indalex a manqué à ses obligations fiduciaires en sollicitant puis en obtenant diverses mesures dans le cadre de la procédure fondée sur la *LACC*, dont la « superpriorité » de la créance des prêteurs DE, l'approbation de la vente de l'entreprise alors qu'elle savait que nul versement ne serait fait aux régimes sous-capitalisés en sus des sommes protégées par les fiducies réputées d'origine législative, et en demandant sa mise en faillite dans l'intention de faire échec aux prétentions relatives à la fiducie réputée (par. 139). En guise de réparation de ces manquements à l'obligation fiduciaire, la cour a imposé une fiducie par interprétation.

[182] In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict — the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the *CCAA* proceedings as if there were independent plan administrators. I also conclude that a remedial constructive trust is not available as a remedy for this breach.

[182] À mon sens, la Cour d'appel confère une portée excessive aux obligations fiduciaires d'Indalex en tant qu'administrateur des régimes et elle relève des manquements qui n'en sont pas. Indalex a seulement manqué à son obligation fiduciaire lorsque, une fois devenue insolvable, ses intérêts sont clairement entrés en conflit avec son obligation fiduciaire d'administrateur d'assurer le versement aux régimes de toutes les cotisations devenues exigibles. Son manquement réside dans l'omission non pas d'éviter ce conflit, qui était en soi inévitable, mais de pallier le problème en veillant à ce que les bénéficiaires des régimes puissent être représentés dans le cadre de la procédure fondée sur la *LACC* comme si l'administrateur des régimes avait été indépendant. Je conclus également que la fiducie par interprétation ne saurait être accordée à titre de réparation pour ce manquement.

[183] This part of the appeals requires us to answer two questions which I will address in turn:

(i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?

(ii) If so, was imposition of a constructive trust an appropriate remedy?

[183] Ce volet des pourvois commande de répondre à deux questions que j'examine successivement :

(i) Quelles étaient les obligations fiduciaires d'Indalex en tant qu'administrateur des régimes de retraite, et y a-t-il eu manquement à ces obligations?

(ii) Dans l'affirmative, l'imposition d'une fiducie par interprétation constituait-elle une réparation appropriée?

2013 SCC 6 (CanLII)

(2) What Fiduciary Duties Did Indalex Have in its Role as Plan Administrator and Did it Breach Those Duties?

(a) *Legal Principles*

[184] The appellants do not dispute that Indalex, in its role of administrator of the plans, had fiduciary duties to the members of the plan and that when it is acting in that role it can only act in the interests of the plans' beneficiaries. It is not necessary for present purposes to decide whether a pension plan administrator is a *per se* or *ad hoc* fiduciary, although it must surely be rare that a pension plan administrator would not have fiduciary duties in carrying out that role: *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41, aff'g 2008 ONCA 394, 67 C.C.P.B. 1, at para. 55.

[185] However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 31. As La Forest J. put it in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574:

> The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship . . . . [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. . . .
>
> . . .
>
> It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. . . . [Emphasis added; pp. 646-47.]

[186] The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the

(2) Quelles étaient les obligations fiduciaires d'Indalex en tant qu'administrateur des régimes de retraite, et y a-t-il eu manquement à ces obligations?

a) *Principes juridiques*

[184] Les appelants ne contestent pas que, en tant qu'administrateur des régimes de retraite, Indalex avait des obligations fiduciaires envers les participants et que, à ce titre, elle ne pouvaient agir que dans l'intérêt des bénéficiaires des régimes. Point n'est besoin, aux fins du pourvoi, de déterminer si l'administrateur d'un régime de retraite est fiduciaire en soi ou *ad hoc*, bien qu'il soit assurément rare qu'un tel administrateur n'ait pas d'obligations fiduciaires dans l'exercice de cette fonction (*Burke c. Cie de la Baie d'Hudson*, 2010 CSC 34, [2010] 2 R.C.S. 273, par. 41, conf. 2008 ONCA 394, 67 C.C.P.B. 1, par. 55).

[185] Or, la conclusion portant que, à titre d'administrateur des régimes, Indalex avait des obligations fiduciaires envers les bénéficiaires marque le début de l'examen, et non sa fin, car les obligations fiduciaires n'existent pas en général, mais découlent des intérêts juridiques qui sont précisément en jeu et s'y rattachent (*Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261, par. 31). Comme l'affirme le juge La Forest dans *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574 :

> La nature particulière de cette obligation [du fiduciaire] peut varier selon les rapports concernés [. . .] [C]e ne sont pas tous les droits découlant de rapports présentant des caractéristiques fiduciaires qui justifient une demande pour manquement à une obligation fiduciaire. . .
>
> . . .
>
> La prétention qu'il y a manquement à une obligation fiduciaire ne peut se fonder que sur le manquement aux obligations particulières qui découlent des rapports dits fiduciaires. . . [Je souligne; p. 646-647.]

[186] Il convient donc d'apprécier la nature et la portée de l'obligation fiduciaire dans le cadre juridique applicable à la relation dont est issue cette

2013 SCC 6 (CanLII)

fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175, at para. 141; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 36-37; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of the legal framework within which a particular fiduciary duty must be exercised. In my respectful view, this is such a case.

obligation (voir, p. ex., *Sharbern Holding Inc. c. Vancouver Airport Centre Ltd.*, 2011 CSC 23, [2011] 2 R.C.S. 175, par. 141; *Galambos c. Perez*, 2009 CSC 48, [2009] 3 R.C.S. 247, par. 36-37; *K.L.B. c. Colombie-Britannique*, 2003 CSC 51, [2003] 2 R.C.S. 403, par. 41). À titre d'exemple, la règle générale veut que le fiduciaire ait un devoir de loyauté doublé d'une obligation d'éviter tout conflit d'intérêts (voir, p. ex., *Strother c. 3464920 Canada Inc.*, 2007 CSC 24, [2007] 2 R.C.S. 177, par. 35; *Lac Minerals*, p. 646-647). Toutefois, il peut se révéler nécessaire d'adapter cette règle générale au cadre juridique dans lequel doit être exercée une obligation fiduciaire en particulier. Tel est, à mon humble avis, le cas en l'espèce.

(b) *The Legal Framework of Indalex's Dual Role as a Plan Administrator and Employer*

b) *Le cadre juridique de la double fonction d'Indalex à titre d'administrateur de régime et d'employeur*

[187] In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the *PBA*. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

[187] Pour déterminer la nature et la portée de la fonction et des obligations fiduciaires d'Indalex en tant qu'administrateur des régimes, nous devons considérer le cadre juridique dans lequel évolue l'administrateur. Ce cadre juridique découle principalement des documents constitutifs des régimes de retraite et des dispositions pertinentes de la *LRR*, des sources qui doivent être examinées avant toutes autres pour déterminer les obligations fiduciaires spécifiques qui incombent à l'administrateur dans ce contexte.

[188] Turning first to the plan documents, I take the salaried plan as an example. Under it, the company is appointed the plan administrator: art. 13.01. The term "Company" is defined to mean Indalex Limited and any reference in the plan to actions taken or discretion to be exercised by the Company means Indalex acting through the board of directors or any person authorized by the board for the purposes of the plan: art. 2.09. Article 13.01 provides that the "Management Committee of the Board of Directors of the Company will appoint a Pension and Benefits Committee to act on behalf of the Company in its capacity as administrator of the Plan. The Pension and Benefits Committee will decide conclusively all matters relating to the operation, interpretation and application of the Plan".

[188] En ce qui concerne d'abord les documents constitutifs des régimes de retraite, considérons ceux relatifs au régime des salariés. Ils confient à la société l'administration du régime (art. 13.01). Le terme « société » s'entend d'Indalex Limited, et toute mention par le régime d'une mesure prise ou d'un pouvoir discrétionnaire exercé par la société suppose qu'Indalex agit par l'entremise du conseil d'administration ou d'une personne autorisée par celui-ci aux fins du régime (art. 2.09). Suivant l'art. 13.01, le [TRADUCTION] « comité de gestion du conseil d'administration de la société nomme un comité de retraite et de prestations pour agir au nom de la société dans l'exercice de sa fonction d'administrateur du régime. Le comité de retraite et de prestations se prononce de manière définitive

2013 SCC 6 (CanLII)

Thus, the Pension and Benefits Committee is to act on behalf of the company and by virtue of art. 2.09 its acts are considered those of the company. Article 13.02 sets out the duties of the Pension and Benefits Committee which include the "performance of all administrative functions not performed by the Funding Agent, the Actuary or any group annuity contract issuer": art. 13.02(1).

sur toute question relative au fonctionnement, à l'interprétation et à l'application du régime ». Le comité de retraite et de prestations a donc pour mandat d'agir pour le compte de la société et, suivant l'art. 2.09, ses actes sont assimilés à ceux de la société. L'article 13.02 énonce les fonctions du comité, dont l'exercice de toute fonction administrative qui ne relève pas du gestionnaire de la caisse, de l'actuaire ou de l'émetteur de tout contrat de rente collective (par. 13.02(1)).

[189] The plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant to these appeals:

22. (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

(2) [Special knowledge and skill] The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

. . .

(4) [Conflict of interest] An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

[189] La *LRR* attribue également pouvoirs et obligations à l'administrateur d'un régime. L'article 22 énumère les obligations générales faites à l'administrateur, dont trois importent particulièrement dans les présents pourvois :

22. (1) [Soin, diligence et compétence] L'administrateur d'un régime de retraite apporte à l'administration et au placement des fonds de la caisse de retraite le soin, la diligence et la compétence qu'une personne d'une prudence normale exercerait relativement à la gestion des biens d'autrui.

(2) [Connaissances et compétences particulières] L'administrateur d'un régime de retraite apporte à l'administration du régime de retraite et à l'administration et au placement des fonds de la caisse de retraite toutes les connaissances et compétences pertinentes que l'administrateur possède ou devrait posséder en raison de sa profession, de ses affaires ou de sa vocation.

. . .

(4) [Conflit d'intérêts] L'administrateur, ou si l'administrateur est un comité de retraite ou un conseil de fiduciaires, un membre du comité ou du conseil qui est l'administrateur du régime de retraite ne permet pas sciemment que son intérêt entre en conflit avec ses attributions à l'égard du régime de retraite.

[190] Not surprisingly, the powers and duties conferred on the administrator by the legislation are administrative in nature. For the most part they pertain to the internal management of the pension fund and to the relationship among the pension administrator, the beneficiaries, and the Superintendent of Financial Services ("Superintendent"). The list includes: applying

[190] Il n'est pas étonnant que les pouvoirs et les obligations légaux de l'administrateur soient de nature administrative. La plupart ont trait à la gestion interne de la caisse de retraite et à la relation entre l'administrateur du régime de retraite, les bénéficiaires et le surintendant des services financiers (le « surintendant »). Mentionnons la demande au surintendant d'enregistrer le régime ou de le

2013 SCC 6 (CanLII)

to the Superintendent for registration of the plan and any amendments to it as well as filing annual information returns: ss. 9, 12 and 20 of the *PBA*; providing beneficiaries and eligible potential beneficiaries with information and documents: s. 10(1)12 and 25; ensuring that the plan is administered in accordance with the *PBA* and its regulations and plan documents: s. 19; notifying beneficiaries of proposed amendments to the plan that would reduce benefits: s. 26; paying commuted value for pensions: s. 42; and filing wind-up reports if the plan is terminated: s. 70.

[191] Of special relevance for this case are two additional provisions. Under s. 56, the administrator has a duty to ensure that pension payments are made when due and to notify the Superintendent if they are not and, under s. 59, the administrator has the authority to commence court proceedings when pension payments are not made.

[192] The fiduciary duties that employer-administrators owe to plan beneficiaries relate to the statutory and other tasks described above; these are the "specific legal interests" with respect to which the employer-administrator's fiduciary duties attach.

[193] Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).

[194] This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(*a*); *BCE Inc. v. 1976 Debentureholders*,

modifier, et le dépôt de la déclaration annuelle (art. 9, 12 et 20 de la *LRR*), la transmission aux bénéficiaires et aux bénéficiaires éventuels admissibles de renseignements et de documents (par. 10(1)12 et art. 25), l'observation de la *LRR* et de son règlement d'application, ainsi que des documents constitutifs du régime (art. 19), l'envoi aux bénéficiaires d'un avis relatif à une modification projetée qui réduirait les prestations (art. 26), le paiement de la valeur de rachat d'une pension différée (art. 42) et le dépôt d'un rapport de liquidation advenant la cessation du régime (art. 70).

[191] Deux autres dispositions importent particulièrement en l'espèce. L'article 56 dispose que l'administrateur a l'obligation de veiller à ce que les cotisations soient versées à la date d'exigibilité et d'en informer le surintendant lorsqu'elles ne l'ont pas été; l'art. 59 habilite l'administrateur à engager une instance judiciaire en cas de défaut de paiement.

[192] Les obligations fiduciaires de l'employeur-administrateur envers les bénéficiaires d'un régime ont trait aux attributions légales et autres susmentionnées; il s'agit des « intérêts juridiques particuliers » auxquels se rattachent les obligations fiduciaires de l'employeur-administrateur.

[193] Un autre aspect important du contexte juridique dans lequel s'inscrivent les obligations fiduciaires d'Indalex à titre d'administrateur des régimes tient à sa double fonction d'employeur et d'administrateur. L'alinéa 8(1)a) de la *LRR* autorise expressément ce double rôle, mais il crée une situation où une même entité peut devoir s'acquitter de deux ensembles distincts d'obligations fiduciaires (les unes envers la société, les autres envers les participants du régime de retraite).

[194] Telle était la situation d'Indalex. À titre d'employeur-administrateur, Indalex agissait par l'entremise de son conseil d'administration, de sorte que ce dernier avait des obligations fiduciaires envers les participants des régimes. Le conseil d'administration avait également l'obligation fiduciaire d'agir au mieux des intérêts de la société (*Loi canadienne sur les sociétés par actions*, L.R.C.

2013 SCC 6 (CanLII)

2008 SCC 69, [2008] 3 S.C.R. 560, at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

1985, ch. C-44, al. 122(1)*a*); *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, par. 36). Pour déterminer ce qui est au mieux des intérêts de l'entreprise, le conseil d'administration peut considérer les intérêts des actionnaires, des employés, des créanciers et d'autres personnes. Or, lorsque ces intérêts ne sont pas concordants ou peuvent entrer en conflit, il appartient aux administrateurs, dans le respect de la loi et dans l'exercice de son appréciation commerciale, de déterminer ce qui sert au mieux les intérêts de la société. Par conséquent, le conseil d'administration d'Indalex, en tant qu'employeur-administrateur, ne pouvait pas toujours agir dans le seul intérêt des bénéficiaires des régimes, mais devait aussi s'acquitter de ses obligations envers la société Indalex.

(c) *Breaches of Fiduciary Duty*

[195] Against the background of these legal principles, I turn to consider the Court of Appeal's findings in relation to Indalex's breach of its fiduciary duties as administrator of the plans. As noted, they fall into three categories: being in a conflict of interest position; taking steps to reduce pension obligations in the *CCAA* proceedings; and seeking bankruptcy status.

c) *Manquements à l'obligation fiduciaire*

[195] Au vu de ces principes juridiques, j'examine les conclusions de la Cour d'appel concernant les manquements d'Indalex à ses obligations fiduciaires à titre d'administrateur des régimes. Je le répète, ces manquements sont de trois ordres : l'existence du conflit d'intérêts, les mesures prises dans le cadre de la procédure fondée sur la *LACC* pour réduire ses obligations vis-à-vis des régimes de retraite et la demande présentée en vue de faire faillite.

(i) Conflict of Interest

[196] The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?

[197] The Court of Appeal in effect concluded that a conflict of interest arises whenever Indalex makes business decisions that have "the potential to affect the Plans beneficiaries' rights" (para. 132) and that whenever such a conflict of interest arose, the employer-administrator was immediately in breach of its fiduciary duties to the plan members. Respectfully, this position puts the matter far too broadly. It cannot be the case that a conflict

(i) Conflit d'intérêts

[196] Il faut d'abord se demander en quoi consiste, dans le cas d'Indalex, un conflit d'intérêts ou d'obligations entre sa fonction de décideur commercial et celle d'administrateur de régime, et quelles mesures elle doit alors prendre?

[197] La Cour d'appel conclut en fait qu'il y a conflit d'intérêts dès qu'Indalex prend une décision de nature commerciale [TRADUCTION] « susceptible d'avoir une incidence sur les droits des bénéficiaires des régimes » (par. 132) et qu'il y a alors manquement immédiat de l'employeur-administrateur à ses obligations fiduciaires envers les participants des régimes de retraite. En toute déférence, il s'agit d'une interprétation beaucoup

2013 SCC 6 (CanLII)

arises simply because the employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the plan beneficiaries.

trop extensive. On ne saurait dire qu'il y a conflit d'intérêts uniquement parce que l'employeur, dans l'exercice de son pouvoir de gérer la société au mieux des intérêts de celle-ci, prend une mesure susceptible d'avoir une incidence sur les bénéficiaires des régimes.

[198] This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. As noted earlier, the *PBA* specifically permits employers to act as plan administrators (s. 8(1)(a)). Moreover, the broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict. Every important business decision has the potential to put at risk the solvency of the corporation and therefore its ability to live up to its pension obligations. The employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries.

[198] Telle est la conclusion qui découle nécessairement du contexte législatif. L'existence de conflits apparents qui sont inhérents à la double fonction exercée par une même personne ne peut constituer un manquement à l'obligation fiduciaire, car ces conflits sont expressément autorisés par la loi, laquelle permet à une personne d'exercer les deux fonctions. Rappelons que la *LRR* permet expressément à l'employeur d'administrer un régime (al. 8(1)a)). En outre, les intérêts commerciaux de la société-employeur en général et les intérêts des bénéficiaires d'un régime de retraite liés à l'obtention des prestations promises risquent presque toujours d'entrer en conflit. Toute décision commerciale importante est susceptible de nuire à la solvabilité de la société et, partant, à sa capacité de respecter ses obligations à l'égard du régime. Sous réserve des limites prévues par les documents constitutifs du régime de retraite et de la loi en général, l'employeur peut modifier unilatéralement le régime, voire y mettre fin, des mesures qui peuvent fort bien ne pas cadrer avec les intérêts des bénéficiaires du régime.

[199] Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal — those inherent in the employer's exercise of business judgment — cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.

[199] De même, les conflits d'intérêts relevés par la Cour d'appel — ceux inhérents à l'appréciation commerciale de l'employeur — ne peuvent emporter à eux seuls le manquement à l'obligation fiduciaire de l'administrateur. Là encore, c'est ce qui appert du régime législatif, qui permet expressément à l'employeur d'administrer un régime.

[200] How, then, should we identify conflicts of interest in this context?

[200] Comment devons-nous donc déterminer s'il y a conflit d'intérêts dans ce contexte?

[201] In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at § 121, to explain when a conflict of interest occurs in the

[201] Dans *R. c. Neil*, 2002 CSC 70, [2002] 3 R.C.S. 631, le juge Binnie renvoie au *Restatement Third, The Law Governing Lawyers* (2000), § 121, pour expliquer à quelles conditions il y a conflit

2013 SCC 6 (CanLII)

context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those tasks and duties that I have described above.

d'intérêts dans le cadre de la relation entre l'avocat et son client (par. 31). À mon avis, le même principe général, adapté aux circonstances, vaut pour l'employeur-administrateur. Il y a donc conflit d'intérêts lorsqu'il existe un risque important que les obligations de l'employeur-administrateur envers la société nuisent de façon appréciable à la défense des intérêts des bénéficiaires d'un régime. Je rappelle cependant que l'obligation de l'employeur-administrateur de représenter les bénéficiaires d'un régime ne s'entend que des attributions et des fonctions énoncées précédemment.

[202] In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect, that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly.

[202] J'estime dès lors que la Cour d'appel a tort de conclure qu'il y avait conflit d'intérêts aussitôt qu'Indalex prenait une décision [TRADUCTION] « susceptible d'avoir une incidence sur les droits des bénéficiaires des régimes » (par. 132). Elle interprète de manière beaucoup trop extensive la notion de conflit éventuel d'intérêts ou d'obligations et celle d'obligation fiduciaire de l'administrateur d'un régime.

(ii) Steps in the *CCAA* Proceedings to Reduce Pension Obligations and Notice of Them

(ii) Mesures prises par Indalex dans le cadre de la procédure fondée sur la *LACC* afin de réduire ses obligations vis-à-vis des régimes de retraite et avis de ces mesures

[203] The Court of Appeal found that Indalex breached its fiduciary duty simply by commencing *CCAA* proceedings knowing that the plans were underfunded and by failing to give the plan beneficiaries notice of the proceedings: para. 139. As I understand the court's reasons, the decision to commence *CCAA* proceedings was solely the responsibility of the corporation and not part of the administration of the pension plan: para. 131. The difficulty which the Court of Appeal saw arose from the potential of the *CCAA* proceedings to result in a reduction of the corporation's pension obligations to the prejudice of the beneficiaries: paras. 131-32.

[203] Pour la Cour d'appel, Indalex a manqué à son obligation fiduciaire du seul fait qu'elle a engagé une procédure en application de la *LACC* tout en sachant que les régimes étaient sous-capitalisés, et ce, sans en informer au préalable les bénéficiaires des régimes (par. 139). Si j'interprète bien ses motifs, la décision d'entreprendre cette démarche relevait uniquement de l'administration de la société, et non de l'administration des régimes de retraite (par. 131). La difficulté résidait selon elle dans le risque que la procédure réduise les obligations de la société vis-à-vis des régimes de retraite au détriment des bénéficiaires (par. 131-132).

[204] I respectfully disagree. Like Justice Deschamps, I find that seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex (reasons of Justice Deschamps, at para. 72).

[204] En toute déférence, je ne suis pas d'accord. Comme ma collègue la juge Deschamps, j'estime que, à elle-seule, la mesure initiale visant à protéger la société contre ses créanciers ne plaçait pas Indalex en situation de conflit d'intérêts ou d'obligations (motifs de la juge Deschamps, par. 72).

2013 SCC 6 (CanLII)

[205] First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

> . . . the purpose of the *CCAA* . . . is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

For this reason, I would be very reluctant to find that, simply by virtue of embarking on *CCAA* proceedings, an employer-administrator breaches its duties to plan members.

[206] Second, the facts of this case do not support the contention that the interests of the plan beneficiaries and the employer were in conflict with respect to the decision to seek *CCAA* protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking *CCAA* protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the *CCAA* or under the *BIA*), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be

[205] Premièrement, il importe de rappeler que la procédure de la *LACC* n'a pas pour objet de défavoriser les créanciers, mais bien de trouver une solution à l'insolvabilité d'une société qui soit constructive pour tous les intéressés. Comme le fait remarquer ma collègue la juge Deschamps dans *Century Services*, au par. 15 :

> . . . la *LACC* [. . .] a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif.

Dans le même arrêt (par. 59), elle cite également en l'approuvant l'extrait suivant des motifs du juge Doherty, dissident, dans *Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57 :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiati[ve] des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

C'est pourquoi j'incline très peu à conclure que l'employeur-administrateur manque à ses obligations envers les participants des régimes de retraite du seul fait qu'il engage une procédure sur le fondement de la *LACC*.

[206] Deuxièmement, les faits de la présente affaire n'appuient pas la prétention selon laquelle les intérêts de l'employeur s'opposaient à ceux des bénéficiaires des régimes quant à la décision de se prévaloir ou non de la protection de la *LACC*. On ne saurait sérieusement soutenir qu'une autre mesure aurait protégé davantage les droits des bénéficiaires des régimes. Ni la Cour d'appel ni les parties n'avancent quelque autre solution qui eût été préférable à la protection contre les créanciers demandée sous le régime de la *LACC*. Indalex éprouvait de graves difficultés financières et ses options étaient limitées : elle pouvait présenter une proposition à ses créanciers (suivant la *LACC* ou la *LFI*) ou faire faillite. Qui plus est, les attributions de l'administrateur des régimes

2013 SCC 6 (CanLII)

consulted about the plan sponsor's decision to seek *CCAA* protection. Finally, the application for *CCAA* proceedings did not reduce pension obligations other than to temporarily relieve the corporation of making special payments and it was the only step with any prospect of the pension funds obtaining from the insolvent corporation the money that would become due. There was thus no conflict of duty or interest between the administrator and the employer when protective action was taken for the purpose of preserving the *status quo* for the benefit of all stakeholders.

n'englobaient pas le fait d'assurer la solvabilité de la société, et un administrateur indépendant n'aurait pu raisonnablement s'attendre à être consulté relativement à la décision du promoteur des régimes de se prévaloir de la protection de la *LACC*. Enfin, la demande présentée sur le fondement de la *LACC* n'a pas réduit les obligations de l'employeur vis-à-vis des régimes de retraite, si ce n'est temporairement quant à l'obligation d'effectuer des paiements spéciaux, et c'était la seule mesure susceptible de permettre aux régimes de retraite d'obtenir de la société insolvable les sommes qui leur étaient dues. L'administrateur-employeur ne s'est donc pas trouvé en conflit d'intérêts ou d'obligations lorsqu'il a demandé protection afin de demeurer en exploitation au bénéfice de tous les intéressés.

[207] The Court of Appeal also found that it was a breach of fiduciary duty not to give the plan beneficiaries notice of the initial application for *CCAA* protection. Again, here, I must join Deschamps J. in disagreeing with the Court of Appeal's conclusion. Section 11(1) of the *CCAA*, as it stood at the time of the proceedings, provided that parties could commence *CCAA* proceedings without giving notice to interested persons:

[207] La Cour d'appel conclut en outre que la société a manqué à son obligation fiduciaire en omettant de donner aux bénéficiaires des régimes un avis de sa demande initiale de protection sous le régime de la *LACC*. Je me range encore une fois à l'opinion de ma collègue la juge Deschamps, qui exprime son désaccord avec cette conclusion. Dans sa version en vigueur au moment de la procédure, le par. 11(1) de la *LACC* disposait qu'une partie pouvait engager une procédure sous le régime de la *LACC* sans en donner avis aux intéressés :

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

[208] This provision was renumbered but not substantially changed when the Act was amended in September of 2009 (S.C. 2005, c. 47, s. 128, in force Sept. 18, 2009, SI/2009-68). Although it is not appropriate in every case, *CCAA* courts have discretion to make initial orders on an *ex parte* basis. This may be an appropriate — even necessary — step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement*

[208] Malgré la nouvelle numérotation issue des modifications apportées à la Loi en septembre 2009 (L.C. 2005, ch. 47, art. 128, entrée en vigueur le 18 septembre 2009, TR/2009-68), la disposition est foncièrement demeurée la même. Le tribunal saisi en vertu de la *LACC* dispose du pouvoir discrétionnaire de rendre une ordonnance initiale *ex parte*. L'exercice de ce pouvoir n'est pas toujours indiqué, mais il peut l'être, voire se révéler nécessaire, afin d'empêcher [TRADUCTION] « les créanciers de réaliser leurs créances en se ruant littéralement sur l'actif dès qu'ils sont informés des difficultés

2013 SCC 6 (CanLII)

Act (2007), at p. 55 ("*Rescue!*"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194, at para. 7. The respondents did not challenge Morawetz J.'s decision to exercise his discretion to make an *ex parte* order in this case.

financières du débiteur » (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 55 (« *Rescue!* »); voir également *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194, par. 7). Les intimés ne contestent pas l'exercice par le juge Morawetz de son pouvoir discrétionnaire de rendre une ordonnance *ex parte* en l'espèce.

[209] This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note that there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis P. Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47, a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169, Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII). In his initial *CCAA* order, Gascon J. put off the decision regarding the

[209] Il ne s'ensuit cependant pas qu'il est toujours nécessaire ou acceptable de rendre une ordonnance initiale *ex parte*. Sans prétendre à l'exhaustivité ni vouloir trancher définitivement la question, je fais simplement remarquer l'existence d'au moins trois cas de figure où les tribunaux atténuent l'effet négatif que pourrait avoir sur les créanciers l'ordonnance rendue sans préavis aux parties susceptibles d'être touchées. Premièrement, lorsque la situation de la société débitrice n'est pas urgente, les tribunaux se montrent réticents à accorder une ordonnance *ex parte*. Dans *Rescue!*, Janis P. Sarra explique que les tribunaux s'attendent de plus en plus à ce que, avant de solliciter une suspension sous le régime de la *LACC*, la demanderesse informe les intéressés au préalable de son intention (p. 55). Par exemple, dans *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47, le juge Butler opine que, [TRADUCTION] « [d]ans le cadre d'une procédure fondée sur la *LACC*, une demande initiale ne saurait être présentée sans préavis pour le seul motif que cette loi s'applique. Les éléments présentés doivent permettre au tribunal de conclure à l'existence d'une situation d'urgence » (par. 27). Deuxièmement, dans l'ordonnance initiale, les tribunaux précisent que les parties peuvent présenter une nouvelle demande afin d'obtenir l'annulation de l'ordonnance en tout ou en partie (*Rescue!*, p. 55). Soulignons que l'ordonnance initiale du juge Morawetz confère cette faculté (par. 46). Enfin, les tribunaux ne rendent une ordonnance initiale qu'à l'égard des questions qui doivent être tranchées sans délai et ils diffèrent le règlement des autres jusqu'à ce que tous les intéressés aient reçu avis de la demande. Ainsi, dans *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169, le juge Morawetz circonscrit l'ordonnance initiale rendue en application de la *LACC* de telle sorte qu'une priorité n'est accordée qu'aux parties auxquelles un avis de la demande a été

2013 SCC 6 (CanLII)

suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

donné. La décision de suspendre ou non les paiements spéciaux ou d'octroyer ou non aux créanciers une priorité sur les bénéficiaires des régimes de retraite est reportée à une date ultérieure, soit jusqu'à ce que les parties susceptibles d'être touchées aient été avisées. Le tribunal adopte une démarche apparentée dans l'affaire *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII). Dans son ordonnance initiale fondée sur la *LACC*, le juge Gascon reporte la décision de suspendre ou non le versement des cotisations pour service antérieur ou des paiements spéciaux aux régimes de retraite en cause jusqu'à ce que les parties susceptibles d'être touchées reçoivent avis de la demande (par. 7).

[210] Failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty in this case. Indalex's decision to act as an employer-administrator cannot give the plan beneficiaries any greater benefit than they would have if their plan was managed by a third party administrator. Had there been a third party administrator in this case, Indalex would not have been under an obligation to tell the administrator that it was planning to enter *CCAA* proceedings. The respondents are asking this Court to give the advantage of Indalex's knowledge as employer to Indalex as the plan administrator in circumstances where the employer would have been unlikely to disclose the information itself. I am not prepared to blur the line between employers and administrators in this way.

[210] En l'espèce, l'omission de donner avis de la demande initiale présentée sur le fondement de la *LACC* ne constituait pas un manquement à l'obligation fiduciaire. La décision d'Indalex d'agir à titre d'employeur-administrateur ne peut conférer aux bénéficiaires des régimes plus d'avantages que si l'administration de leurs régimes avait été confiée à un tiers indépendant. Dans ce dernier cas, Indalex n'aurait pas été tenue de révéler à ce tiers son intention d'engager une procédure sous le régime de la *LACC*. Les intimés demandent à notre Cour d'attribuer à Indalex, l'administrateur, l'avantage que détient Indalex, l'employeur, grâce à sa connaissance de certaines données, dans des circonstances où l'employeur n'aurait vraisemblablement pas communiqué ces données. Je ne suis pas disposé à brouiller ainsi la distinction entre la fonction d'employeur et celle d'administrateur.

[211] I conclude that Indalex did not breach its fiduciary duty by commencing *CCAA* proceedings or by not giving notice to the plan beneficiaries of its intention to seek the initial *CCAA* order.

[211] Je conclus qu'Indalex n'a pas manqué à son obligation fiduciaire en engageant la procédure fondée sur la *LACC* ou en omettant d'informer les bénéficiaires des régimes de son intention d'obtenir une ordonnance initiale fondée sur la *LACC*.

[212] I turn next to the Court of Appeal's conclusion that seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order constituted breaches of fiduciary duty.

[212] Je me penche maintenant sur la conclusion de la Cour d'appel selon laquelle la demande et l'obtention des ordonnances DE sans préavis aux bénéficiaires des régimes, ainsi que la demande et l'obtention de l'approbation de la vente constituaient des manquements à l'obligation fiduciaire.

2013 SCC 6 (CanLII)

[213] To begin, I agree with the Court of Appeal that "just because the initial decision to commence *CCAA* proceedings is solely a corporate one . . . does not mean that all subsequent decisions made during the proceedings are also solely corporate ones": para. 132. It was at this point that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator.

[213] D'abord, je conviens avec la Cour d'appel que [TRADUCTION] « même si la décision initiale d'engager une procédure sous le régime de la *LACC* est de nature strictement commerciale [. . .], toutes les décisions ultérieures prises pendant l'instance ne le sont pas pour autant » (par. 132). C'est à cette étape que les intérêts commerciaux d'Indalex sont entrés en conflit avec ses obligations d'administrateur des régimes de retraite.

[214] The DIP orders could easily have the effect of making it impossible for Indalex to satisfy its funding obligations to the plan beneficiaries. When Indalex, through the exercise of business judgment, sought *CCAA* orders that would or might have this effect, it was in conflict with its duty as plan administrator to ensure that all contributions were paid when due.

[214] Les ordonnances DE auraient fort bien pu faire en sorte qu'Indalex ne puisse plus s'acquitter de ses obligations de capitalisation vis-à-vis des bénéficiaires des régimes. Lorsque, à l'issue de son appréciation commerciale et sur le fondement de la *LACC*, Indalex a sollicité des ordonnances qui auraient eu ou auraient pu avoir une telle conséquence, elle était en conflit avec son obligation d'administrateur des régimes de veiller au versement de toutes les cotisations dès leur exigibilité.

[215] I do not think, however, that the simple existence of this conflict of interest and duty, on its own, was a breach of fiduciary duty in these circumstances. As discussed earlier, the *PBA* expressly permits an employer to be a pension administrator and the statutory provisions about conflict of interest must be understood and applied in light of that fact. Moreover, an independent plan administrator would have no decision-making role with respect to the conduct of *CCAA* proceedings. So in my view, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plan beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

[215] Je ne crois cependant pas que la seule existence de ce conflit d'intérêts et d'obligations constituait en soi un manquement à l'obligation fiduciaire dans les circonstances. Je le rappelle, la *LRR* autorise expressément l'employeur à administrer un régime, et les dispositions législatives relatives au conflit d'intérêts doivent être interprétées et appliquées en conséquence. En outre, un administrateur indépendant n'aurait eu aucun rôle décisionnel à jouer dans le déroulement de la procédure fondée sur la *LACC*. À mon sens, la difficulté résidait en l'espèce non pas dans l'existence du conflit, mais bien dans l'omission d'Indalex de prendre quelque mesure afin que les bénéficiaires des régimes aient la possibilité de veiller à la protection de leurs intérêts dans le cadre de la procédure fondée sur la *LACC* comme si l'administrateur des régimes avait été indépendant. En résumé, le manquement ne tenait pas à l'existence du conflit, mais plutôt à l'omission de prendre les mesures qu'elle commandait.

[216] Despite Indalex's failure to address its conflict of interest, the plan beneficiaries, through their own efforts, were represented at subsequent steps in the *CCAA* proceedings. The effect of Indalex's

[216] Malgré l'omission d'Indalex de pallier le conflit d'intérêts, les bénéficiaires des régimes ont eux-mêmes pris des mesures pour être représentés aux étapes ultérieures de l'instance fondée sur la

2013 SCC 6 (CanLII)

breach was therefore mitigated, a point which I will discuss in greater detail when I turn to the issue of the constructive trust.

[217] Nevertheless, for the purposes of providing some guidance for future *CCAA* proceedings, I take this opportunity to briefly address what an employer-administrator can do to respond to these sorts of conflicts. First and foremost, an employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest.

[218] Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206 (Ont. S.C.J.). In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Ct. J. (Gen. Div.)), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case.

LACC. Les conséquences du manquement d'Indalex ont ainsi été atténuées; je reviendrai plus en détail sur ce point au moment de me pencher sur la fiducie par interprétation.

[217] Néanmoins, aux fins du bon déroulement de toute procédure susceptible d'être engagée ultérieurement en application de la *LACC*, je saisis l'occasion d'offrir des repères en examinant brièvement les mesures que l'employeur-administrateur pourrait prendre pour pallier un tel conflit. Avant toute chose, l'employeur-administrateur qui se trouve en situation de conflit doit en informer le juge saisi sur le fondement de la *LACC*. Il ne suffit pas d'inscrire les bénéficiaires sur la liste des créanciers; le juge doit être informé que le débiteur, en sa qualité d'administrateur de régime, est en conflit d'intérêts ou susceptible de l'être.

[218] Étant donné son expertise et ses connaissances dans ce domaine, le juge saisi en vertu de la *LACC* est bien placé pour déterminer la meilleure façon de faire en sorte que les bénéficiaires d'un régime soient dûment représentés au moment même où se déroule la procédure fondée sur la *LACC*. Informé de l'existence du conflit, le juge peut juger opportun de nommer, aux conditions qui lui paraissent indiquées, un administrateur ou un avocat indépendant à titre d'*amicus curiae*. Il est en effet arrivé qu'un juge nomme un avocat — et détermine les conditions de son mandat — pour représenter dans une instance fondée sur la *LACC* des personnes ayant intenté une action en responsabilité délictuelle, des clients, des pensionnés et des employés non syndiqués (*Rescue!*, p. 278; voir, p. ex., *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206 (C.S.J. Ont.)). Dans d'autres cas, le juge peut estimer qu'il est possible de donner avis aux bénéficiaires du régime sans recourir à quelque intermédiaire. À mon sens, la transmission d'un avis, même si elle est souhaitable, peut ne pas toujours être réaliste, et la décision s'y rapportant devrait relever du pouvoir discrétionnaire du juge. En revanche, le juge peut décider de limiter les prélèvements sur le financement DE jusqu'à ce que les bénéficiaires aient reçu un avis (*Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont.

2013 SCC 6 (CanLII)

The point, as well expressed by the Court of Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

(Div. gén.)), par. 24). En définitive, il appartient au juge d'exercer son pouvoir discrétionnaire et d'arrêter la ou les mesures appropriées. Comme l'exprime bien la Cour d'appel, ce qu'il faut se rappeler c'est que l'entreprise insolvable qui est également administrateur de régime ne peut [TRADUCTION] « simplement ignorer les obligations qui lui incombent en tant qu'administrateur des régimes une fois qu'elle a décidé de se prévaloir de la protection de la *LACC* » (par. 132).

[219] I conclude that the Court of Appeal erred in finding that Indalex breached its fiduciary duties as plan administrator by taking the various steps it did in the *CCAA* proceedings. However, I agree with the Court of Appeal that it breached its fiduciary duty by failing to take steps to ensure that the plan beneficiaries had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator.

[219] J'estime que la Cour d'appel conclut à tort qu'Indalex a manqué à ses obligations fiduciaires d'administrateur des régimes en prenant diverses mesures dans le cadre de la procédure fondée sur la *LACC*. Je conviens cependant avec elle qu'Indalex a manqué à son obligation fiduciaire en omettant de faire ce qu'il fallait pour que les bénéficiaires des régimes puissent être dûment représentés dans le cadre de cette procédure comme si l'administrateur des régimes avait été indépendant.

(iii) The Bankruptcy Motion

[220] Indalex also applied to lift the *CCAA* stay so that it could file an assignment into bankruptcy. As Campbell J. put it, this was done "to ensure the priority regime [it] urged as the basis for resisting the deemed trust": para. 52. The Court of Appeal concluded that this was a breach of Indalex's fiduciary duties because the motion was brought "with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to [the U.S. debtors]": para. 139. I respectfully disagree.

(iii) La motion présentée en vue de faire faillite

[220] Indalex a aussi demandé la levée de la suspension accordée sur le fondement de la *LACC* afin qu'elle puisse faire cession de ses biens. Comme le dit le juge Campbell, cette démarche [TRADUCTION] « visait à donner effet à l'ordre de priorité qu'Indalex faisait valoir à l'encontre de la fiducie réputée » (par. 52). La Cour d'appel conclut qu'il s'agit d'un manquement aux obligations fiduciaires d'Indalex, car la motion a été présentée [TRADUCTION] « afin de faire échec aux prétentions relatives à la fiducie réputée et d'obtenir le transfert du fonds de réserve aux [débitrices américaines] » (par. 139). En toute déférence, je ne suis pas d'accord.

[221] It was certainly open to Indalex as an employer to bring a motion to voluntarily enter into bankruptcy. A pension plan administrator has no responsibility or authority in relation to that step. The problem here is not that the motion was brought, but that Indalex failed to meaningfully address the conflict between its corporate interests and its duties as plan administrator.

[221] Il était certainement loisible à Indalex, l'employeur, de présenter une motion en vue de faire cession volontaire de ses biens. L'administrateur d'un régime de retraite n'a ni obligation, ni pouvoir à cet égard. Le problème en l'espèce tient non pas à la présentation de la motion, mais plutôt à ce qu'Indalex a omis de s'attaquer véritablement au problème du conflit entre ses intérêts commerciaux et ses obligations d'administrateur des régimes.

2013 SCC 6 (CanLII)

[222] To sum up, I conclude that Indalex did not breach any fiduciary duty by undertaking *CCAA* proceedings or seeking the relief that it did. The breach arose from Indalex's failure to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented in the insolvency proceedings, particularly when Indalex sought the DIP financing approval, the sale approval and the motion for bankruptcy.

[222] En résumé, j'estime qu'Indalex n'a pas manqué à une obligation fiduciaire lorsqu'elle a engagé la procédure fondée sur la *LACC* ou demandé la mesure en cause. Il y a eu manquement parce qu'Indalex n'a pas fait en sorte que les intérêts des bénéficiaires des régimes de retraite soient effectivement défendus dans le cadre de la procédure liée à son insolvabilité, en particulier lorsqu'elle a demandé l'approbation du financement DE et de la vente, puis présenté une motion en vue de faire faillite.

(3) *Was Imposing a Constructive Trust Appropriate in This Case?*

(3) *Convenait-il en l'espèce d'imposer une fiducie par interprétation?*

[223] The next issue is whether a remedial constructive trust is, as the Court of Appeal concluded, an appropriate remedy in response to the breach of fiduciary duty.

[223] La question qui se pose ensuite est celle de savoir si, comme le conclut la Cour d'appel, l'imposition d'une fiducie par interprétation constitue une réparation adéquate du manquement à l'obligation fiduciaire.

[224] The Court of Appeal exercised its discretion to impose a constructive trust and its exercise of this discretion is entitled to deference. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: *Donkin v. Bugoy*, [1985] 2 S.C.R. 85, cited in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 54, by Sopinka J. (dissenting, but not on this point). In my respectful view, the Court of Appeal's erroneous conclusions about the scope of a plan administrator's fiduciary duties require us to examine the constructive trust issue anew. Moreover, the Court of Appeal, in my respectful opinion, erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it.

[224] La Cour d'appel exerce son pouvoir discrétionnaire d'imposer une fiducie par interprétation, et cet exercice commande la déférence. Une telle mesure ne peut être infirmée en appel que si l'exercice du pouvoir discrétionnaire s'appuie sur un principe erroné (*Donkin c. Bugoy*, [1985] 2 R.C.S. 85, cité dans *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217, par. 54, le juge Sopinka (dissident, mais pas sur ce point)). En toute déférence, les conclusions erronées de la Cour d'appel sur la portée des obligations fiduciaires de l'administrateur du régime nous obligent à revoir les conditions de l'imposition d'une fiducie par interprétation. Qui plus est, la Cour d'appel commet selon moi une erreur de principe lorsqu'elle conclut que l'actif convoité résulte du manquement à l'obligation fiduciaire, de sorte qu'il serait injuste que la partie fautive se l'approprie.

[225] As noted earlier, the Court of Appeal imposed a constructive trust in favour of the plan beneficiaries with respect to funds retained in the reserve fund equal to the total amount of the wind-up deficiency for both plans. In other words, upon insolvency of Indalex, the plan beneficiaries received 100 cents on the dollar as a result of a judicially imposed trust taking priority over

[225] Comme je le mentionne précédemment, la Cour d'appel statue que le fonds de réserve fait l'objet d'une fiducie par interprétation à l'intention des bénéficiaires des régimes à raison d'un montant égal au déficit de liquidation global des deux régimes. En d'autres termes, une fois Indalex devenue insolvable, les bénéficiaires des régimes avaient droit au paiement de l'intégralité de leurs créances

2013 SCC 6 (CanLII)

secured creditors, and indeed over other unsecured creditors, assuming there was no deemed trust for the executive plan.

grâce à l'imposition judiciaire d'une fiducie prenant rang avant les créances garanties, ainsi que les créances chirographaires, à supposer que le régime des cadres n'ait bénéficié d'aucune fiducie réputée.

[226] I have explained earlier why I take a different view than did the Court of Appeal of Indalex's breach of fiduciary duty. In light of what I conclude was the breach which could give rise to a remedy, my view is that the constructive trust cannot properly be imposed in this case and the Court of Appeal erred in principle in exercising its discretion to impose this remedy.

[226] J'expose précédemment les raisons pour lesquelles je diffère d'opinion avec la Cour d'appel en ce qui concerne le manquement à l'obligation fiduciaire d'Indalex. Vu mes conclusions sur la nature du manquement susceptible de donner droit à réparation, je crois que la fiducie par interprétation ne saurait être imposée en l'espèce et que la Cour d'appel commet une erreur de principe en exerçant son pouvoir discrétionnaire d'accorder cette réparation.

[227] I part company with the Court of Appeal with respect to several aspects of its constructive trust analysis; it is far from clear to me that any of the conditions for imposing a constructive trust were present here. However, I will only address one of them in detail. As I will explain, a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset.

[227] Je suis en désaccord avec la Cour d'appel sur plusieurs points au sujet de la fiducie par interprétation; il ne me paraît pas du tout évident que l'une ou l'autre des conditions auxquelles une telle fiducie peut être imposée est remplie en l'espèce. Je n'examine cependant en détail que l'un de ces points. Comme je l'explique ci-après, l'imposition d'une fiducie par interprétation par suite d'un manquement à une obligation fiduciaire ne constitue une réparation appropriée que si un actif déterminable résulte des actes de l'auteur du manquement et qu'il serait injuste que ce dernier ou, parfois, un tiers, conserve cet actif. Or, selon moi, un tel actif n'a pas résulté de l'omission d'Indalex de pallier véritablement les conflits d'intérêts auxquels donnait lieu la procédure fondée sur la *LACC*.

[228] As the Court of Appeal recognized, the governing authority concerning the remedial constructive trust outside the domain of unjust enrichment is *Soulos*. In *Soulos*, McLachlin J. (as she then was) wrote that a constructive trust may be an appropriate remedy for breach of fiduciary duty: paras. 19-45. She laid out four requirements that should generally be satisfied before a constructive trust will be imposed: para. 45. Although, in *Soulos*, McLachlin J. was careful to indicate that these are conditions that "generally" must be present, all parties in this case accept that these four conditions must be present before a remedial constructive trust may be ordered for

[228] La Cour d'appel reconnaît que, sauf lorsqu'il est question d'enrichissement sans cause, l'arrêt *Soulos* s'applique en matière de fiducie par interprétation imposée en guise de réparation. Aux paragraphes 19-45 de cet arrêt, la juge McLachlin (maintenant Juge en chef) écrit qu'une fiducie par interprétation peut constituer une réparation appropriée du manquement à l'obligation fiduciaire. Au paragraphe 45, elle énonce quatre conditions qui doivent généralement être réunies pour qu'une fiducie par interprétation puisse être imposée. Même si, dans *Soulos*, la juge McLachlin précise bien qu'il s'agit de conditions qui doivent « généralement » être réunies, toutes les parties au

2013 SCC 6 (CanLII)

breach of fiduciary duty. The four conditions are these:

(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

(2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

(3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [para. 45]

[229] My concern is with respect to the second requirement, that is, whether the breach resulted in an asset in the hands of Indalex. A constructive trust arises when the law imposes upon a party an obligation to hold specific property for another: D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 454 ("*Waters*"). The purpose of imposing a constructive trust as a remedy for a breach of duty or unjust enrichment is to prevent parties "from retaining property which in 'good conscience' they should not be permitted to retain": *Soulos*, at para. 17. It follows, therefore, that while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained. That cannot be said here.

pourvoi conviennent qu'elles doivent toutes être respectées pour que le tribunal puisse imposer une fiducie par interprétation à titre de réparation par suite d'un manquement à une obligation fiduciaire. Ces quatre conditions sont les suivantes :

(1) le défendeur doit avoir été assujetti à une obligation en *equity*, c'est-à-dire une obligation du type de celles dont les tribunaux d'*equity* ont assuré le respect, relativement aux actes qui ont conduit à la possession des biens [ou de l'actif];

(2) il faut démontrer que la possession des biens [ou de l'actif] par le défendeur résulte des actes qu'il a ou est réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'*equity* lui imposait à l'égard du demandeur;

(3) le demandeur doit établir qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations;

(4) il ne doit pas exister de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire; par exemple, les intérêts des créanciers intervenants doivent être protégés. [par. 45]

[229] Je doute que la deuxième condition — la possession des biens (ou de l'actif) par Indalex résultant du manquement à ses obligations — soit remplie. Il y a fiducie par interprétation lorsque la loi impose à une personne de détenir un bien précis pour autrui (D. W. M. Waters, M. R. Gillen et L. D. Smith, *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 454 (« *Waters* »)). Lorsqu'une telle réparation est accordée par suite d'un manquement à une obligation ou d'un enrichissement sans cause, elle vise à « empêcher [les personnes] de conserver des biens qu'en toute "conscience" elles ne devraient pas être autorisées à garder » (*Soulos*, par. 17). Il s'ensuit donc que la fiducie par interprétation peut certes constituer une réparation convenable dans divers cas, mais que la possession de biens doit généralement résulter des actes de la partie fautive (parfois, d'un tiers) vis-à-vis du demandeur, cette partie ou ce tiers fautif ne pouvant alors en toute justice et conscience garder les biens. Ce n'est pas le cas en l'espèce.

2013 SCC 6 (CanLII)

[230] The Court of Appeal held that this second condition was present because "[t]he assets [i.e. the reserve fund monies] are directly connected to the process in which Indalex committed its breaches of fiduciary obligation": para. 204. Respectfully, this conclusion is based on incorrect legal principles. To satisfy this second condition, it must be shown that the breach *resulted in* the assets being in Indalex's hands, not simply, as the Court of Appeal thought, that there was a "connection" between the assets and "the process" in which Indalex breached its fiduciary duty. Recall that in *Soulos* itself, *the defendant's acquisition of the disputed property was a direct result of his breach of his duty of loyalty* to the plaintiff: para. 48. This is not our case. As the Court observed, in the context of an unjust enrichment claim in *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 995:

> . . . for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

[231] While cases of breach of fiduciary duty are different in important ways from cases of unjust enrichment, La Forest J. (with Lamer J. concurring on this point) applied a similar standard for proprietary relief in *Lac Minerals*, a case in which wrongdoing was the basis for the constructive trust: p. 678, quoted in *Waters*, at p. 471. His comments demonstrate the high standard to be met in order for a constructive trust to be awarded:

> The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. . . . [A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [p. 678]

[232] The relevant breach in this case was the failure of Indalex to meaningfully address the conflicts of interest that arose in the course of the

[230] La Cour d'appel conclut que cette deuxième condition est respectée car [TRADUCTION] « [l]'actif [les sommes constituant le fonds de réserve] est directement lié à la procédure dans le cadre de laquelle Indalex a manqué à son obligation fiduciaire » (par. 204). À mon humble avis, cette conclusion s'appuie sur des principes de droit erronés. Pour satisfaire à la deuxième condition, il faut démontrer que la possession de l'actif par Indalex *résulte* du manquement à son obligation, et non seulement, comme le croit la Cour d'appel, qu'il y a un « lien » entre l'actif et la « procédure » dans le cadre de laquelle Indalex a manqué à ses obligations fiduciaires. Rappelons que, dans *Soulos*, *l'acquisition par le défendeur de l'immeuble en cause était la conséquence directe du manquement à son devoir de loyauté* envers le demandeur (par. 48). Telle n'est pas la situation en l'espèce. Comme le dit notre Cour dans l'arrêt *Peter c. Beblow*, [1993] 1 R.C.S. 980, p. 995, dans le contexte d'une allégation d'enrichissement sans cause,

> pour qu'il y ait fiducie par interprétation, le demandeur doit établir qu'il a, du fait de sa contribution, un lien direct avec le bien qui se trouve grevé d'une fiducie.

[231] Même si le manquement à l'obligation fiduciaire diffère grandement de l'enrichissement sans cause, dans l'arrêt *Lac Minerals*, le juge La Forest (avec l'accord du juge Lamer sur ce point) applique un critère semblable à une réparation liée au droit de propriété. Dans cette affaire, la fiducie par interprétation faisait suite à un acte fautif (p. 678, cité dans *Waters*, p. 471). Les remarques du juge La Forest confirment le caractère strict de la norme applicable à l'imposition judiciaire d'une fiducie par interprétation :

> La fiducie par interprétation confère un droit de propriété, mais ce droit ne peut exister que si un droit à une réparation a déjà été établi. Dans la grande majorité des cas, la fiducie par interprétation ne sera pas la réparation appropriée. [. . .] [I]l n'y a lieu de conférer une fiducie par interprétation qu'en présence d'un motif pour accorder au demandeur les droits supplémentaires découlant de la reconnaissance d'un droit de propriété. [p. 678]

[232] Le manquement intervenu en l'espèce consiste dans l'omission d'Indalex de pallier véritablement les conflits d'intérêts qu'a fait naître la

2013 SCC 6 (CanLII)

CCAA proceedings. (The breach that arose with respect to the bankruptcy motion is irrelevant because that motion was not addressed and therefore could not have given rise to the assets.) The "assets" in issue here are the funds in the reserve fund which were retained from the proceeds of the sale of Indalex as a going concern. Indalex's breach in this case did not give rise to the funds which were retained by the Monitor in the reserve fund.

[233] Where does the respondents' claim of a procedural breach take them? Taking their position at its highest, it would be that the DIP approval proceedings and the sale would not have been approved. This position, however, is fatally flawed. Turning first to the DIP approval, there is no evidence to support the view that, had Indalex addressed its conflict in the DIP approval process, the DIP financing would have been rejected or granted on different terms. The *CCAA* judge, being fully aware of the pension situation, ruled that the DIP financing was "required", that there was "no other alternative available to the Applicants for a going concern solution", and that "the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing": endorsement of Morawetz J., April 8, 2009, at paras. 6 and 9. In effect, the respondents are claiming funds which arose only because of the process to which they now object. Taking into account that there was an absence of any evidence that more favourable financing terms were available, that the judge's decision was made with full knowledge of the plan beneficiaries' claims, and that he found that the DIP financing was necessary, the respondents' contention is not only speculative, it also directly contradicts the conclusions of the *CCAA* judge.

[234] Turning next to the sale approval and the approval of the distribution of the assets, it is clear that the plan beneficiaries had independent representation but that this did not change the result.

procédure fondée la *LACC*. (Le manquement qui aurait découlé de la motion présentée en vue de faire faillite n'a pas à être considéré puisque la motion n'a été examinée et ne peut donc pas avoir permis l'entrée en possession de l'actif.) L'actif en cause correspond au fonds de réserve constitué par prélèvement sur le produit de la vente de l'entreprise en exploitation d'Indalex. Ce manquement d'Indalex n'est pas à l'origine des fonds que le contrôleur a conservés en constituant le fonds de réserve.

[233] Quelle peut être l'issue de l'allégation des intimés selon laquelle il y a eu manquement aux exigences de procédure? Suivant la plus favorable, ni le financement DE ni la vente n'auraient été approuvés. Or, cette thèse est irrémédiablement viciée. Premièrement, en ce qui concerne la procédure d'approbation du financement DE, aucun élément de preuve n'établit que si Indalex avait pallié ses conflits dans le cadre de cette procédure, le financement aurait été refusé ou autorisé à d'autres conditions. Parfaitement informé de la situation des régimes de retraite, le juge saisi sur le fondement de la *LACC* estime que le financement DE [TRADUCTION] « s'impose », que « les requérantes ne disposent d'aucune autre solution permettant la continuité de l'exploitation » et que « les avantages du financement DE pour les intéressés et les créanciers l'emportent sur tout préjudice que pourrait causer aux créanciers non garantis l'octroi d'un financement garanti par une superpriorité » (motifs du juge Morawetz, 8 avril 2009, par. 6 et 9). En fait, les intimés réclament des fonds qui ont été obtenus uniquement grâce à la procédure qu'ils contestent aujourd'hui. Vu l'absence d'éléments de preuve voulant que des modalités de financement plus avantageuses aient pu être obtenues, et comme le juge est bien conscient de l'existence des réclamations des bénéficiaires des régimes et qu'il conclut que le financement DE s'impose, la prétention des intimés est non seulement conjecturelle, mais va aussi directement à l'encontre des conclusions du juge.

[234] En ce qui concerne l'approbation de la vente et de la répartition de l'actif, il est clair que les bénéficiaires des régimes ont été représentés de manière indépendante, mais que cette mesure n'a

2013 SCC 6 (CanLII)

Although, perhaps with little thanks to Indalex, the interests of both plans were fully and ably represented before Campbell J. at the sale approval and interim distribution motions in July of 2009.

rien changé au résultat. En juillet 2009, devant le juge Campbell, pendant toute l'audition des motions visant l'approbation de la vente et la répartition provisoire du produit de la vente, les intérêts des deux régimes ont bel et bien été défendus, même si Indalex n'y a peut-être pas été pour grand-chose.

[235] The executive plan retirees, through able counsel, objected to the sale on the basis that the liquidation values set out in the Monitor's seventh report would provide greater return for unsecured creditors. The motions judge dismissed this objection "on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs": trial reasons of Campbell J., at para. 13 (emphasis added). Both the executive plan retirees and the USW, which represented some members of the salaried plan, objected to the proposed distribution of the sale proceeds. In response to this objection, it was agreed that those objections would be heard promptly and that the Monitor would retain sufficient funds to satisfy the pensioners' claims if they were upheld: trial reasons of Campbell J., at paras. 14-16.

[235] Par l'entremise d'un avocat compétent, les retraités du régime des cadres se sont opposés à la vente en arguant que, selon le septième rapport du contrôleur, les valeurs de liquidation permettaient aux créanciers chirographaires de recouvrer plus d'argent. Le juge saisi des motions a rejeté leur opposition [TRADUCTION] « au motif qu'aucun élément de preuve n'appuyait clairement cette prétention et que, de toute façon, l'opération approuvée garantissait la valeur de l'actif pour les fournisseurs et les clients, et préservait environ 950 emplois » (motifs du juge Campbell en première instance, par. 13 (je souligne)). Les retraités du régime des cadres et le Syndicat, qui représentait certains participants du régime des salariés, a contesté la répartition projetée du produit de la vente. Il a dès lors été convenu que le juge entendrait leurs arguments au plus tôt et que le contrôleur conserverait des fonds suffisants pour donner suite aux prétentions des retraités dans le cas où il y serait fait droit (motifs du juge Campbell en première instance, par. 14-16).

[236] There is no evidence to support the contention that Indalex's breach of its fiduciary duty as pension administrator resulted in the assets retained in the reserve fund. I therefore conclude that the Court of Appeal erred in law in finding that the second condition for imposing a constructive trust — i.e. that the assets in the defendant's hands must be shown to have resulted from the defendant's breaches of duty to the plaintiff — had been established.

[236] Aucun élément de preuve n'appuie la prétention que l'actif constituant le fonds de réserve découle du manquement d'Indalex à son obligation fiduciaire en tant qu'administrateur de régime. Je suis donc d'avis que la Cour d'appel a tort de conclure que la deuxième condition à remplir pour qu'une fiducie par interprétation puisse être imposée — démontrer que la possession des biens par le défendeur résulte des manquements à ses obligations envers le demandeur — a été remplie.

[237] I would add only two further comments with respect to the constructive trust. A major concern of the Court of Appeal was that unless a constructive trust were imposed, the reserve funds would end up in the hands of other Indalex entities which were not operating at arm's length from Indalex. The U.S. debtors claimed the reserve fund

[237] Voici deux autres remarques au sujet de la fiducie par interprétation. L'une des préoccupations principales de la Cour d'appel est que, à défaut d'une telle fiducie par interprétation, le fonds de réserve se retrouve en la possession de sociétés ayant un lien de dépendance avec Indalex. Les débitrices américaines ont réclamé l'octroi du fonds

2013 SCC 6 (CanLII)

because it had paid on its guarantee of the DIP loans and thereby stepped into the shoes of the DIP lender with respect to priority. Sun Indalex claims in the U.S. bankruptcy proceedings as a secured creditor of the U.S. debtors. The Court of Appeal put its concern this way: "To permit Sun Indalex to recover on behalf of [the U.S. debtors] would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed": para. 199.

de réserve en faisant valoir les sommes versées en exécution de leur garantie des prêts DE et qu'elles étaient par conséquent subrogées aux droits des créanciers DE et bénéficiaient de la priorité accordée à ces derniers. Sun Indalex a présenté une réclamation dans le cadre de la procédure de faillite intentée aux É.-U. à titre de créancier garanti des débitrices américaines. La Cour d'appel formule sa réticence comme suit : [TRADUCTION] « Permettre à Sun Indalex de recouvrer des sommes pour le compte [des débitrices américaines] équivaudrait à autoriser le débiteur d'obligations fiduciaires à tirer profit de manquements à celles-ci, et ce, au détriment des créanciers de ces obligations » (par. 199).

[238] There are two difficulties with this approach, in my respectful view. The U.S. debtors paid real money to honour their guarantees. Moreover, unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected. Neither the parties nor the Court of Appeal advanced such a reason.

[238] À mon humble avis, cette approche comporte deux failles. Les débitrices américaines ont dû véritablement débourser de l'argent pour honorer leurs garanties. De plus, à moins qu'un fondement juridique permette de faire abstraction de la personnalité morale distincte de chacune des entreprises, leur existence distincte doit être respectée. Ni les parties ni la Cour d'appel n'ont avancé un tel fondement.

[239] Finally, I would note that imposing a constructive trust was wholly disproportionate to Indalex's breach of fiduciary duty. Its breach — the failure to meaningfully address the conflicts of interest that arose during the *CCAA* process — had no adverse impact on the plan beneficiaries in the sale approval process which gave rise to the "asset" in issue. Their interests were fully represented and carefully considered before the sale was approved and the funds distributed. The sale was nonetheless judged to be in the best interests of the corporation, all things considered. In my respectful view, imposing a $6.75 million penalty on the other creditors as a remedial response to this breach is so grossly disproportionate to the breach as to be unreasonable.

[239] Enfin, il convient de signaler que l'imposition d'une fiducie par interprétation est une mesure totalement disproportionnée au manquement d'Indalex à son obligation fiduciaire. Ce manquement — l'omission de pallier véritablement les conflits d'intérêts nés à l'occasion de la procédure fondée sur la *LACC* — n'a pas eu d'incidence défavorable sur les bénéficiaires des régimes par suite de la procédure d'approbation de la vente dont a résulté la possession des « biens » en cause. Les intérêts des régimes ont été dûment défendus avant que la vente ne soit approuvée et les fonds répartis. Tout compte fait, le tribunal a néanmoins estimé que la vente était dans le meilleur intérêt de l'entreprise. À mon humble avis, priver les autres créanciers de 6,75 millions de dollars pour réparer ce manquement est disproportionné au point d'être déraisonnable.

[240] A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for

[240] L'imposition judiciaire d'une fiducie par interprétation longtemps après les faits à titre de réparation risque de nuire à la certitude qui est

2013 SCC 6 (CanLII)

commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

essentielle à l'activité commerciale et qui est particulièrement importante lorsqu'il s'agit de financer le sauvetage d'une entreprise insolvable. Imposer une fiducie par interprétation par suite du manquement à l'obligation fiduciaire de veiller à ce que les bénéficiaires des régimes de retraite jouissent de garanties procédurales, alors qu'ils en ont bénéficié dans les faits, se révèle inéquitable au vu de l'ensemble des circonstances.

[241] I conclude that a constructive trust is not an appropriate remedy in this case and that the Court of Appeal erred in principle by imposing it.

[241] Je conclus que la fiducie par interprétation ne constitue pas une réparation appropriée en l'espèce et que la Cour d'appel a tort, sur le plan des principes, de l'imposer.

C. *Third Issue: Did the Court of Appeal Err in Concluding That the Super Priority Granted in the CCAA Proceedings Did Not Have Priority by Virtue of the Doctrine of Federal Paramountcy?*

C. *Troisième question en litige : La Cour d'appel a-t-elle tort de conclure que la superpriorité accordée dans le cadre de la procédure fondée sur la LACC ne confère pas de préséance par application de la prépondérance fédérale?*

[242] Although I disagree with my colleague Justice Deschamps with respect to the scope of the s. 57(4) deemed trust, I agree that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy: paras. 48-60.

[242] Bien que je ne sois pas d'accord avec ma collègue la juge Deschamps en ce qui concerne la portée de la fiducie réputée du par. 57(4), je conviens que si une fiducie est réputée exister en l'espèce, la créance DE prend rang avant elle en application de la doctrine de la prépondérance fédérale (par. 48-60).

D. *Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?*

D. *Quatrième question en litige : La décision de la Cour d'appel sur les dépens du Syndicat est-elle entachée d'une erreur?*

(1) Introduction

(1) Introduction

[243] The disposition of costs in the Court of Appeal was somewhat complex. Although the costs appeal relates only to the costs of the USW, it is necessary in order to understand their position to set out the costs order below in full.

[243] L'adjudication des dépens en Cour d'appel s'est révélée assez complexe. Bien que le volet du présent pourvoi relatif aux dépens ne vise que ceux adjugés au Syndicat, il convient de revoir en détail l'ordonnance du tribunal inférieur sur les dépens afin de bien saisir les prétentions de cette partie.

[244] With respect to the costs of the appeal to the Court of Appeal, no order was made for or against the Monitor due to its prior agreement with the former executives and the USW. However, the court ordered that the former executives and the USW, as successful parties, were each entitled to

[244] Pour ce qui concerne les dépens en Cour d'appel, il n'y a pas d'adjudication favorable ou défavorable au contrôleur étant donné l'entente préalable conclue avec les anciens cadres et le Syndicat. La Cour d'appel ordonne toutefois que les anciens cadres et le Syndicat, qui ont gain de

2013 SCC 6 (CanLII)

costs on a partial indemnity basis fixed at $40,000 inclusive of taxes and disbursements from Sun Indalex and the U.S. Trustee, payable jointly and severally: costs endorsement, 2011 ONCA 578, 81 C.B.R. (5th) 165, at para. 7.

[245] Morneau Shepell Ltd., the Superintendent, and the former executives reached an agreement with respect to legal fees and disbursements and the Court of Appeal approved that agreement. The former executives received full indemnity legal fees and disbursements in the amount of $269,913.78 to be paid from the executive plan attributable to each of the 14 former executives' accrued pension benefits, allocated among the 14 former executives in relation to their pension entitlement from the executive plan. In other words, the costs would not be borne by the other three members of the executive plan who did not participate in the proceedings: C.A. costs endorsement, at para. 2. The costs of the appeal payable by Sun Indalex and the U.S. Trustee were to be paid into the fund of the executive plan and allocated among the 14 former executives in relation to their pension entitlement from the executive plan.

[246] USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the

cause, se voient adjuger sur la base de l'indemnisation partielle des dépens de 40 000 $, frais et débours compris, payables solidairement par Sun Indalex et le syndic américain (décision relative aux dépens, 2011 ONCA 578, 81 C.B.R. (5th) 165, par. 7).

[245] Le surintendant, Morneau Shepell Ltd., et les anciens cadres ont conclu une entente en ce qui concerne les honoraires et les débours, et la Cour d'appel l'a approuvée. Les anciens cadres ont obtenu, sur la base d'une indemnisation complète, la somme de 269 913,78 $ pour les honoraires et les débours, payable par prélèvement sur la caisse de retraite des cadres correspondant aux prestations de retraite accumulées respectivement par les 14 anciens cadres, puis répartie entre ces derniers selon leurs droits respectifs à pension aux termes du régime. En d'autres termes, les dépens ne devaient pas être supportés par les trois membres du régime des cadres qui n'ont pas pris part à l'instance (décision de la C.A. relative aux dépens, par. 2). Les dépens de l'appel payables par Sun Indalex et le syndic américain devaient être versés à la caisse du régime des cadres puis répartis entre les 14 anciens cadres selon leurs droits à pension suivant leur régime.

[246] Le Syndicat a demandé le paiement de ses dépens à partir de la caisse du régime des salariés. La Cour d'appel a cependant rejeté la demande au motif que le Syndicat se trouvait dans une [TRADUCTION] « situation fondamentalement différente » de celle des anciens cadres (décision relative aux dépens, par. 3). Ces derniers étaient bénéficiaires de la caisse de retraite (14 des 17 participants au régime), ils avaient consenti au paiement des dépens à partir de leurs droits respectifs à des prestations et ceux qui n'avaient pas consenti à ce prélèvement n'étaient pas tenus à ce paiement. En revanche, le Syndicat était l'agent négociateur (et non le bénéficiaire) de seulement 7 des 169 participants du régime des salariés, dont aucun n'avait été avisé du paiement des frais de justice par prélèvement sur leur régime, ou y avait consenti. En outre, le Syndicat a demandé et demande toujours que ses dépens soient payés à partir de la caisse de retraite, ce qui diffère sensiblement de l'ordonnance rendue en faveur des anciens cadres. Ces derniers ont expressément fait en sorte que leur décision d'engager l'instance

2013 SCC 6 (CanLII)

event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

ne compromette pas les prestations de retraite des participants qui n'avaient pas retenu les services d'un avocat, même s'ils auraient évidemment tiré avantage d'un dénouement favorable au régime des cadres. Le Syndicat n'entend pas mettre les 162 participants qu'il ne représente pas à l'abri du risque lié à la poursuite. Il demande que tous les participants partagent ce risque même s'ils ne représentent que 7 d'entre eux. La démarche du Syndicat était donc substantiellement différente de celle des anciens cadres et que la cour a approuvée.

(2) Standard of Review

[247] In *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

(2) Norme de contrôle

[247] Dans *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678, le juge Rothstein statue que « l'adjudication des dépens est un exemple typique d'une décision discrétionnaire » (par. 126). L'attribution discrétionnaire de dépens ne doit donc être annulée en appel que si le tribunal inférieur « a commis une erreur de principe ou si cette attribution est nettement erronée » (*Hamilton c. Open Window Bakery Ltd.*, 2004 CSC 9, [2004] 1 R.C.S. 303, par. 27).

(3) Analysis

[248] I do not see any basis to interfere with the Court of Appeal's costs endorsement in this case. In my view, the USW's submissions are largely based on an inaccurate reading of the Court of Appeal's costs endorsement. Contrary to what the USW submits, the Court of Appeal did *not* require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. Nor is it correct to suggest that the costs endorsement would "restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund" or "preclude financing of beneficiary action when a fund is in deficit": USW factum, at paras. 71 and 76. Nor would I read the Court of Appeal's brief costs endorsement as laying down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary.

(3) Analyse

[248] Je ne vois en l'espèce aucune raison de revenir sur la décision de la Cour d'appel quant aux dépens. À mon avis, les prétentions du Syndicat reposent en grande partie sur une interprétation erronée de la décision de la Cour d'appel à cet égard. Contrairement à ce que fait valoir le Syndicat, la Cour d'appel *ne* tient *pas* le consentement des bénéficiaires du régime pour une condition préalable au paiement des dépens à partir de la caisse de retraite. Il est aussi erroné de laisser entendre que la décision relative aux dépens fait en sorte que [TRADUCTION] « les bénéficiaires ne peuvent être indemnisés des dépens que lorsqu'il existe un surplus dans la caisse de retraite en fiducie » ou qu'ils ne peuvent « financer l'exercice d'un recours lorsque la caisse est déficitaire » (mémoire du Syndicat, par. 71 et 76). Je ne considère pas non plus que, dans sa brève décision, la Cour d'appel établit la règle qu'un syndicat représentant les bénéficiaires d'une caisse de retraite ne peut être indemnisé de ses dépens par la caisse de retraite parce qu'il n'est pas lui-même bénéficiaire.

2013 SCC 6 (CanLII)

[249] The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan members got their costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

[250] The decision whether to award costs from the pension fund remains a discretionary matter. In *Nolan*, Rothstein J. surveyed the various factors that courts have taken into account when deciding whether to award a litigant its costs out of a pension trust. The first broad inquiry considered in *Nolan* was into whether the litigation concerned the due administration of the trust. In connection with this inquiry, courts have considered the following factors: (1) whether the litigation was primarily about the construction of the plan documents; (2) whether it clarified a problematic area of the law; (3) whether it was the only means of clarifying the parties' rights; (4) whether the claim alleged maladministration; and (5) whether the litigation had no effect on other beneficiaries of the trust fund: *Nolan*, at para. 126.

[251] The second broad inquiry discussed in *Nolan* was whether the litigation was ultimately adversarial: para. 127. The following factors have been considered: (1) whether the litigation included allegations by an unsuccessful party of a breach of fiduciary duty; (2) whether the litigation only benefited a class of members and would impose costs on other members if successful; and (3) whether the litigation had any merit.

[252] I do not think that it is correct to elevate these two inquiries (which constitute the Costs Payment Test articulated by the USW) to a test for entitlement to costs in the pension context. The factors set out in *Nolan* and other cases cited therein are best understood as highly relevant

[249] La thèse du Syndicat paraît avoir pour prémisses le droit qu'il aurait au paiement des dépens parce qu'il satisfait au critère qu'il formule à cet égard dans son mémoire et, puisque les participants du régime des cadres ont obtenu le paiement de leurs dépens à partir de leur caisse de retraite, le droit du Syndicat au paiement de ses dépens par prélèvement sur la caisse de retraite des salariés. J'estime néanmoins que ces prémisses ne sont pas valables.

[250] La décision d'ordonner le paiement de dépens à partir d'une caisse de retraite demeure discrétionnaire. Dans *Nolan*, le juge Rothstein considère les différentes questions que se posent les tribunaux pour décider d'adjuger ou non à une partie des dépens qui seront payés par prélèvement sur une fiducie de retraite. Dans *Nolan*, la première considération générale était celle de savoir si l'objet du litige est la bonne administration de la fiducie. Pour se prononcer, les tribunaux se sont posé les questions suivantes : (1) le litige concerne-t-il essentiellement l'interprétation des documents constitutifs du régime; (2) vise-t-il à clarifier un aspect problématique du droit applicable; (3) constitue-t-il le seul moyen de préciser les droits des parties; (4) la mauvaise administration est-elle alléguée; (5) y a-t-il absence d'incidence sur les autres bénéficiaires de la fiducie? (*Nolan*, par. 126).

[251] La deuxième considération générale examinée au par. 127 de l'arrêt *Nolan* est celle de savoir si le litige a été de nature contradictoire, ce qui soulève les questions suivantes : (1) la partie déboutée alléguait-elle le manquement à l'obligation fiduciaire; (2) le litige ne servait-il que les intérêts d'une catégorie de participants, et si les demandeurs avaient eu gain de cause, des dépens auraient-ils été imposés à d'autres participants; (3) le litige avait-il quelque fondement?

[252] Je ne crois pas qu'il convienne de faire des deux considérations retenues dans *Nolan* (lesquelles constituent le critère applicable au paiement des dépens que formule le Syndicat) le critère qui permet de déterminer le droit à l'adjudication des dépens dans le contexte des régimes de retraite.

2013 SCC 6 (CanLII)

considerations guiding the exercise of judicial discretion with respect to costs.

[253] The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

[254] The second premise of the USW appeal appears to be that if the executive plan members have their costs paid out of the fund, so too should the salaried plan members. Respectfully, however, this is not an accurate statement of the order made with respect to the executive plan.

[255] The Court of Appeal's order with respect to the executive plan meant that only the pension fund attributable to those members of the plan who actually supported the litigation — the vast majority I would add — would contribute to the costs of the litigation even though all members of the plan would benefit in the case of success. As the Court of Appeal noted:

> The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. [Costs endorsement, at para. 3]

Il est préférable de voir dans les facteurs énoncés dans *Nolan* — et dans la jurisprudence qui y est citée — des considérations de grande importance qui orientent les tribunaux dans l'exercice de leur pouvoir discrétionnaire en matière de dépens.

[253] Comme l'instance engagée en l'espèce portait sur des points de droit nouveaux, son issue était incertaine et les demandeurs couraient le risque d'être déboutés. La Cour d'appel opine essentiellement que le Syndicat, qui représentait seulement 7 des 169 participants du régime, ne devait pas être en mesure, dans les faits, d'imposer à tous les participants du régime, dont la plupart n'étaient pas membres du Syndicat, les risques inhérents au litige sans les consulter. Quels que puissent être les arguments invoqués à l'encontre de la décision de la Cour d'appel à la lumière de l'issue favorable du recours et du partage par tous les participants du régime des gains obtenus, l'échec du recours ne saurait justifier que tous les participants d'un régime déjà sous-capitalisé subissent les conséquences pécuniaires du risque couru.

[254] Suivant la seconde prémisse de la prétention du Syndicat, si les participants du régime des cadres obtiennent paiement de leurs dépens à partir de leur caisse de retraite, les participants du régime des salariés devraient l'obtenir également. Or, telle n'est pas la teneur exacte de l'ordonnance de la Cour d'appel relative au régime des cadres.

[255] Suivant cette ordonnance, seule la partie de la caisse de retraite attribuable aux participants qui ont pris part au recours — la grande majorité d'entre eux, faut-il le préciser — contribue au paiement des dépens même si tous les participants du régime tirent avantage du dénouement favorable. La Cour d'appel signale d'ailleurs ce qui suit :

> [TRADUCTION] Les retraités représentés par avocat, soit 14 des 17 participants du régime des cadres, ont consenti au paiement des dépens à partir de leurs droits respectifs à des prestations, et ceux qui n'ont pas consenti à ce prélèvement ne seront pas tenus au paiement. [Décision relative aux dépens, par. 3]

2013 SCC 6 (CanLII)

[256] The Court of Appeal therefore approved an agreement as to costs which did not put at further risk the pension funds available to satisfy the pension entitlements of those who did not support the litigation. Thus, the Court of Appeal did not apply what the USW refers to as the Costs Payment Test to the executive plan because the costs order was the product of agreement and did not order payment of costs out of the fund as a whole.

[256] La Cour d'appel approuve donc un accord sur les dépens qui n'expose pas à un risque supplémentaire les fonds constituant les caisses de retraite et devant permettre le versement des prestations auxquelles ont droit ceux qui n'appuient pas l'exercice du recours. Par conséquent, elle n'applique pas au régime des cadres le critère qui, selon le Syndicat, vaudrait pour le paiement des dépens, car l'ordonnance relative aux dépens découle d'un accord et elle ne prévoit pas le paiement des dépens par prélèvement sur la caisse de retraite dans sa globalité.

[257] In the case of the USW request, there was no such agreement and no such limitation of risk to the supporters of the litigation.

[257] S'agissant de la demande du Syndicat, nul accord n'est intervenu au même effet, et ce n'était pas seulement les participants derrière le recours qui s'exposaient au risque lié à l'issue de celui-ci.

[258] I see no error in principle in the Court of Appeal's refusal to order the USW costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court. I would dismiss the USW costs appeal but without costs.

[258] Je ne vois aucune erreur de principe dans le refus de la Cour d'appel d'ordonner que les dépens du Syndicat soient payés à partir de la caisse de retraite, étant donné surtout l'issue du pourvoi devant notre Cour. Je suis d'avis de rejeter sans frais le pourvoi du Syndicat relatif aux dépens.

IV. Disposition

IV. Dispositif

[259] I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February 18, 2010 orders of Campbell J.

[259] Je suis d'avis d'accueillir les pourvois de Sun Indalex, de FTI Consulting et de George L. Miller, d'annuler les ordonnances de la Cour d'appel de l'Ontario et de rétablir celles rendues par le juge Campbell le 18 février 2010, sauf dans la mesure précisée ci-après.

[260] With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

[260] En ce qui concerne les dépens, je suis d'avis d'annuler les ordonnances de la Cour d'appel sur les dépens afférents aux appels interjetés devant elle et d'ordonner que chacune des parties paie ses propres dépens devant la Cour d'appel et devant notre Cour.

[261] I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of $269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and

[261] Je suis d'avis de ne pas modifier les par. 9 et 10 de l'ordonnance de la Cour d'appel rendue concernant l'appel des anciens cadres, de sorte que les débours et honoraires de ces derniers, établis sur la base de l'indemnisation complète, qui totalisent 269 913,78 $, soient payés par prélèvement sur la partie de la caisse de retraite du régime des cadres

2013 SCC 6 (CanLII)

specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

[262] I would dismiss the USW costs appeal, but without costs.

The reasons of LeBel and Abella JJ. were delivered by

LeBel J. (dissenting) —

I. Introduction

[263] The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

[264] I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

[265] Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA*

correspondant aux prestations de retraite accumulées respectivement par les 14 anciens cadres; plus particulièrement, les dépens seront répartis entre les 14 anciens cadres en fonction de leurs droits respectifs à pension aux termes du régime et ne seront pas supportés par les trois autres participants.

[262] Je suis d'avis de rejeter sans frais le pourvoi interjeté par le Syndicat relativement aux dépens.

Version française des motifs des juges LeBel et Abella rendus par

Le juge LeBel (dissident) —

I. Introduction

[263] Les participants à deux régimes de retraite établis par Indalex Limited (« Indalex ») risquent de perdre au moins la moitié de leurs prestations de retraite du fait de l'insolvabilité de leur employeur et de l'arrangement homologué par la Cour supérieure de justice de l'Ontario en application de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). La Cour d'appel de l'Ontario a jugé que ces participants avaient droit à une réparation. Mes collègues, les juges Deschamps et Cromwell, arrivent à la conclusion contraire, pour des motifs différents et en partie contradictoires. Avec égard pour leur opinion, et à l'instar de la Cour d'appel, je suis d'avis que la fiducie par interprétation peut s'appliquer en l'espèce et devrait être imposée, pour les motifs qui suivent.

[264] Je ne résumerai pas les faits de l'affaire, mes collègues les ayant déjà exposés. Je m'y reporterai au besoin dans mes motifs. Cependant, avant d'expliquer mes divergences d'opinions avec mes collègues, j'indiquerai brièvement les questions de droit sur lesquelles je souscris, en totalité ou en partie, à leurs motifs.

[265] À l'instar de mes collègues, je conclus que le régime des cadres ne pouvait être protégé par aucune fiducie réputée résultant de l'application du par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), puisque ce régime

2013 SCC 6 (CanLII)

proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("DIP") super priority prevails by reason of the application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

[266] But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal (2011 ONCA 265, 104 O.R. (3d) 641).

II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

[267] Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It ought not stop at the level of a theoretical and detached approach that fails to address how, very concretely,

n'avait pas été liquidé lorsque la procédure fondée sur la *LACC* a été enclenchée. Comme la juge Deschamps, je conclus à l'existence d'une fiducie réputée dans le cas du déficit de liquidation du régime des salariés. Je reconnais toutefois aussi que la priorité de la créance des prêteurs au débiteur-exploitant (« DE ») sur toutes les autres l'emporte, par application du principe de la prépondérance fédérale. Je conviens également qu'il faut rejeter l'appel interjeté par le Syndicat des Métallos sur la question des dépens.

[266] Toutefois, malgré le respect que je porte à mes collègues, je conçois différemment d'eux la nature et la portée des obligations fiduciaires de l'employeur qui choisit d'administrer un régime de retraite régi par la *LRR*. Sa double fonction n'autorise pas l'employeur à faire preuve de laxisme dans la définition et l'exercice de ses obligations fiduciaires, ni ne justifie ses actes répréhensibles. Au contraire, comme je l'expliquerai, j'estime qu'Indalex a non seulement manqué à ses obligations envers les bénéficiaires, mais adopté en fait une démarche qui allait à l'encontre de leurs intérêts. La gravité de ces manquements justifiait amplement la décision de la Cour d'appel d'imposer une fiducie par interprétation. Dans cette mesure, je suis d'avis de confirmer les motifs de la juge Gillese et le jugement de la Cour d'appel (2011 ONCA 265, 104 O.R. (3d) 641).

II. Les obligations fiduciaires de l'employeur en sa qualité d'administrateur d'un régime de retraite

[267] Avant d'analyser les obligations de l'employeur à titre d'administrateur d'un régime de retraite visé par la *LRR*, il faut examiner la situation des bénéficiaires. Qui sont-ils? À quelle période de leur vie en sont-ils? En quoi consistent leurs points vulnérables? Une relation fiduciaire s'entend de la relation factuelle et juridique entre un bénéficiaire vulnérable et un fiduciaire qui détient et peut exercer un pouvoir sur le bénéficiaire dans les situations prévues par la loi. L'analyse d'une telle relation nécessite un examen attentif des caractéristiques du bénéficiaire. Il ne faut pas s'en tenir à une perspective théorique et détachée, en négligeant de voir, très concrètement, comment la

2013 SCC 6 (CanLII)

this relationship works or can be twisted, perverted or abused, as was the situation in this case.

relation fonctionne et comment il est possible de la fausser, de la faire dévier ou d'en abuser, comme ce fut le cas en l'espèce.

[268] The beneficiaries were in a very vulnerable position relative to Indalex. They did not enjoy the protection that the existence of an independent administrator might have given them. They had no say and no input in the management of the plans. The information about the plans and their situation came from Indalex in its dual role as employer and manager of the plans. Their particular vulnerability arose from their relationship with Indalex, acting both as their employer and as the administrator of their retirement plans. Their vulnerability was substantially a consequence of that specific relationship (*Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 68, *per* Cromwell J.). The nature of this relationship had very practical consequences on their interests. For example, as Gillese J.A. noted in her reasons (at para. 40) the consequences of the decisions made in the course of management of the plan and during the *CCAA* proceedings signify that the members of the Executive Plan stand to lose one-half to two-thirds of their retirement benefits, unless additional money is somehow paid into the plan. These losses of benefits are, in all probability, permanent in the case of the beneficiaries who have already retired or who are close to retirement. They deeply affect their lives and expectations. For most of them, what is lost is lost for good. No arrangement will allow them to get a start on a new life. We should not view the situation of the beneficiaries as regrettable but unavoidable collateral damage arising out of the ebbs and tides of the economy. In my view, the law should give the members some protection, as the Court of Appeal intended when it imposed a constructive trust.

[268] Les bénéficiaires se trouvaient dans une position de grande vulnérabilité par rapport à Indalex. Ils ne jouissaient pas de la protection que l'existence d'un administrateur indépendant aurait pu leur assurer. Ils n'avaient pas la possibilité de donner leur avis ni de participer aux décisions à l'égard de la gestion des régimes. Toute l'information sur les régimes et sur leur situation leur provenait d'Indalex, à titre à la fois d'employeur et d'administrateur. Leur vulnérabilité particulière découlait essentiellement de leur relation avec Indalex, qui assumait cette double fonction (*Galambos c. Perez*, 2009 CSC 48, [2009] 3 R.C.S. 247, par. 68, le juge Cromwell). La nature de cette relation a entraîné des conséquences très concrètes sur leurs intérêts. Par exemple, comme le signale la juge Gillese dans ses motifs (par. 40), les décisions prises au fil de la gestion du régime des cadres et pendant la procédure fondée sur la *LACC* risquent de faire perdre aux participants entre la moitié et les deux tiers de leurs prestations, à moins d'une injection de fonds. Dans le cas des bénéficiaires retraités ou en fin de carrière, il s'agit probablement de pertes permanentes. Leur vie et leurs attentes s'en trouvent profondément affectées. Pour la plupart d'entre eux, ces pertes sont irrémédiables; aucun arrangement ne leur permettra d'entamer une nouvelle étape de leur vie. Nous ne devons pas considérer la situation des bénéficiaires comme une conséquence indirecte regrettable, mais inévitable, des fluctuations de l'économie. À mon avis, la loi devrait offrir une certaine protection aux bénéficiaires, et c'est ce que la Cour d'appel a tenté de faire en imposant la fiducie par interprétation.

[269] Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a

[269] Indalex se trouvait en situation de conflit d'intérêts dès qu'elle a envisagé de demander la protection de la *LACC* et de proposer un arrangement à ses créanciers. Du point de vue de l'entreprise, on ne pourrait guère trouver à redire à cette décision. Il s'agissait d'une décision d'affaires. Cependant, Indalex jouait en même temps le rôle de fiduciaire à

2013 SCC 6 (CanLII)

fiduciary in relation to the members and retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary relationship at will when it conflicted with its business obligations or decisions. Throughout the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

l'égard des participants aux régimes et des retraités, et c'est là où le bât blesse. L'analogie avec les « deux chapeaux » ne constitue pas un moyen de défense pour Indalex. Elle ne pouvait pas mettre la relation fiduciaire de côté à sa guise lorsque cette relation entrait en conflit avec ses obligations ou ses décisions d'affaires. Tout au long de la procédure intentée sous le régime de la *LACC* et jusqu'à la nomination d'un administrateur indépendant (Morneau Shepell Ltd.) qui s'est substitué à elle, elle demeurait une fiduciaire.

[270] It is true that the *PBA* allows an employer to act as an administrator of a pension plan in Ontario. In such cases, the legislature accepts that conflicts of interest may arise. But, in my opinion, nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer remains a fiduciary under the statute and at common law (*PBA*, s. 22(4)). The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise. If this proves to be impossible, the employer is still "seized" with fiduciary duties, and cannot ignore them out of hand.

[270] Certes, la *LRR* autorise un employeur à agir à titre d'administrateur d'un régime de retraite en Ontario. Le législateur admet dans ces cas la possibilité d'un conflit d'intérêts. Néanmoins, à mon avis, rien dans la *LRR* ne permet de conclure que l'employeur, en sa qualité d'administrateur, serait assujetti à une norme moindre ou assumerait des fonctions et des obligations moins strictes qu'un administrateur indépendant. Il demeure un fiduciaire aux termes de la loi et en common law (*LRR*, par. 22(4)). L'employeur n'est pas tenu d'assumer le fardeau de l'administration des régimes de retraite qu'il a convenu d'établir ou qui sont le fruit de décisions antérieures. Par contre, s'il choisit de l'assumer, une relation fiduciaire prend naissance et l'on s'attend à ce que l'employeur soit capable d'éviter ou de régler les conflits d'intérêts susceptibles d'intervenir. Lorsque cela se révèle impossible, l'employeur demeure soumis à ses obligations fiduciaires et ne peut s'en débarrasser sommairement.

[271] Once Indalex had considered the *CCAA* process and decided to proceed in that manner, it should have been obvious that such a move would trigger conflicts of interest with the beneficiaries of the pension plans and that these conflicts would become untenable, as per the terms of s. 22(4) of the *PBA*. Given the nature of its obligations as administrator and fiduciary, it was impossible to wear the "two hats". Indalex had to discharge its corporate duties, but at the same time it had to address its fiduciary obligations to the members and beneficiaries of the plans. I do not fault it for applying under the *CCAA*, but rather for not relinquishing its position as administrator of the plans at the time of the application. It even retained

[271] Dès qu'Indalex a envisagé la possibilité d'engager une procédure fondée sur la *LACC* et a opté pour cette solution, il aurait dû lui paraître évident que sa décision engendrerait des conflits avec les intérêts des bénéficiaires des régimes de retraite, en contravention au par. 22(4) de la *LRR*, et que la situation deviendrait insoutenable. Compte tenu de la nature des obligations qui lui incombaient à titre d'administrateur et de fiduciaire, Indalex ne pouvait plus coiffer « deux chapeaux ». Indalex avait le devoir de protéger les intérêts de la société, mais elle devait aussi s'acquitter de ses obligations fiduciaires envers les participants et bénéficiaires des régimes. Je ne lui reproche pas d'avoir présenté une demande sous le régime de la

2013 SCC 6 (CanLII)

this position once it engaged in the arrangement process. Other conflicts and breaches of fiduciary duties and of fundamental rules of procedural equity in the Superior Court flowed from this first decision. Moreover, Indalex maintained a strongly adversarial attitude towards the interest of the beneficiaries throughout the arrangement process, while it was still, at least in form, the administrator of the plans.

[272] The option given to employers to act as administrators of pension plans under the *PBA* does not constitute a licence to breach the fiduciary duties that flow from this function. It should not be viewed as an invitation for the courts to whitewash the consequences of such breaches. The option is predicated on the ability of the employer-administrator to avoid the conflicts of interests that cause these breaches. An employer deciding to assume the position of administrator cannot claim to be in the same situation as the Crown when it discharges fiduciary obligations towards certain groups in society under the Constitution or the law. For those cases, the Crown assumes those duties because it is obligated to do so by virtue of its role, not because it chooses to do so. In such circumstances, the Crown must often balance conflicting interests and obligations to the broader society in the discharge of those fiduciary duties (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 37-38). If Indalex found itself in a situation where it had to balance conflicting interests and obligations, as it essentially argues, it could not retain the position of administrator that it had willingly assumed. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

[273] Indalex could apply for protection under the *CCAA*. But, in so doing, it needed to make arrangements to avoid conflicts of interests. As nothing was done, the members of the plans were

LACC, mais plutôt de ne pas avoir alors renoncé à administrer les régimes. Elle a même continué à les administrer pendant la procédure en vue de conclure un arrangement. D'autres conflits d'intérêts et manquements à ses obligations fiduciaires ainsi qu'aux règles fondamentales d'équité procédurale devant la Cour supérieure ont découlé de cette décision initiale. Qui plus est, Indalex a conservé tout au long de cette procédure une attitude fortement contraire aux intérêts des bénéficiaires, malgré le fait qu'elle administrait toujours les régimes, à tout le moins théoriquement.

[272] Si la *LRR* offre à l'employeur le choix d'agir à titre d'administrateur d'un régime de retraite, elle ne l'autorise pas à manquer aux obligations fiduciaires qui découlent de cette fonction et il ne faudrait pas conclure qu'elle invite les tribunaux à escamoter les conséquences de tels manquements. Cette faculté de choisir présuppose la capacité de l'employeur-administrateur d'éviter les conflits d'intérêts qui entraînent de tels manquements. L'employeur qui choisit d'agir à titre d'administrateur ne saurait prétendre se trouver dans la même situation que l'État qui s'acquitte des obligations fiduciaires que lui impose la Constitution ou la loi à l'égard de certains groupes de la société. Ces obligations incombent à l'État, non pas par choix, mais en raison de son rôle. Dans ces circonstances, l'État est souvent appelé à concilier des intérêts opposés avec ses obligations envers la société en général (*Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261, par. 37-38) en s'acquittant de ses obligations fiduciaires. Si Indalex devait concilier des intérêts et des obligations contradictoires, comme elle le prétend, elle ne pouvait pas conserver la fonction d'administrateur qu'elle avait assumée de son plein gré. La solution consistait non pas à mettre en veilleuse sa fonction d'administrateur avec les obligations fiduciaires en découlant, mais à y renoncer et à la transférer avec diligence à un administrateur indépendant.

[273] Il était loisible à Indalex de demander la protection de la *LACC*. Toutefois, il lui fallait dans ce cas prendre des mesures pour éviter les conflits d'intérêts. Son inaction a forcé les

2013 SCC 6 (CanLII)

left to play catch up as best they could when the process that put in place the DIP financing and its super priority was initiated. The process had been launched in such a way that it took significant time before the beneficiaries could effectively participate in the process. In practice, the United Steelworkers union, which represented only a small group of the members of the Salaried Employees Plan, acted for them after the start of the procedures. The members of the Executive Plan hired counsel who appeared for them. But, throughout, there were problems with notices, delays and the ability to participate in the process. Indeed, during the *CCAA* proceedings, the Monitor and Indalex seemed to have been more concerned about keeping the members of the plans out of the process rather than ensuring that their voices could be heard. Two paragraphs of the submissions to this Court by Morneau Shepell Ltd., the subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

> When counsel for the Retirees again appeared at a motion to approve the bidding procedure, his objections were considered premature:
>
> > In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction — but that is for another day.
>
> Only when counsel appeared at the sale approval motion, as directed by the motions judge, were the concerns of the pension plan beneficiaries heard. At that time, the Appellants complain, the beneficiaries were too late and their motion constituted a collateral attack on the original DIP Order. However, it cannot be the case that stakeholder groups are too early, until they are too late. [R.F., at paras. 54-55]

[274] I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its

participants aux régimes à se débrouiller de leur mieux pour rattraper le train en marche une fois que le processus de financement DE assorti d'une priorité sur toutes les autres créances avait été mis en branle. Compte tenu de la manière dont ce processus a été engagé, un délai considérable s'est écoulé avant que les bénéficiaires puissent y participer réellement. Dans les faits, le Syndicat des Métallos, qui ne représentait qu'un petit nombre de bénéficiaires du régime des salariés, a agi en leur nom après le début du processus. Pour leur part, les participants au régime des cadres ont retenu les services d'un avocat. Cependant, du début à la fin, ils se sont heurtés à des difficultés concernant les avis, les délais et leur capacité de participer au processus. En effet, tout au long de la procédure intentée sous le régime de la *LACC*, le contrôleur et Indalex semblent s'être souciés davantage d'écarter les participants aux régimes que de veiller à ce qu'ils puissent être entendus. Le passage suivant des arguments présentés devant notre Cour par Morneau Shepell Ltd., l'administrateur ultérieur du régime, résume bien la conduite d'Indalex et du contrôleur à l'égard des bénéficiaires, dont les observations ne semblaient jamais tomber à point :

> [TRADUCTION] Lorsque l'avocat représentant les retraités a comparu à nouveau à l'audience sur la motion en approbation du processus de vente par soumission, ses objections ont été considérées comme prématurées :
>
> > À mon avis, les questions soulevées par les retraités n'ont aucune incidence sur le processus de vente par soumission. Les retraités pourront soulever ces questions lorsqu'une motion en homologation d'une opération sera présentée — ce qui n'est pas le cas maintenant.
>
> Ce n'est que lorsque l'avocat a comparu relativement à la motion en homologation de la vente, conformément aux directives du juge des requêtes, que les préoccupations des bénéficiaires du régime de retraite ont finalement été entendues. À ce moment-là, selon les appelants, l'intervention des bénéficiaires arrivait trop tard et constituait une contestation indirecte de l'ordonnance DE initiale. Or, il ne peut pas être toujours soit trop tôt soit trop tard pour les groupes intéressés. [m.i., par. 54-55]

[274] Je ne saurais passer sous silence la tentative ratée d'Indalex de faire cession de ses biens

2013 SCC 6 (CanLII)

business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

en faillite après l'homologation de la vente de l'entreprise. Cette manoeuvre visait entre autres à nuire aux intérêts des participants aux régimes. À l'époque, Indalex cumulait toujours ses deux fonctions, du moins sur le plan juridique. Cependant, ses obligations fiduciaires ne se trouvaient de toute évidence pas au centre de ses préoccupations. Les conflits d'intérêts se sont multipliés au cours de la procédure. Au lieu d'essayer de les régler, Indalex les a balayés du revers de la main. Elle a ainsi manqué à ses obligations fiduciaires et aux prescriptions du par. 22(4) de la *LRR*.

III. Procedural Fairness in *CCAA* Proceedings

III. L'équité procédurale dans une procédure intentée sous le régime de la *LACC*

[275] The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

[275] La manière dont l'instance s'est déroulée devant la Cour supérieure résultait, du moins en partie, du non-respect par Indalex de ses obligations fiduciaires. Les points de procédure soulevés devant la cour n'ont pas permis d'atténuer les conséquences de ces manquements. Certes, les bénéficiaires ont finalement obtenu ou reçu certains renseignements concernant la procédure et ils ont pu être représentés par un avocat à diverses étapes, mais l'esprit et les principes du système canadien de justice civile n'ont pas été respectés, et c'est là le problème fondamental.

[276] I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some

[276] Je reconnais que, souvent, le temps presse dans ce genre de procédure. La situation d'un débiteur nécessite la prise de mesures rapides et efficaces. Un litige qui s'éternise, comme certaines actions civiles, ne saurait convenir pour l'application de la *LACC*. Toutefois, la procédure prévue par cette loi n'est pas de nature purement administrative. Il s'agit également d'un processus judiciaire, assujetti à ce titre aux principes du système contradictoire. Les règles fondamentales de ce système ne sauraient être bafouées. Toutes les parties intéressées ont droit à une procédure équitable qui leur permet d'exprimer leur point de vue et d'être entendues. Il ne suffit pas à cet égard de répondre que rien d'autre ne pouvait être tenté, qu'il n'existait pas de solution meilleure ou, essentiellement, qu'entendre les participants aurait constitué une perte de temps. Dans toute procédure,

2013 SCC 6 (CanLII)

way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

que ce soit en droit administratif, pénal ou civil, le droit d'être informé et celui d'être entendu d'une manière ou d'une autre demeurent des principes fondamentaux de la justice. Ils demeurent applicables sous le régime de la *LACC*, comme le font remarquer certains auteurs et juges (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (C.J. Ont. (Div. gén.)), par. 5 (le juge Farley). Ces principes n'ont pas été respectés en l'espèce, et mes collègues le reconnaissent, mais minimisent les conséquences de tels manquements et vices de procédure.

IV. Imposing a Constructive Trust

[277] In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203-4: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

IV. Imposition d'une fiducie par interprétation

[277] Dans les circonstances, la décision de la Cour d'appel d'imposer une fiducie par interprétation ne me paraît pas erronée (par. 200-207). Il s'agit d'une décision équitable conforme aux exigences de la justice, selon les principes énoncés par notre Cour dans les arrêts *Canson Enterprises Ltd. c. Boughton & Co.*, [1991] 3 R.C.S. 534, et *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217. Pareille réparation pour le tort causé par Indalex est fondée (*Soulos*, par. 36, la juge McLachlin (maintenant Juge en chef)). Les faits de l'espèce respectent les quatre conditions qui justifient généralement l'imposition d'une fiducie par interprétation (*Soulos*, par. 45), comme le constate la juge Gillese aux par. 203-204 de ses motifs : (1) le défendeur était assujetti à une obligation en equity relativement aux actes qui ont conduit à la possession des biens; (2) il a été démontré que la possession des biens par le défendeur résultait des actes qu'il a ou est réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'equity lui imposait à l'égard du demandeur; (3) le demandeur a établi qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations; (4) il n'existe pas de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire, comme la protection des intérêts des créanciers intervenants.

2013 SCC 6 (CanLII)

[278] In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

[278] En imposant pareille réparation, la Cour d'appel a exercé la compétence inhérente des tribunaux de concevoir une réparation en equity en réponse non seulement à une question de procédure, mais également à une question de fond. L'article 9 de la *LACC* est formulé en termes généraux et n'a pas pour effet de priver le tribunal du pouvoir de combler au besoin les lacunes du droit pour rendre justice aux parties (G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law, 2007* (2008), 41, p. 78-79).

[279] The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

[279] En imposant la fiducie, la Cour n'a pas négligé le fait qu'Indalex et Indalex É.-U. constituent des personnes morales distinctes. Elle a tenu compte à juste titre de leurs rapports étroits, la seconde contrôlant dans les faits la première. Il était possible, voire nécessaire, de prendre ces rapports en compte pour déterminer si la fiducie par interprétation constituait une réparation adéquate en l'espèce.

[280] For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

[280] Pour les motifs qui précèdent, je suis d'avis de confirmer la fiducie par interprétation et de rejeter l'appel avec dépens en faveur des intimés.

APPENDIX

The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

6. The said Act is amended by adding thereto the following sections:

23*a*.—(1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the same after his receipt thereof into the pension plan as the employee's contribution thereto and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

ANNEXE

The Pension Benefits Amendment Act, 1973, S.O. 1973, ch. 113

[TRADUCTION]

6. La même loi est modifiée par l'adjonction de ce qui suit :

23*a*.—(1) Toute somme qu'un employeur reçoit d'un employé conformément à une entente relative à son versement par l'employeur à titre de cotisation salariale est réputée détenue en fiducie par l'employeur en vue de son versement, après qu'il l'a reçue, au régime de retraite à titre de cotisation salariale, et l'employeur ne peut s'en approprier quelque partie ni la transformer à son usage personnel ou à un autre usage non autorisé par la fiducie.

2013 SCC 6 (CanLII)

(2) For the purposes of subsection 1, any sum withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be a sum received by the employer from the employee.

(3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the plan shall, when due under the plan, be deemed to be held by the employer in trust for payment of the same into the plan in accordance with the plan and this Act and the regulations as the employer's contribution and the employer shall not appropriate or convert any part of the amount required to be paid to the fund to his own use or to any use not authorized by the terms of the pension plan.

Pension Benefits Act, R.S.O. 1980, c. 373

21. . . .

(2) Upon the termination or winding up of a pension plan filed for registration as required by section 17, the employer is liable to pay all amounts that would otherwise have been required to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

. . .

23.—(1) Where a sum is received by an employer from an employee under an arrangement for the payment of the sum by the employer into a pension plan as the employee's contribution thereto, the employer shall be deemed to hold the sum in trust for the employee until the sum is paid into the pension plan whether or not the sum has in fact been kept separate and apart by the employer and the employee has a lien upon the assets of the employer for such amount that in the ordinary course of business would be entered in books of account whether so entered or not.

. . .

(3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

(2) Pour les besoins du paragraphe 1, la somme qu'un employeur prélève sur une somme payable à l'employé, notamment par retenue salariale, est réputée constituer une somme que l'employeur reçoit de l'employé.

(3) Toute somme qu'un employeur doit verser à un régime de retraite à titre de cotisation patronale et qui est exigible aux termes du régime est réputée détenue en fiducie par l'employeur en vue de son versement au régime de retraite conformément à celui-ci, à la présente loi et au règlement, et l'employeur ne peut s'approprier ni transformer à son usage personnel ou à tout autre usage non autorisé par le régime quelque partie du montant qui doit être versé à la caisse.

Pension Benefits Act, R.S.O. 1980, ch. 373

[TRADUCTION]

21. . . .

(2) À la cessation ou à la liquidation d'un régime de retraite déposé en vue de son agrément en vertu de l'article 17, l'employeur est tenu de verser à l'assureur, à l'administrateur ou au fiduciaire du régime de retraite les sommes dont le versement aurait été par ailleurs exigible pour satisfaire aux critères de solvabilité, et ce, jusqu'à la date de la cessation ou de la liquidation du régime.

. . .

23.—(1) L'employeur qui reçoit une somme d'un employé conformément à une entente relative à son versement par l'employeur à un régime de retraite à titre de cotisation salariale est réputé la détenir en fiducie jusqu'à son versement au régime de retraite, et ce, qu'il l'ait conservée séparément ou non, et l'employé a un privilège sur l'actif de l'employeur à raison du montant qui, dans le cours normal des affaires, serait consigné dans les livres de compte, qu'il y soit consigné ou non.

. . .

(3) L'employeur qui est tenu de cotiser à un régime de retraite est réputé détenir en fiducie pour le compte des participants au régime une somme dont le montant est calculé conformément au paragraphe (4), et ce,

2013 SCC 6 (CanLII)

(*a*) the employer contributions are payable into the plan under the terms of the plan or this Act; or

(*b*) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

. . .

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(*a*) the value of the assets of the plan; and

(*b*) the value of pension benefits guaranteed under subsection 31 (1) and any other pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

a) que la cotisation de l'employeur soit payable ou non aux termes du régime ou de la présente Loi et

b) que l'employeur l'ait conservée séparément ou non,

et les participants ont un privilège sur l'actif de l'employeur à raison du montant qui, dans le cours normal des affaires, serait consigné dans des livres de compte, qu'il y soit consigné ou non.

(4) Aux fins de déterminer le montant qui est réputé détenu en fiducie en application du paragraphe (3) à une date précise, le calcul est effectué comme si le régime avait été liquidé à cette date.

. . .

32. En plus des sommes que l'employeur est tenu de payer en application du paragraphe 21 (2), lors de la cessation ou de la liquidation d'un régime de retraite à prestations déterminées ou lorsqu'une modification fait en sorte qu'un régime n'est plus un régime de retraite à prestations déterminées, l'employeur est tenu de combler la différence entre

a) la valeur de l'actif du régime et

b) la valeur des prestations de retraite garanties suivant le paragraphe 31 (1) et de toutes autres prestations de retraite auxquelles le droit est acquis aux termes du régime,

et l'employeur verse à l'assureur, au fiduciaire ou à l'administrateur du régime de retraite les sommes ainsi requises de la manière prévue par règlement.

Pension Benefits Amendment Act, 1983, S.O. 1983, ch. 2

[TRADUCTION]

2. Le paragraphe 21 (2) de la même loi est abrogé et remplacé par ce qui suit :

(2) Lors de la cessation ou de la liquidation d'un régime de retraite enregistré, l'employeur dont les employés bénéficient du régime verse à l'administrateur, à l'assureur ou au fiduciaire du régime

a) une somme dont le montant est égal

2013 SCC 6 (CanLII)

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

23.—(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension plan as the employee's contribution to the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension plan.

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be money received by the employer from the employee.

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(i) au coût du service courant et

(ii) aux paiements spéciaux prescrits par règlement,

qui sont accumulés à la date de la cessation ou de la liquidation, celle-ci comprise, mais qui, suivant les conditions du régime et le libellé du règlement, ne sont pas encore dus;

b) toute autre somme qui, aux termes du régime de retraite ou du règlement, est due par l'employeur au régime de retraite, mais qui n'a pas été versée à la date de la cessation ou de la liquidation.

(2a) Pour les besoins de l'alinéa (2) a), le coût du service courant et les paiements spéciaux sont réputés s'accumuler sur une base quotidienne.

3. L'article 23 de la même loi est abrogé et remplacé par ce qui suit :

23.—(1) L'employeur qui reçoit de l'argent d'un employé en vertu d'un arrangement précisant que l'employeur versera cet argent à un régime de retraite en tant que cotisation de l'employé aux termes du régime de retraite est réputé détenir cet argent en fiducie pour l'employé jusqu'à ce que l'employeur verse cet argent au régime de retraite.

(2) Pour l'application du paragraphe (1), toute retenue à la source ou autre somme prélevée par l'employeur est réputée constituer de l'argent que l'employeur reçoit de l'employé.

(3) L'administrateur ou le fiduciaire du régime de retraite a un privilège sur l'actif de l'employeur à raison d'un montant égal à la somme réputée détenue en fiducie suivant le paragraphe (1).

(4) L'employeur qui, dans le cadre d'un régime de retraite, est tenu de cotiser à ce régime est réputé détenir en fiducie pour le compte des participants du régime une somme égale au total

a) de toutes les sommes que l'employeur est tenu de verser au régime pour acquitter

(i) le coût du service courant et

(ii) les paiements spéciaux prescrits par règlement

qui sont dus aux termes du régime ou du règlement, et qui n'ont pas été versés;

2013 SCC 6 (CanLII)

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

. . .

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32.—(1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

58.—(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

. . .

b) lors de la cessation ou de la liquidation du régime, toute autre somme que l'employeur est tenu de payer en vertu de l'alinéa 21 (2) a).

(5) L'administrateur ou le fiduciaire du régime de retraite a un privilège sur l'actif de l'employeur à raison d'un montant égal à celui de la somme qui est réputée détenue en fiducie suivant le paragraphe (4).

(6) Les paragraphes (1) et (4) s'appliquent que les sommes mentionnées soient conservées séparément ou non.

. . .

8. Les articles 32 et 33 de la même loi sont abrogés et remplacés par ce qui suit :

32.—(1) L'employeur dont les employés participent à un régime de retraite à prestations déterminées par lequel il est lié ou auquel il est partie et qui fait l'objet d'une liquidation partielle ou totale est tenu de verser à l'administrateur, à l'assureur ou au fiduciaire du régime un montant égal à l'excédent de la valeur des prestations de retraite garanties par l'article 31 et de la valeur des prestations de retraite acquises suivant le régime de retraite à prestations déterminées sur la valeur de l'actif du régime établie conformément au règlement applicable au paiement des prestations de retraite accumulées eu égard aux états de services en Ontario.

(2) Le versement que l'employeur est tenu d'effectuer suivant le paragraphe (1) s'ajoute à celui exigé au paragraphe 21 (2).

(3) L'employeur verse à l'assureur, au fiduciaire ou à l'administrateur du régime de retraite à prestations déterminées, de la manière prescrite par règlement, toute somme dont le versement est exigé au paragraphe (1).

Loi de 1987 sur les regimes de retraite, L.O. 1987, ch. 35

58. (1) L'employeur qui reçoit de l'argent d'un employé en vertu d'un arrangement précisant que l'employeur versera cet argent à une caisse de retraite en tant que cotisation de l'employé aux termes du régime de retraite, est réputé détenir cet argent en fiducie pour l'employé jusqu'à ce que l'employeur verse cet argent à la caisse de retraite.

. . .

2013 SCC 6 (CanLII)

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

. . .

59.—(1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . .

75.—(1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to

(3) L'employeur qui est tenu de cotiser à une caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont dues et impayées à la caisse de retraite.

(4) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

. . .

59. (1) L'intérêt sur l'argent qu'un employeur est tenu de verser à une caisse de retraite s'accumule sur une base quotidienne.

(2) L'intérêt sur les cotisations est calculé et crédité à des taux qui ne sont pas inférieurs aux taux prescrits et conformément aux exigences prescrites.

. . .

75. (1) En Ontario, un participant à un régime de retraite dont le total de l'âge plus le nombre d'années d'emploi continu ou d'affiliation continue est d'au moins cinquante-cinq, à la date de prise d'effet de la liquidation totale ou partielle, a droit à l'une des pensions suivantes :

a) une pension conforme aux conditions du régime de retraite si, aux termes du régime de retraite, le participant est admissible au paiement immédiat d'une prestation de retraite;

b) une pension conforme aux conditions du régime de retraite, commençant à la plus antérieure des dates suivantes :

(i) la date normale de retraite prévue par le régime de retraite,

(ii) la date à laquelle le participant aurait droit à une pension non réduite aux termes du régime de retraite si celui-ci n'était pas liquidé et que l'affiliation du participant avait continué jusqu'à cette date;

c) une pension réduite dont le montant correspond à celui à verser aux termes du régime de retraite commençant à la date à laquelle le participant

2013 SCC 6 (CanLII)

the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

. . .

76.—(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Commission declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40 (3) (50 per cent rule) and section 75,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Pension Benefits Act, R.S.O. 1990, c. P.8

57. (1) [Trust property] Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

(2) [Money withheld] For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

aurait droit à la pension réduite en vertu du régime de retraite si celui-ci n'était pas liquidé et que l'affiliation du participant avait continué jusqu'à cette date.

. . .

76. (1) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si la Commission déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 40 (3) (règle des 50 pour cent),

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8

57. (1) [Bien en fiducie] L'employeur qui reçoit de l'argent d'un employé en vertu d'un arrangement précisant que l'employeur versera cet argent à une caisse de retraite en tant que cotisation de l'employé aux termes du régime de retraite, est réputé détenir cet argent en fiducie pour l'employé jusqu'à ce que l'employeur verse cet argent à la caisse de retraite.

(2) [Sommes retenues] Pour l'application du paragraphe (1), l'argent retenu des sommes payables à l'employé par l'employeur, que ce soit par retenues salariales ou autrement, est réputé être de l'argent que l'employeur a reçu de l'employé.

2013 SCC 6 (CanLII)

(3) [Accrued contributions] An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) [Wind up] Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

. . .

58. (1) [Accrual] Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) [Interest] Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . .

74. (1) [Activating events] This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.

2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).

3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation.

(1.1) [Same, termination of employment] Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

(3) [Cotisations accumulées] L'employeur qui est tenu de cotiser à une caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont dues et impayées à la caisse de retraite.

(4) [Liquidation] Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

. . .

58. (1) [Accumulation] L'argent qu'un employeur est tenu de verser à une caisse de retraite s'accumule sur une base quotidienne.

(2) [Intérêt] L'intérêt sur les cotisations est calculé et crédité à des taux qui ne sont pas inférieurs aux taux prescrits et conformément aux exigences prescrites.

. . .

74. (1) [Événements déclencheurs] Le présent article s'applique si une personne cesse d'être un participant à la date de prise d'effet de l'un des événements déclencheurs suivants :

1. La liquidation du régime de retraite, si sa date de prise d'effet tombe le 1er avril 1987 ou après cette date.

2. La cessation, par l'employeur, de l'emploi d'un participant, si sa date de prise d'effet tombe le 1er juillet 2012 ou après cette date, la présente disposition ne s'appliquant toutefois pas si la cessation se produit dans les circonstances visées au paragraphe (1.1).

3. L'arrivée d'autres événements prescrits dans les circonstances prescrites par règlement.

(1.1) [Idem : cessation d'emploi] La cessation de l'emploi n'est pas un événement déclencheur si elle résulte d'un acte d'inconduite délibérée, d'indiscipline ou de négligence volontaire du participant qui n'est pas frivole et que l'employeur n'a pas toléré, ou qu'elle se produit dans les autres circonstances prescrites.

2013 SCC 6 (CanLII)

(1.2) [Exceptions, election by certain pension plans] This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect.

(1.3) [Benefit] A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date.

(2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.

(3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.

(1.2) [Exceptions : choix fait par certains régimes de retraite] Le présent article ne s'applique pas à l'égard d'un régime de retraite conjoint ou d'un régime de retraite interentreprises tant qu'un choix fait en vertu de l'article 74.1 pour le régime et les participants est en vigueur.

(1.3) [Prestation] En Ontario, un participant à un régime de retraite dont le total de l'âge plus le nombre d'années d'emploi continu ou d'affiliation continue est d'au moins 55, à la date de prise d'effet de l'événement déclencheur, a droit à l'une des pensions suivantes :

a) une pension conforme aux conditions du régime de retraite si, aux termes de celui-ci, il est admissible au paiement immédiat d'une prestation de retraite;

b) une pension conforme aux conditions du régime de retraite, commençant à la première des dates suivantes :

(i) la date normale de retraite prévue par le régime de retraite,

(ii) la date à laquelle il aurait droit à une pension non réduite aux termes du régime de retraite si l'événement déclencheur ne s'était pas produit et que son affiliation avait continué jusqu'à cette date;

c) une pension réduite dont le montant correspond à celui à verser aux termes du régime de retraite commençant à la date à laquelle il aurait droit à la pension réduite en vertu du régime de retraite si l'événement déclencheur ne s'était pas produit et que son affiliation avait continué jusqu'à cette date.

(2) [Partie d'année] Pour déterminer le total de l'âge plus l'emploi ou l'affiliation, un crédit d'un douzième est accordé pour chaque mois d'âge et pour chaque mois d'emploi ou d'affiliation continus à la date de prise d'effet de l'événement déclencheur.

(3) [Participant pendant 10 ans] Les prestations de raccordement offertes aux termes du régime de retraite auxquelles un participant aurait droit si l'événement déclencheur ne s'était pas produit et que l'affiliation du participant continuait, sont incluses dans le calcul de la prestation de retraite prévue au paragraphe (1.3) dans le cas d'une personne qui a accumulé au moins 10 années d'emploi continu chez l'employeur ou qui est un participant depuis au moins 10 ans.

2013 SCC 6 (CanLII)

(4) [Prorated bridging benefit] For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred.

(4) [Prestation de raccordement distribuée proportionnellement] Pour l'application du paragraphe (3), si la prestation de raccordement offerte aux termes du régime de retraite ne se rapporte pas à des périodes d'emploi ou d'affiliation au régime de retraite, la prestation de raccordement est distribuée selon le rapport qui existe entre la période réelle d'emploi du participant à la période d'emploi que le participant aurait faite à la première date à laquelle le membre aurait droit au paiement de prestations de retraite et d'une pleine prestation de raccordement aux termes du régime de retraite si l'événement déclencheur ne s'était pas produit.

(5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

(5) [Avis de licenciement] L'affiliation à un régime de retraite qui est liquidé inclut la période de préavis de licenciement exigé en vertu de la partie XV de la *Loi de 2000 sur les normes d'emploi*.

(6) [Application of subs. (5)] Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

(6) [Champ d'application du par. (5)] Le paragraphe (5) ne s'applique pas afin de calculer le montant de la prestation de retraite d'un participant qui est tenu de cotiser à la caisse de retraite, à moins que le participant verse les cotisations à l'égard de la période de préavis de licenciement.

(7) [Consent of employer] For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

(7) [Consentement de l'employeur] Pour l'application du présent article, si le consentement de l'employeur est une condition d'admissibilité au droit de recevoir une prestation accessoire, l'employeur est réputé avoir donné son consentement.

(7.1) [Consent of administrator, jointly sponsored pension plans] For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

(7.1) [Consentement de l'administrateur : régimes de retraite conjoints] Pour l'application du présent article, si le consentement de l'administrateur d'un régime de retraite conjoint est une condition d'admissibilité au droit de recevoir une prestation accessoire, l'administrateur est réputé avoir donné son consentement.

(8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

(8) [Calcul de la prestation de retraite] La prestation mentionnée à l'alinéa (1.3) a), b) ou c) à l'égard de laquelle un participant a rempli toutes les conditions d'admissibilité prévues au présent article est incluse dans le calcul de la prestation de retraite du participant ou de sa valeur de rachat.

. . .

. . .

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension

75. (1) [Responsabilité de l'employeur à la liquidation] Si un régime de retraite est liquidé, l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des

2013 SCC 6 (CanLII)

plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

Appeals of Sun Indalex Finance, George L. Miller and FTI Consulting allowed, LeBel *and* Abella JJ. *dissenting. Appeal of USW dismissed.*

Solicitors for the appellant Sun Indalex Finance, LLC: Goodmans, Toronto.

Solicitors for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors: Chaitons, Toronto.

Solicitors for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited: Stikeman Elliott, Toronto.

Solicitors for the appellant/respondent United Steelworkers: Sack Goldblatt Mitchell, Toronto.

Solicitors for the respondents Keith Carruthers, et al.: Koskie Minsky, Toronto.

Solicitors for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited

Pourvois de Sun Indalex Finance, George L. Miller et FTI Consulting accueillis, les juges LeBel *et* Abella *sont dissidents. Pourvoi du Syndicat des Métallos rejeté.*

Procureurs de l'appelante Sun Indalex Finance, LLC : Goodmans, Toronto.

Procureurs de l'appelant George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7 : Chaitons, Toronto.

Procureurs de l'appelante FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited : Stikeman Elliott, Toronto.

Procureurs de l'appelant/intimé le Syndicat des Métallos : Sack Goldblatt Mitchell, Toronto.

Procureurs des intimés Keith Carruthers, et autres : Koskie Minsky, Toronto.

Procureurs de l'intimée Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau

2013 SCC 6 (CanLII)

Partnership): Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitor for the respondent/intervener the Superintendent of Financial Services: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Insolvency Institute of Canada: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Federation of Pensioners: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: McMillan, Montréal.

Solicitors for the intervener the Canadian Bankers Association: Osler, Hoskin & Harcourt, Toronto.

Sobeco, société en commandite) : Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Procureur de l'intimé/intervenant le Surintendant des services financiers : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenant l'Institut d'insolvabilité du Canada : Thornton Grout Finnigan, Toronto.

Procureurs de l'intervenant le Congrès du travail du Canada : Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante la Fédération canadienne des retraités : Paliare, Roland, Rosenberg, Rothstein, Toronto.

Procureurs de l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : McMillan, Montréal.

Procureurs de l'intervenante l'Association des banquiers canadiens : Osler, Hoskin & Harcourt, Toronto.

2013 SCC 6 (CanLII)

ESSENTIALS OF
CANADIAN LAW

PENSION LAW

SECOND EDITION

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Faculty of Law, University of Toronto

Canada's state-supported retirement delivery system. These legal principles ask us to acknowledge the public policy role of pension plans providing a minimum level of sustenance following an employee's working life. This dichotomy has produced a fertile breeding ground for pension law jurisprudence and legislation as it has evolved since its genesis a half-century ago.

B. OVERVIEW

1) Statistical Overview

It is often helpful in social sciences and humanities (and law) to begin a textbook with a brief statistical overview of its subject matter. In the field of pensions and pension law this is no exception. The changing statistics over the years concerning pension plan membership, coverage, plan type, and registration mobilize the law and contextualize the applicable legal and regulatory principles.

a) Introduction

On 1 January 2011, over six million Canadian workers participated in 19,463 registered employment-based pension plans.[1]

b) Plan design type

There are two basic types of pension plan design: defined benefit and defined contribution.[2] A typical defined benefit pension plan (DB) promises a pension benefit at retirement determined by a formula taking into account a fixed or tiered percentage multiplied by the employee's length

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1 Statistics Canada, *Table 280-00016 Registered pension plans (RPPs), members and market value of assets, by funding instrument, sector, type of plan and contributory status*, Annual [Statistics Canada], CANSIM, online: www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2800016&pattern=Registered+pension+plans&tabMode=dataTable&srchLan=-1&p1=1&p2=-1. On 1 January 2000 there were 15,557 pension plans covering 5.3 million workers and by 2004, there were 14,777 pension plans covering 5.6 million workers. See Statistics Canada, *Pension Plans in Canada January 1, 2000*, Cat No 74-401-XPB (Ottawa: Ministry of Industry: Income Statistics Division, Pensions and Wealth Program, 2001) at 16 [*Pension Plans in Canada January 1, 2000*] and Statistics Canada, *Canada's Retirement Income Programs, 2006 Ed*, Cat No 74-507-XCB (Ottawa: Ministry of Industry: Income Statistics Division, 2006) [*Canada's Retirement Income Programs, 2006*].

2 There are numerous variations on these two types, including Target Benefit Plans and other "hybrid" plans. See Chapter 3, Section B(2) for a more thorough discussion on plan design.

of service in the plan and his or her final or career average salary at retirement. Employer contributions to a defined benefit plan are usually based on actuarial recommendations in which the actuary makes a number of assumptions about the plan's future experience, demographics, and salaries, among other things. In a defined benefit plan, the benefit, not the contribution, is defined.

In a defined contribution pension plan (DC), also called money purchase plans, contribution rates are fixed in the plan text and are usually based on a percentage of the member's earnings, a specific dollar amount, or a specified number of cents per hour worked. DC plans produce a pension benefit at retirement based on the funds available in each employee's account. Sometimes employee DC accounts are based on the aggregate fund rate of return. In a defined contribution plan, the contribution, not the benefit, is defined.

On 1 January 2011, there were 6,826 defined contribution plans and 11,975 defined benefit plans registered in Canada, and 74 percent of all pension plan members in Canada participate in DB plans. Most employees covered by defined benefit plans participate in large pension plans.[3] More than half of all employees in defined benefit plans work in the public sector.[4]

Because of the historically-high membership levels in defined benefit plans, many of the legal principles affecting pension plans, while applicable to all plans, have a particular relevance to defined benefit plans. The prevalence of defined benefit coverage is illustrated, for example, by the abundance of caselaw addressing pension surplus or pension deficits. These legal issues only arise in defined benefit plans. Moreover, provincial pension standards legislation only has limited reference to defined contribution plans and contains almost no legislative standards dedicated exclusively to that plan type.

c) Recent changes in pension coverage

Between 1990 and 2011, pension plan membership in Canada—in absolute numbers—increased by almost 19 percent.[5] However, when ex-

3 Over 95 percent of all DB plan employees belong to plans containing at least 100 employees. Since 2000, increases in the number of defined benefit plans have almost exclusively been with respect of plans with fewer than ten members. Many new DB plans are Individual Pension Plans (IPPs). Between 2000 and 2010, the number of IPPs nearly quadrupled. In the same period, the number of DB plans with 100–499 employees decreased by 45 percent.

4 Statistics Canada, above note 1.

5 During the 1990s, there was a slight decrease in plan membership of less than 1 percent (from 5,318,090 as of 1 January 1992 to 5,267,894 as of 1 January

pressed as a percentage of the paid workforce, pension coverage during the same period declined from 45 percent to 39 percent.[6] The relative decline in pension plan membership has been explained as being due to a number of factors including employer insolvency, decreased unionization, changing employer trends in workplace employee benefits, and employment shifts towards low-pension-coverage industries.[7]

There is also movement in the statistics relating to relative coverage as between plan types. While in 1990, 91 percent of all plan members participated in defined benefit plans, twenty years later, this has dropped to 74 percent. In 2011, approximately 4.5 million employees participated in 12,000 defined benefit plans. In the same period, employee participation doubled in defined contribution plans. In 1990, there were 430,561 employees participating in defined contribution plans, as compared to 969,207 in 2010.[8]

These statistics illustrate, in part, a trend over the last quarter century where employers who kept pension plans converted them from a defined benefit formula to a defined contribution formula. Overall, statistics demonstrate an increasing preference of employers to provide benefits under the defined contribution model. The law is slowly responding to the reality of defined contribution coverage, both on the regulatory front and at common law.

2000). Between 1998 and 2000, total plan membership increased by 3.5 percent, which has been largely attributed to growth in sustained employment in 1998 and 1999 following the recession and period of mass layoffs of the early 1990s: *Pension Plans in Canada January 1, 2000*, (Ottawa, Ministry of Industry: Income Statistics Division, Pension and Wealth Program, 2001) at 19 and Table 3 [*Pension Plans in Canada January 1 2001*]. Between 1 January 2000 and 1 January 2004, plan membership increased by 6 percent to 5,589,799: *Canada's Retirement Income Programs, 2006* (Ottawa: Ministry of Industry: Income Statistics Division, 2006) [*Canada's Retirement Income Programs, 2006*]. Between 1 January 2004 and 1 January 2011, plan memberships increased by nearly 8 percent to 6,065,751, Statistics Canada, above note 1.

6 Statistics Canada, *Percentage of Labour Force and Employees Covered by a Registered Plan (RPP)*, summary table, online: www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labor26a-eng.htm. Since pension plans form part of the employment relationship, paid workforce coverage excludes persons not entitled to participate in pension plans such as the self-employed working in unincorporated businesses, unpaid family workers, and the unemployed.

7 See, for example, Morissette and Drolet, "Pension Coverage and Retirement Savings" in Statistics Canada, *Perspectives on Labour and Income*, Cat. No 75-0001-XPE (Ottawa: Statistics Canada, 2001) at 41 and 43. See also "Pension Plans in Canada, as of January 1, 2011" in Statistics Canada, *The Daily* (25 May 2012), online: www.statcan.gc.ca/daily-quotidien/120525/dq120525a-eng.htm.

8 Statistics Canada, above note 1.

At the end of 2010, total annual contributions to pension plans were $54.2 billion, up 168 percent from 2001 and nearly $34 billion higher. Between 2001 and 2010, employer contributions increased by 192 percent, while employee contributions increased by 124 percent.[9]

d) Geographic concentration

When viewed by jurisdiction, Ontario has the statistical hegemony on Canadian pension registration and membership. In 2011, over two million Canadian employees participating in pension plans were employed in Ontario and this represented almost 35 percent of all employee participants in Canada.[10] There are over 7,500 pension plans registered in Ontario, representing 39 percent of all registered plans.[11] Correspondingly, the jurisprudence and the regulatory policy arising from Ontario have played an influential role in the development of Canadian pension law.

e) Funding instrument

A pension plan must provide for the funding of employer contributions by one of several prescribed funding vehicles. Funding instruments set out the obligations of third-party custodians who receive, invest, and sometimes manage the contributions and assets of the pension fund. The two most common types of funding arrangements are by a contract with an insurance company or a trust agreement that has named individual trustees or a financial institution as custodial trustee.[12]

At the end of 2010, 49 percent of all pension plans were funded by way of insurance contract. Most defined contribution pension plans fall into this category. However, insurance contracts cover only 16 percent of total plan membership. In contrast, 61 percent of employee participants participated in pension trusts which, at the end of 2010, held

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9 Statistics Canada, *Table 280-0026 Registered pension plans (RPPs), contributions to registered pension plans, by sector, type of plan and contributory status, annual (dollars), Annual.* CANSIM, online: www5.statcan.gc.ca/cansim/pick-choisir?lang=eng&p2=33&id=2800026.

10 There are more employee participants employed in Ontario than in all other provinces and jurisdictions combined, excluding Quebec. Statistics Canada, *Table 280-0009 Registered pension plans (RPPs), members and market value of assets, by jurisdiction of plan registration, sector, type of plan and contributory status, Annual.* CANSIM [*Statscan report*], online: www5.statcan.gc.ca/cansim/pick-choisir?lang=eng&p2=33&id=2800009.

11 As at 1 January 2011, there were 7,592 plans registered with the Financial Services Commission of Ontario out of the total 19,463 plans surveyed in the *Statscan report, ibid.*

12 A third, less common, funding vehicle is by way of consolidated revenue arrangement with the federal or provincial government.

over three-quarters of a trillion dollars in accumulated assets (over 14 times the asset levels held under insurance contracts).[13] The use of the pension trust as the leading funding arrangement for Canadian pension plans explains, in considerable part, the significance of trust law in circumscribing the legal rights and responsibilities of pension plan stakeholders.

2) Thematic Overview

a) Historical context

Prior to the Second World War, the concept of a retirement pension simply did not exist. Breadwinners were expected to work until they no longer could and then depend upon their children or handouts from civic or religious institutions for financial security. Private employment-based retirement payments were not pensions *per se*, but were gratuitous rewards for loyal service and were often discretionary and revocable by the employer. The concept of a right to a minimum level of post-retirement sustenance, as a matter of public policy, arose in 1927 when the Government of Canada introduced the Old Age Pension (OAP). The OAP was a social benefit, more or less unrelated to employment and awarded based on the means of the recipient. With strict residency requirements, and an income test that presumed assistance from children and income from property, it was more akin to today's notion of social welfare than to a pension. By the 1940s, favourable federal tax legislation offered a greater degree of financial security for employees in receipt of retirement income by prohibiting an employer that provided a pension plan from reducing or revoking a pension already "in pay."

The introduction of provincial pension legislation in the 1960s was part of the package within which the modern welfare state evolved. The initial manifestation of the Ontario *Pension Benefits Act*[14] required the compulsory establishment of an employee pension plan for every employer with fifteen or more employees. Ontario eliminated the mandatory sponsorship requirement in 1964, shortly prior to the legislation's 1 January 1965 effective date. It did so in conjunction with consultations with the federal government regarding the Canada Pension Plan, a then new compulsory and joint-contributory scheme which the Ontario government concluded was consistent with its aim of ensuring a

13 Statistics Canada, *Table 280-0014, Registered pension plans (RPPs), members and market value of assets, by funding instrument, sector, type of plan and contributory status, Annual*. CANSIM, online: www5.statcan.gc.ca/cansim/pick-choisir?lang=eng&p2=33&id=2800014.

14 SO 1962–63, c 103, Royal Assent 26 April 1963 [*PBA*].

more to the point, a "fiction."[57] It is in part because of the realization that sponsoring a defined contribution plan does not necessarily or sufficiently minimize an employer's risks and costs that a few employers who have converted their plans to a defined contribution formula are now looking to unwind said conversion.[58]

C. APPLICATION

This section discusses the extent to which the *PBA* applies to a pension plan.

1) Introduction

The *PBA* applies "to every pension plan that is provided for persons employed in Ontario."[59] A comparable provision exists in the *PBSA* regarding "included employment" in the federal sphere.[60] This raises questions concerning the jurisdictional reach of the legislation on the following issues: what is a "pension plan;" what does it mean to be "employed;" and to what extent does the Act apply to persons outside of Ontario (or, in the case of the *PBSA*, outside of "included employment"). Each of these questions is considered below.

2) Applies to a Pension Plan

The *PBA* only applies to *pension* plans, namely, plans that are "organized and administered to provide pensions for employees."[61]

a) Must provide pension benefits

In order for an employee benefit plan to be considered a pension plan, it must promise the payment of "pension benefits," that is, regular amounts payable upon retirement to an employee during the balance of his or her lifetime.[62] Under the *ITA* as well, a condition of registration is that the plan's "primary purpose" be to "provide periodic payments to

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57 See Ambachtsheer, above note 43.

58 Steve Bonnar & Bill Moore, "The Pension Design Pendulum: There and Back Again?" (2003) 16 Canadian HR Reporter 22 at 22.

59 *PBA*, s 3.

60 *PBSA*, s 4.

61 *PBA*, s 1(1), "pension plan." See also *PBSA*, s 4(2).

62 *PBA*, s 1(1), "pension" and "pension benefit." See also *PBSA*, s 2(1), "pension benefit" and "pension benefit credit."

individuals after retirement and until death in respect of their service as employees."[63]

This means that other employee benefit plans that may form part of an employee's total compensation package, such as health and welfare plans, supplementary medical care plans, dental plans, life and disability insurance plans are all conceptually and necessarily excluded from the *PBA*'s application.[64]

For a scheme to be a pension plan there must be evidence of an intention to establish a pension plan. In *Canada (Attorney General) v Confederation Life Insurance Co*,[65] the Ontario Court of Appeal rejected arguments by senior executives of an insolvent employer that their supplementary retirement allowances fell within the application of the *PBA*. The executives sought the *PBA*'s protections that would make their allowances exempt from execution, seizure, or attachment by the employer's creditors, a right protected under the *PBA*. The court reasoned:

> . . . there is, in fact, no plan at all. There were different arrangements at different times. At one time or another, the retiree was required to give a non-competition covenant, to agree to be available for consultation, and to agree not to divulge or communicate confidential information of the company. The right to the payments never vested; in the event the employee's employment was terminated for cause, he received nothing. None of these aspects is consistent or compatible

63 *ITA*, s 147.1(11)(a) and *ITR*, s 8502(a). See also *Loba Ltd v Canada (Minister of National Revenue—MNR)*, 2004 FCA 342, leave to appeal to SCC refused, [2004] SCCA No 540 [*Loba*]; *Jordan Financial Ltd v Canada (Minister of National Revenue—MNR)*, 2007 FCA 263, leave to appeal to SCC refused, [2007] SCCA No 460 [*Jordan*]; *1346687 Ontario Inc v Canada (Minister of National Revenue—MNR)*, 2007 FCA 262, leave to appeal to SCC refused, [2007] SCCA No 481 [*1346687 Ontario*]; *1398874 Ontario Inc v Canada (Minister of National Revenue—MNR)*, 2010 FCA 14.

64 This is not to suggest that such plans are exempt from regulation generally. For example, group life and disability insurance plans provided in Ontario are regulated provincially by the *Insurance Act* (Ontario), and health and welfare plans are regulated in Canada (to a minimal extent in order to ensure the deductibility of contributions) by the *ITR*. As recognized by the Supreme Court of Canada, "Canadian jurisdictions do not provide for an explicit dichotomy between pension and welfare benefits for retirees, but provincial pensions legislation, to varying degrees, protects the vested nature of pension plans." Rather, La Forest J in his decision notes that unions and employers can agree to vest welfare benefits and there is an inference in favour of the vesting of such benefits where the parties have not specifically turned their attention to that issue. See *Dayco (Canada) Ltd v CAW-Canada*, [1993] 2 SCR 230 at 285. See also *BC Nurses' Union v Municipal Pension Board of Trustees*, 2006 BCSC 132 at para 130.

65 [1997] OJ No 123 (CA).

> with a pension registrable under the *PBA*, thus supporting the conclusion that [the employer's] arrangement was not a plan "organized and administered" to provide pensions.[66]

The Confederation Life executive plan did not confer vesting rights to employees, nor did it have a funding mechanism as required by the legislation. The court concluded that the parties' intentions were to exclude themselves by contract from the scope of the legislation, and observed that the scheme, as a whole, failed to include almost any of the statutorily-mandated hallmarks of a pension plan.[67]

Other cases have considered the issue of whether a benefit scheme that is not registered with the pension regulator nevertheless meets the statutory test of being a "pension plan" and is thereby, subject to the *PBA*.[68]

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66 *Ibid* at para 47.

67 *Ibid* at paras 47–49. The Court also observed, at para 48:

> . . . pension plans contemplate and require funding. There was never any intention to fund this arrangement; it was a "pay-as-you-go" proposition. It was not a case of overlooking the matter of funding. On the contrary, a good deal of consideration was given to the question. Consultants' reports were commissioned on a number of occasions. The costs were estimated and, in the result, no change was made.

68 See *Salvation Army, Canada East v Ontario (Attorney General)* (1992), 88 DLR (4th) 238 (Ont Ct Gen Div) [*Salvation Army*]. See also *Re Leigh Instruments Ltd (Trustee of)* (23 November 1992) (Ont Ct Gen Div) [unreported]. In this case, a retirement arrangement that was not registered under the *PBA*, but was in the process of becoming registered, was held to be subject to the provisions of the *PBA* and, thereby, the assets of the pension fund were held not to be assets of the bankrupt employer that sponsored the plan. However, in *Police Retirees of Ontario Inc v Ontario Municipal Employees' Retirement Board* (1999), 22 CCPB 49 at paras 68–71 (Ont SCJ), aff'd (2000), 190 DLR (4th) 689 (Ont CA), a "supplementary early retirement benefit plan" that formed part of a larger pension plan scheme was not a separate "pension plan" within the meaning of the *PBA* because entitlement to payment of any benefits was conditional on being entitled to a basic pension under the main plan ("It seems counter-intuitive that one could determine that an agreement has a separate existence as a pension plan, when any benefits due to a beneficiary of that agreement are predicated on the beneficiary's precursory entitlement under another plan": at para 68 (Ont SCJ)). Further, contributions were not put in a separate fund but were co-mingled with the assets of the main fund. This proposition was affirmed in *Nolan v Kerry (Canada) Inc*, 2009 SCC 39 at para 199 [*Kerry*]. See also *Manufacturers Life Insurance Co v Burton*, [1976] OJ No 809 (HCJ): a paid-up annuity under a life insurance contract which was vested in 1959, assigned to a bank in satisfaction of a debt in 1962, and became payable in 1974 is not a "pension plan" within the meaning of the *PBA*, despite that the policy used the phrases "pension" and "pension plan." At the time the policy vested and was assigned to the bank, the *PBA* had not yet come into force (which it did in 1965). The exemption made in the *PBA* against assignment of pension benefits did not have retroactive or retrospective application.

b) Excluded retirement arrangements

The *PBA* does not apply to any form of employee retirement plan that the *PBA* expressly exempts.[69] Such plans would include an employee profit sharing plan or a deferred profit sharing plan,[70] a retiring allowance,[71] a retirement compensation arrangement,[72] and a plan under which all benefits are provided by contributions made by employees. In addition, an employer-sponsored registered retirement savings plan is not subject to the *PBA*.[73]

c) Supplementary employee retirement plans

Another type of plan exempt from the application of the *PBA* is a so-called supplementary (or supplemental) employee retirement plan (SERP). A SERP is an arrangement that provides only benefits, or that permits only contributions, that exceed the limits allowed to accrue and be paid to employees under the *ITA*. In essence, a SERP is an arrangement to compensate highly-paid employees whose pensions would otherwise exceed the maximum limits permitted by tax laws.[74]

Some jurisdictions entirely exempt SERPs from registration.[75] Others exclude SERPs provided that all the employees participating in the SERP are otherwise entitled to benefits under the main pension plan.[76] In Nova Scotia, the requirement is that SERPs are registered if the employer makes contributions.[77]

3) Applies to Employment

The *PBA* only applies to plans organized in relation to "employment."[78] It therefore would not apply, for example, to a savings plan sponsored

69 *PBA*, s 1, "pension plan" and *PBA*, Reg, ss 47(3)6 & 7.
70 As defined in ss 144 and 147 of the *ITA*, respectively.
71 As defined in s 248(1) of the *ITA*.
72 *ITA*, s 248(1).
73 Except under certain conditions in Nova Scotia, in which case an RRSP must be registered in that province: see *NSPBA*, s 50(1)(b) and *Pension Benefits Regulations*, NS Reg 164/2002, s 22.
74 For more information on the maximum limits permitted by tax laws, see Chapter 7, Section B(3)(b).
75 *PBA*, s 1, "pension plan" and *PBA*, Reg, s 47(3)6. See also New Brunswick (*NBPBA*, s 1(a) and Reg, s 3.1); Newfoundland and Labrador (*NLPBA*, s 2(cc)(ii)).
76 See federal (*PBSA*, Reg, s 28.5); Alberta (*AEPPA*, s 1(1)(tt) and Reg, s 68(1)(d)); British Columbia (*BCPBSA*, s 1(1) and Reg, s 2(2)(d)); Manitoba (*MPBSA*, ss 1 and 18(3)); Quebec (*QSPPA*, s 2); Saskatchewan (*SPBA*, s 2(1)(y), and Reg, s 3(2)(c)).
77 Nova Scotia (*NSPBA*, s 2(ae)).
78 See definition of "employer" in *PBA*, s 1, which identifies the corresponding terms "employed" and "employment."

by an individual with a financial institution, sponsored by an educational institution for its students, or set up under a family trust.

a) Employee

The definition of "employee" under the *PBA* is broader than under the common law.[79] The statutory definition does not limit the employment relationship to contracts for indefinite periods, but includes independent contractors and even voluntary relationships. All that is required for a person to be an employee within the meaning of the *PBA* is that he or she "receive remuneration" from a participating employer.[80] Therefore, if the pension plan terms broadly cover all "employees" in the workplace, virtually any person who receives compensation from that employer would be eligible to join.

The *PBA*'s definition can be contrasted with the more narrow requirements for plan registration under the *ITA*. A pension plan is not eligible for tax registration if it covers independent contractors and other persons who are self-employed.[81] Since few, if any, plan stakeholders are agreeable to having their plan not registered with CRA solely in order to include self-employed contractors, almost all pension plans circumscribe the class of employees eligible to participate in the plan to conform to the more narrow requirements of the *ITA*.[82]

b) Employer

Like the definition of "employee," the term "employer" under the *PBA* has also been given a broad meaning. Generally, an employer is the entity that remunerates the employee.[83] Determining who is an "employer" in this context raises different issues from a determination of who

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79 *Salvation Army*, above note 68, followed in *St Marys*, above note 6.

80 In the *PBA*, the definition of "employee" (s 1) means "a natural person who is employed by an employer," and "employer" means, "in relation to a member, former member, or retired member of a pension plan, the person or persons from whom or the organization from which the member, former member, or retired member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning." See the corresponding definitions in other jurisdictions.

81 See Canada Revenue Agency, Information Circular IC-72-13R8 (16 December 1988) at para 8(b). See also *ITA* Technical Interpretation #9929515 "Employer-employee Relationship" (21 December 1999).

82 Alberta has an express provision that excludes an employee from participation if he or she would not be eligible to join the plan under the *ITA*: *AEPPA*, s 29(2)(a)(ii).

83 See *Victorian Order of Nurses for Canada v Ontario (Superintendent of Financial Services)*, 2009 CarswellOnt 5474 (FSCO Arbitration) at 33 [*VON Canada*]; *Police Assn of Nova Scotia Pension Plan (Trustees of) v Amherst (Town)*, 2008 NSCA 74, leave to appeal to SCC refused, [2008] SCCA No 442 [*Amherst*]; *Dustbane*

is an employer in the conventional sense or at common law.[84] Whether a person is an employer under the *PBA* depends upon the provision being scrutinized, the statutory context in which the term is used, and the evidentiary foundation supporting the relationship.

Courts have found, in different contexts, that the term employer as used in the *PBA* is broad enough to include a religious organization that provides discretionary payments to volunteers;[85] a trustee-in-bankruptcy that steps into the shoes of an insolvent employer;[86] simultaneously both a former employer and the new company to which employees transferred employment four years earlier;[87] and a pension plan sponsor that administers a plan for the employees of different participating distributors, each of which remits separate employer contributions to the plan.[88]

A consistent theme running through all these decisions has been a concern for the welfare of the employees and a consideration of whether their benefits would be protected given a finding that a particular person was their "employer" under the *PBA* for the purposes of the minimum standard at issue.

4) Multi-Jurisdictional Pension Plans

a) Introduction

The *PBA* applies only with respect to employment "in Ontario." A person is deemed to be employed in Ontario if the employer's office or establishment where the employee reports to work is located in Ontario.[89] If an employee is not required to report to work at a particular office or establishment, the employee is deemed to be employed in Ontario if his or her remuneration is paid from Ontario.[90] Similar rules exist in other provinces' legislation.

Notwithstanding the deemed employment rules, the structure of Canadian federalism coupled with the reality that many employers

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Enterprises Limited v Ontario (Superintendent of Financial Services) [2002] OJ No 2943 (Div Ct) [*Dustbane*].

84 *Dustbane*, *ibid* at para 2.

85 *Salvation Army*, above note 68.

86 *St Marys*, above note 6.

87 *GenCorp Canada Inc v Ontario (Superintendent of Pensions)* (1998), 158 DLR (4th) 497 (Ont CA), leave to appeal to SCC refused, [1998] SCCA No 206.

88 *Dustbane*, above note 83.

89 *PBA*, s 4(1).

90 *PBA*, s 4(2) and see *Régie des rentes du Quebec v Pension Commission of Ontario* (2000), 189 DLR (4th) 304 (Ont Div Ct) [*Leco*].

operate in more than one province leads to a constitutional issue with respect to the potential for "extra-territorial" application of the *PBA*.

In *Stelco Inc v Ontario (Superintendent of Pensions)*,[91] a pension plan was registered in Ontario and it included employees in more than one province. The regulator deemed it necessary to assess the decrease in the level of plan membership across the entire country in order to determine whether a partial wind up of the pension plan should take place in Ontario. The regulator was not purporting to apply Ontario law to non-Ontario employees, or vice versa. Instead, the regulator was taking note of factual events outside Ontario for the purpose of applying Ontario law, in Ontario. The Ontario Court of Appeal upheld the regulator's order, on the basis that any "extra-territorial effect" of the order was "necessarily incidental" to the valid exercise of the pension regulator's jurisdiction in Ontario. The court concluded that "taking account of events outside this province does not constitute exercising jurisdiction outside the boundaries of the province."[92]

b) Reciprocal agreements

To address, in part, inter-jurisdictional problems arising where a pension plan covers employees in more than one province, a number of provincial regulators began, in 1968, to enter into a Memorandum of Reciprocal Understanding (known commonly as the "Reciprocal Agreement").[93] In its current form, the Reciprocal Agreement is a series of bilateral or multilateral agreements among the provinces, the object of which is to simplify pension plan administration and eliminate the need to register plans in more than one jurisdiction.

The authority to enter into this arrangement is conferred under the constating statute of each participating pension regulator.[94]

The Reciprocal Agreement delegates authority as between regulators in matters relating to a so-called "multi-jurisdictional pension plan."[95] Under the Agreement, the province in which "the plurality of

91 (1995), 126 DLR (4th) 767 (CA), var'g (1994), 115 DLR (4th) 437 (Div Ct) [*Stelco*].

92 *Ibid*.

93 See *PBA*, Reg, s 1.4(1) "designated jurisdiction." The Reciprocal Agreement has been entered into by Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Quebec, and Saskatchewan. See also *Leco*, above note 90, which discusses the scope and purpose of the Reciprocal Agreement.

94 In Ontario the current authority is derived from *PBA*, s 95. See also federal (*PBSA*, s 4(6)), Quebec (*QSPPA*, s 249).

95 This term is also defined in the *PBA*: See *PBA*, s 1(1), which defines a "designated multi-jurisdictional pension plan" as "a pension plan to which [the *PBA*] applies and to which the pension benefits legislation of one or more designated jurisdictions also applies."

the plan members are employed" becomes the jurisdiction of registration (called the "major authority") of the pension plan.[96] However, the minimum standards contained in the pension laws of the other provinces (called the "minor authorities") are believed to continue to apply to employees working in those provinces. The major authority is charged with administering the laws of the other province. What this means is that while a multi-jurisdictional pension plan need only be registered in one province, it does not necessarily mean that the laws of the other province do not apply in respect of employees working in that other province. For example, when a multi-jurisdictional pension plan is being wound up, the administrator is required to allocate and account for the assets and benefits by province.[97] Moreover, where the legislation is silent on a matter, the regulator of the province in which the plan is registered, "as a matter of constitutional law," may be required to apply other provinces' pension standards laws.[98]

In *Boucher v Stelco Inc*, the Supreme Court of Canada affirmed the importance of Reciprocal Agreements as a means of avoiding subjecting multi-jurisdictional pension plans to multiple administrative controls.[99] An updated multi-jurisdictional Reciprocal Agreement is in the process of being implemented in several provinces.[100]

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96 *PBA*, Reg, s 23(2). Section 23(3) states that "where the plurality of the members of a pension plan are employed, only those members who are employed in Ontario or in any of the designated jurisdictions shall be counted."

97 *PBA*, Reg, s 30(2)(h).

98 *Leco*, above note 90 at para 61.

99 2005 SCC 64 at para 3, aff'g (*sub nom Bourdon v Stelco Inc*) (2004), 241 DLR (4th) 266 (Que CA) [*Boucher*].

100 See *Agreement Respecting Multi-Jurisdictional Pension Plans*, O Gaz, vol 144-21 (21 May 2011) at 1096. The agreement is in force in Ontario and Quebec, and the other provinces are expected to follow suit. The major changes include allowing major and minor authorities to agree that a particular power or function could be exercised by the minor authority. The proposed agreement also specifies that "plan matters" such as registration and funding will be subject to the rules of the major authority's jurisdiction. In contrast, "entitlement matters" such as vesting, locking-in, and surplus distribution will be subject to the rules of the minor authority's jurisdiction: s 6. See also Schedule B to *The Proposed Agreement*. The agreement also describes the processes for decision making and appeals (s 4(4)); provides specific rules for a change of major authority (s 5); ensures that assessments and claims under the PBGF are not affected by the agreement (s 9); and delineates funding obligations (ss 6(2) and (4)) and asset allocations (ss 10–17).

c) Designated provinces

In order for the Reciprocal Agreement to apply to a major authority, that province must be a signatory to the Reciprocal Agreement and be "designated" as such under the legislation of the minor authority.[101]

All provinces except Prince Edward Island participate in the Reciprocal Agreement, and accordingly, Prince Edward Island is not a designated province.[102] What this means, for example, is that a pension plan that has a plurality of employees in PEI must still be registered in Ontario if there are employees in Ontario.[103]

A province can exempt some of its laws from being applicable where a pension plan that includes employees from that province is registered in another province. There must be statutory support for this exemption.[104] A province can also exempt itself from the application of the Reciprocal Agreement in respect of certain matters. These exemptions can take the form of a declaration by that province that it has exempted itself from the operation of the Reciprocal Agreement with respect to a particular pension plan.[105]

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101 An example of this designation is *PBA*, Reg, s 23.

102 *PBA*, Reg, s 23(1). PEI is the only province without pension standards legislation in force: see Chapter 1, Section C(5)(a). On 17 May 2012, PEI introduced Bill 41, but it is not yet in force.

103 Query whether the *PBA* will have application where the plan is registered in Ontario and the employee works outside of Ontario in a province that is not a "designated province" under the *PBA*: see *Lloyd, DeBeck & Partners Ltd v Cumis Life Insurance Co* (1983), 50 BCLR 353 (SC).

104 For example, in Quebec the *QSPPA* specifically exempts multi-jurisdictional plans (also called "inter-provincial plans") from the provisions of the Quebec Act on matters dealing with registration, inspection, solvency requirements, and investment rules: see *QSPPA*, Reg, c R-15.1, r 6.2, ss 21, 53, 69, and 92 (Note: This Regulation was replaced except with respect to pension plans governed by an agreement whereby ss 21, 53, and 92 continue to apply until the date of a new agreement under s 249 of the *QSPPA* can be reached). This exemption, however, does not apply to applications for the withdrawal of surplus by an employer which still must be administered in accordance with Quebec's rules, even if the plan is registered in Ontario: see *Leco*, above note 90. See also *Vivendi Universal Canada Inc v Ontario (Superintendent of Financial Services)*, [2005] OJ No 2085 (SCJ) [*Vivendi*].

105 This was done in the matter of the surplus application under the Revised Pension Plan of Leco Inc, which was the subject of dispute in *Leco*. See also *Re McColl-Frontenac Petroleum Inc* (17 June 2002) (PCO). In that case, the PCO observed, "as the Régie has exempted itself from the operation of the Reciprocal Agreement with respect to the Plan, we no longer have authority to make decisions regarding the Québec portion of the Plan." See also *Vivendi*, *ibid*; *Imperial Oil Ltd v Nova Scotia (Superintendent of Pensions)* (1995), 126 DLR (4th) 343 at 354–55 (NSCA), leave to appeal to SCC refused, [1995] SCCA No 356.

d) Judicial consideration

In *Régie des rentes du Québec v Pension Commission of Ontario*[106] (also known as the "*Leco*" case), the scope of the Reciprocal Agreement was addressed by the Ontario Divisional Court. In this case, a pension plan was registered in Ontario and also included employees in Quebec and elsewhere. The plan was wound up and the employer applied to the Ontario regulator for a withdrawal of surplus in accordance with the Ontario surplus rules. The Quebec pension regulator (following objections by certain Quebec employees) objected to Ontario's rules being applied with respect to the Quebec portion of the plan[107] and initiated two judicial review applications of the Ontario regulator's decision, one in Quebec and one in Ontario.[108]

The Ontario Divisional Court agreed with the Quebec regulator and quashed the consent. First, the court granted the Quebec regulator, by implied authority under the Reciprocal Agreement, public interest standing to bring an application for judicial review from a decision of the Ontario regulator where it was alleged that Ontario breached the terms of the Reciprocal Agreement. Secondly, the court criticized the Ontario regulator for only applying the requirements of the Ontario legislation to the employer's pension surplus withdrawal application. The court determined that the Ontario regulator was required, "as a matter of constitutional law," to interpret and apply Quebec's pension rules to the surplus withdrawal transaction, insofar as the transaction affected members of the pension plan employed in Quebec.[109] The court also observed that the pension plan text expressly provided that the plan would be administered in accordance with the laws of the Quebec and Ontario and that on plan termination "the provisions of any Pension Benefits Act to which the Plan is subject will be applied." Accordingly, the matter was referred back to the Ontario regulator, which reconsidered the application in light of the Divisional Court ruling.[110]

As a result of *Leco*, the Ontario regulator has made it a practice when considering employer applications, particularly with respect to

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106 Above note 90.

107 At the time of this wind up in 1987, the Ontario surplus rules permitted an employer to withdraw the surplus without the consent of the employees if the employer could establish entitlement to the surplus under the plan documentation. The Quebec rules, on the other hand, required employee consent or a referral to arbitration in the event of a dispute over entitlement.

108 The Quebec judicial review decision is reported at (1998), 20 CCPB 18 (Que Sup Ct).

109 *Leco*, above note 90 at para 61.

110 See *Re McColl-Frontenac Petroleum Inc*, above note 105.

Quebec and particularly also with respect to applications for the withdrawal or transfer of surplus assets, to apply or consider the rules applicable in the jurisdiction of the minor authority.[111]

e) Conflict of laws

Caselaw subsequent to *Leco* demonstrates that matters of the extraterritorial application of the *PBA* are far from settled, especially on the issue of whether parties to a pension contract can dictate in the pension plan text which jurisdiction's laws will apply in a given scenario.

In *Alberta (Gaming and Liquor Commission) v Davies*,[112] the pension plan was registered in Manitoba and was being partially wound up. As in *Leco*, the wind up affected employees working outside of the province of registration, in this case, Alberta. The employer applied for the withdrawal of the surplus on the partial wind up and the question was whether the pension surplus procedures of Manitoba's legislation or Alberta's legislation applied to the employer's application as it pertained to the termination of the Alberta employees. One important difference between *Leco* and *Davies* is that, unlike the case in *Leco*, the Court in *Davies* concluded that there was no evidence of Manitoba and Alberta having entered into the Reciprocal Agreement as between those two jurisdictions.

The Alberta court determined that the Alberta surplus rules were the proper laws to apply, on both the wording of the pension plan text, but also based on the wording of the Manitoba *PBA*. First, similar to the case in *Leco*, the court observed that the plan text stated it was to be administered in accordance with "the provincial pension benefits legislation, if any, as amended from time to time . . . which are applicable to an employee working in that province." Alberta law was applicable to those employees and, accordingly, the intention of the parties was that the Alberta rules would govern. Secondly, and equally as important, the court concluded that the Manitoba *PBA* was not intended to apply extraterritorially:

> I am also satisfied from my review of the legislation that the Manitoba Legislature had no general intention in passing the *Manitoba Pension Act* to usurp the jurisdiction of other provincial governments. Indeed,

111 See Vivendi, above note 104. See also *Great-West Life Assurance Co Canadian Agents' Pension Plan* (26 March 1998) (1998) 7(1) Pension Bulletin 62 (PCO); and *Pension Plan for Employees of Contractors Machinery & Equipment & Grove Industrial Products, Divisions of Kidde Canada Ltd* (24 September 1998) (1998) 7(1) Pension Bulletin 62 (PCO).

112 2003 ABQB 789 [*Davies*].

> section 10(1)(a) indicates a clear intention, in my view, that the Manitoba legislature intended to give the Manitoba Pension Commission jurisdiction only to establish and govern pension plans "throughout Manitoba." As well, section 11 makes it clear that the Manitoba Pension Commission is to exercise authority of the pension commission of another province only if a specific agreement is entered into with the other province. I am satisfied therefore, that the *Manitoba Pension Act* does not specifically apply to the Alberta employees covered by the Pension Plan notwithstanding that the Manitoba Pension Commission administers the Pension Plan and that, instead, Alberta law applies in respect to the Alberta employees although not, of course, to the Manitoba Pension Commission or to the construction of the Trust Agreement. In respect to both these matters, Manitoba law prevails.[113]

Leco and *Davies* are consistent with one another. The court found the same way on the threshold issue of which province's laws apply. In both cases, the laws of the province in which the employees were employed governed, rather than the laws of the province in which the plan was registered. Moreover, both plan texts evidenced rather clearly an intention that the laws of the other province would apply to employees in that province. The material difference between the two cases was the question of who was the proper party to apply the laws, that is, the regulator or the court and, more specifically, the regulator or court of which province.

What about situations where the plan text does not clearly state which province's laws should apply or, even more problematic, states that only one province's laws will apply to all employees? These two questions have been considered with inconsistent results.

In *Dinney v Great-West Life Assurance Co*,[114] the pension plan at issue was registered in Manitoba and the issue was whether the Manitoba *PBA* applied with respect to whether certain pensioners were entitled to benefit from a pension indexing provision of the plan that, under the Manitoba legislation, could not be divested through subsequent amendments or legislation. This right did not exist outside of Manitoba and the question was whether those pensioners under the plan who were formerly employed outside Manitoba were entitled to this protection or whether the pension standards legislation of those other provinces applied. The court held that the Manitoba legislation applied to all the employees and distinguished *Leco*, principally on the differences in wording in the two plan texts. In *Leco*, both Quebec and Ontario law

113 *Ibid* at para 15.
114 2002 MBQB 277 [*Dinney*].

applied, both as a matter of law and as a matter of contract. However, in *Dinney*, the pension plan text did not provide that the laws of other provinces applied and, in fact, was silent with respect to which law applied. The court inferred from this silence that there is "no reason in principle why, where the proper law of the plan is Manitoba, the entitlement of the pensioners should be governed by the laws of another province."[115] The court implicitly applied a classic conflict of laws rationale and concluded that "the proper law of the contract is Manitoba and that, generally speaking, Manitoba law should and would govern the plan."[116]

Accordingly, the court in *Dinney* determined that a pension contract can, at least in some circumstances, inferentially dictate which laws will apply.[117]

Dinney can be contrasted with the Quebec Court of Appeal decision in *Boucher v Stelco Inc*,[118] where the pension plan terms expressly stated that the plan, which was registered in Ontario, but included some Quebec employees, would be "construed and interpreted in accordance with" Ontario law and that, if the plan were wound up, "the wind up will be carried out in accordance with the provisions" of the Ontario *PBA*. A portion of the plan affecting Quebec employees was partially wound up and a question arose as to whether the Quebec partial wind-up rules governed the wind up or whether, from the appellant employee perspective, the more favourable Ontario partial wind-up rules applied.[119] A majority panel of the Quebec Court of Appeal determined that the Quebec law applied, notwithstanding that the plan terms suggested otherwise. First, the court interpreted the plan provisions and determined they did not expressly confer Ontario benefits on

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115 *Ibid* at para 14.

116 *Ibid* at para 6.

117 The court acknowledged, however, that this is not a principle of general application and that in some circumstances Manitoba law would not apply (at para 15):

> There may very well be instances where Manitoba law would have to give way to the laws of another province; for example, one can conceive of a situation where one province would lay down regulatory standards for the protection of persons employed in that province and such like but in my view this is not one of those cases. This case is essentially one of the interpretation of the plan and the court can certainly infer—as I do here—that the parties intended the plan and specifically the vesting provisions to be interpreted in accordance with Manitoba law.

118 *Boucher*, above note 99 (Que CA).

119 In Ontario, employees affected by a partial wind up in Ontario are entitled to protections not accorded in Quebec, such as enhanced early retirement "grow-in" benefits and, if available, a portion of surplus attributable to the partial wind up group employed in Ontario.

Quebec employees, rather, only that the plan would be administered in accordance with the requirements of Ontario law. Secondly, the court found that the Ontario *PBA* rules concerning partial wind-up rights left "no room for interpretation. It only applies to members of pension plans residing in Ontario."[120]

The dissenting panel member, like the court in *Dinney*, deferred to a freedom of contract rationale and concluded that the plan text governed the wind up, that is, the Ontario rules would apply to the Quebec employees:

> The contractual election of the parties made at section 21 of their Plan, means that the appellants should be considered, with respect to application of Ontario law, as being Ontario members and deemed to be exercising an employment in Ontario. To conclude otherwise would prevent parties to a contract in the appellants' submission, from designating this law as the governing law of their contract.[121]

Neither the majority nor minority panel in *Boucher* referred to either *Leco* or *Dinney*. Moreover, beyond a parsing of the differences in wording in the individual plan texts and the specific statutory provisions at issue, when the general legal principles at issue in *Dinney* and *Boucher* are compared, analytically as well as purposively, it is difficult to reconcile the two cases. There is a fundamental issue whether parties to a pension contract are even competent to contract out of a province's pension laws or choose which province's laws will apply in a particular scenario under the pension plan or, alternatively, whether the pension laws of a province, as minimum standards legislation applicable in respect of a province, governs notwithstanding the contract. Perhaps one of the considerations is whether the pension contract, by deeming a particular jurisdiction's laws to apply to a particular scenario (for example, a wind up), confers greater rights on the employees employed in the province than would otherwise be afforded to those employees under their home legislation.[122]

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120 *Boucher*, above note 99 at 295 (Que CA).

121 *Ibid* at 284–85.

122 The Divisional Court in *Stelco* suggested as such, above note 91 at 440:

> As to permitting the residents of other provinces to take advantage of the partial wind up, and requiring the employer to let them have the advantage of the wind up even though resident elsewhere, the point, in our view, is determined by the agreement to which I have referred respecting the law to be applied. The effect of the wind up on persons resident elsewhere than in Ontario can also be regarded as an incidental result of the action in Ontario and justified constitutionally on that basis as well.

The Supreme Court of Canada dismissed the appeal from the Quebec Court of Appeal decision in *Boucher*.[123] In a very narrow decision, the Supreme Court viewed the employees' action as inadmissible in the Quebec courts on the basis that the employees should have—and did not—challenge in the Ontario courts the Superintendent's decision in Ontario approving the wind-up report that excluded the employees' entitlement to grow-ins. The Superintendent's decision was therefore final and could not be attacked collaterally in the Quebec courts. Because of its finding on this point, the Court expressly declined to interpret the *PBA* or the pension plan's requirements with respect to the extraterritorial application of the grow-in rights.

f) Administrator responsibilities

Just as a regulator must apply the pension laws applicable in other jurisdictions, so too must the pension plan administrator. A plan administrator must be sensitive to the different requirements of each jurisdiction when administering a multi-jurisdictional pension plan. For example, how must an administrator account for an employee's service accrued in the plan while he or she was employed over the years in different jurisdictions? Historically, administrators have been able to choose whether to calculate the employee's entire pension credits and entitlement based on the laws of the jurisdiction where the employee finally terminated employment and plan membership (a so-called "final location approach") or, alternatively, whether to calculate each period of service in each different jurisdiction forever subject to that jurisdiction's pension laws, such that on termination of employment and plan membership each period during which pension credits were earned may be subject to different legislative requirements (a so-called "checkerboard approach"). The extent to which either approach has a positive or negative effect on an employee's entitlement under the pension plan depends on where the employee terminated membership and where the employee accrued his or her other periods of service. However, under the updated multi-jurisdictional Reciprocal Agreement—that is, in the process of being implemented in several provinces—the "final location" approach determines all benefit entitlements. Once each province implements the updated multi-jurisdictional Reciprocal Agreement, administrators will no longer be able to choose between the "checkerboard" and the "final location" approach; rather the "final location" approach will automatically apply in deter-

123 *Boucher*, above note 99 (SCC).

mining pension credits and entitlement.[124] Without commenting on the constitutionality of the "final location" approach, the positive effect of this change is that it offers a uniformity of approach across the provinces, which in turn provides consistency to administrators and pension stakeholders.

While there is uniformity in many areas of each province's pension standards legislation, in some cases significant differences can arise. For example, many jurisdictions have different requirements for pension portability on termination of employment, locking-in, pre-retirement death benefits, spousal entitlements, postponed retirement, vesting, interest on employee contributions, employer plan wind-up deficit payment obligations, marriage breakdown, pension administration requirements, surplus use and withdrawal, and regulatory structure and procedures. On some matters of administration that by their very nature are national in scope, for example, how the administrator is constituted, it is difficult to see how each province's rules can be applied simultaneously.[125]

As *Leco, Davies, Dinney,* and *Boucher* demonstrate, the rules are not entirely clear, even with respect to pension standards concerning individual entitlements. Certainly if the pension plan registered in one province states that the laws of another province apply to employees in that other province, that statement might assist the administrator in determining which laws to apply.[126] Nevertheless, there is no doubt that it is confusing for administrators to differentiate between the applicable laws in a given context.[127]

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124 See s 6 of the *Agreement Respecting Multi-Jurisdictional Pension Plans*, above note 100.

125 For example, where a plan is registered in Ontario, which permits an employer to also be the plan administrator, and the plan includes employees in Quebec, in which province the administrator must be constituted as a pension committee that includes employees, it would seem odd that the administrator must be constituted differently as it makes administration decisions affecting employees in each province.

126 This was the case in *Leco*, above note 90 and *Davies*, above note 112.

127 As stated above, the Supreme Court of Canada in its narrow decision in *Boucher* declined to take the opportunity to clarify the issues arising in *Leco, ibid, Davies, ibid*, and *Dinney*, above note 114, namely, the extent to which the pension laws of the province in which the pension plan is registered can affect the pension entitlements of an employee in the plan who works in another jurisdiction. For more on this issue, see also *Multi-marques Distribution Inc c Régie des rentes du Québec*, 2008 QCCA 597, leave to appeal to SCC refused, [2008] SCCA No 254. A related, but also confusing, situation can arise where a pension plan covers employees all employed in one single province, but some employees are federally regulated and some are provincially regulated within that province:

CHAPTER 7

FUNDING

A. INTRODUCTION

A pension plan must be pre-"funded."[1] It cannot be a pay-as-you-go arrangement. This feature is "central to the regulatory scheme"[2] established by the *Pension Benefits Act* (the *PBA*) and is what qualitatively distinguishes pension plans from other forms of retirement compensation arrangements. The objective of "going-concern" and "solvency" funding is to ensure that contributions associated with pension benefits are paid regularly throughout the working life of the employee, and invested prudently, so that the necessary funds will exist upon retirement to pay the pension and other benefits that were promised in the plan text. The purpose of adequate funding standards is to enhance the security of pension benefits by mandating minimum funding levels and regulating the timing of payments to pension funds.

The *PBA*'s funding rules exist to protect employees; without these rules, the receipt of an employee's pension is contingent on the liquidity of the employer at the time the pension is payable. As one court asked, rhetorically:

1 *Pension Benefits Act*, RSO 1990, c P.8, ss 55–62 [*PBA*]; Pension plans must also be funded in accordance with the requirements of the *Income Tax Act*, RSC 1985, (5th Supp), c 1, as amended [*ITA*].

2 *St Marys Paper Inc (Re)* (1994), 116 DLR (4th) 448 at 460–61 (Ont CA), appeal dismissed at (1996), 26 OR (3d) 416 (SCC) [*St Marys Paper*].

> Who is more interested in the solvency of a pension plan than its members, who are either depending upon it as a source of income in their retirement years, or looking forward to the day when they will, or must?[3]

Statutory solvency funding requirements apply almost exclusively to defined benefit pension plans, since a defined contribution pension plan is, in essence, fully funded once the employer's normal contributions to the pension fund are remitted. In a defined benefit pension plan, the amount of an employer's required contribution is largely determined according to assumptions made by the plan actuary. These assumptions take into account the demographics of the plan and economic and personnel factors, such as increases in salaries and the expected investment experience.

Over time, the cost of a defined benefit plan is determined by the benefits and expenses paid less investment earnings. In order to fund a defined benefit plan in an orderly and systematic manner, the cost of the pension plan must, therefore, be allocated to time periods using actuarial cost methods and assumptions to determine a current service cost, or "normal cost," for each year and an "actuarial liability" as of the valuation date.

This chapter describes the rules concerning contributions to an ongoing pension plan and the actuarial valuations and reports that must be prepared and filed at periodic and other prescribed intervals and which give a snapshot of the health of the pension fund and the investment of the pension fund. Special funding rules and exceptions exist for multi-employer pension plans (MEPPs), jointly sponsored pension plans (JSPPs), and target benefit plans (TBPs).

B. CONTRIBUTIONS

1) Introduction

The *PBA* identifies certain terms relating to pension contributions that must be included in the plan text and prescribes rules applicable to employees and employers who make those contributions. The most significant responsibility in relation to pension contributions, however, falls upon the plan administrator. While the administrator does not make contributions, it must nevertheless ensure that all contributions that are required to be made are properly remitted to the pension fund in a timely manner by those persons who are responsible for making them.

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3 *Collins v Ontario (Pension Commission)* (1986), 31 DLR (4th) 86 at 98 (Div Ct).

2) Plan Design Requirements

a) Introduction

A pension plan must set out the method of calculating the contributions required by the pension plan.[4] A pension plan is not eligible for registration if the formula for calculating the employer's contributions to the pension fund is variable at the discretion of the employer[5] or does not provide for funding sufficient to provide the benefits promised and payable under the pension plan.[6] Significantly, every pension plan must set out the obligation of the employer to pay the "normal cost" of funding the plan, as well as any "going concern unfunded liability" and "solvency deficiency" under the plan.[7]

b) MEPP, JSPP, and TBP rules

There is an important exception to the plan design requirements concerning an employer's contribution obligation with respect to MEPPs[8] and JSPPs.[9] These are jointly-trusteed and sponsored defined-benefit pension plans where the obligation of the employer to contribute to the pension plan is usually limited to a fixed amount set out in a collective agreement. In TBPs[10] the employer's contribution obligations are also fixed, and these plans need not be jointly sponsored and are usually not. In MEPPs, JSPPs, and TBPs, there must be a provision for the funding of benefits that sets out the employer's contribution obligations in respect of the plan.[11] However, the pension plan must also describe the employees' obligation to make contributions under the plan, including contributions in respect of any going concern unfunded liability and, except in the case of MEPPs, any solvency deficiency.[12] Further, the plan terms may limit the employer's contribution obligation to "such amounts set out in the applicable collective agreement as are required to be paid by the employer."[13] In other words, a MEPP, JSPP, or TBP does not require that the employer pay any unfunded liabilities or solvency deficiencies, if that is the nature of the pension bargain.

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4 *PBA*, s 10(1)(6).

5 *PBA*, s 14.1(2).

6 *PBA*, s 55(1).

7 *PBA*, Reg, s 4(1). These terms are defined Section C(2), below in this chapter.

8 *PBA*, ss 1(3) & (4).

9 *PBA*, s 1(2).

10 *PBA*, s 39.2(1). As of the date of publication, section 39.2 had not been proclaimed and regulations had not yet been released.

11 *PBA*, Reg, s 6(1), and *PBA*, s 10(3)2.

12 *PBA*, s 10(3)1.

13 *PBA*, Reg, s 6(2)(b).

c) Interest

A pension plan must describe the method of calculating interest to be credited to contributions under the pension plan.[14] For employee contributions to a defined benefit pension plan, the pension plan must prescribe interest to be credited at a rate that is not less the actual pension fund rate of return,[15] or the fund rate of return attributable to "that part of the pension fund to which the contributions are made,"[16] or the average of the "CANSIM V122515"[17] rate, averaged over the most recent period in which interest is applied.[18] Similar, but not identical, rules exist in other jurisdictions.[19]

In defined contribution pension plans, employee contributions are credited or debited with the interest, gains, or losses of the pension fund, as the case may be, less the cost of administrative expenses, unless the plan provides that those expenses are to be paid by the employer.[20]

Some jurisdictions require that interest be credited at least annually,[21] while others require it at least monthly or annually.[22] The prescribed

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14 *PBA*, ss 10(1)(8) and 58(2).

15 *PBA*, Reg, s 24(3). An average fund rate can be used when crediting interest on employee contributions provided that the averaging period is no more than five years: see *PBA*, Reg, s 24(3)(5) and FSCO Policy 1200-100 (March 1991).

16 *PBA*, Reg, s 24(3.1).

17 This is the rate calculated on the basis of the yields of five-year personal fixed-term chartered bank deposit rates as determined from the Canadian Socio-Economic Information Management (CANSIM) series V122515 available on the Bank of Canada's website.

18 *PBA*, Reg, s 24(3).

19 Federal (*Pension Benefits Standards Act, 1985*, RSC 1985, c 32 (2d Supp) [*PBSA*] s 19 and Directive s 6); Alberta (*AEPPA*, s 36 and Reg, s 33); British Columbia (*BCPBSA*, s 31 and Reg, s 24); Manitoba (*MPBA*, s 25(1) and Reg, s 5.17); New Brunswick (*NBPBA*, s 54 and Reg, ss 43(1) & (2)); Newfoundland and Labrador (*NLPBA*, s 36(2) and Reg, s 9, and Directive No 16); Nova Scotia (*NSPBA*, s 63(2) and Reg, s 32(2)); Quebec (*QSPPA*, ss 44–47); Saskatchewan (*SPBA*, s 30(b) and Reg, s 27(3)). As of the date of publication, new legislation has been proposed for Alberta and British Columbia, but not yet passed.

20 *PBA*, s 58(2) and Reg, s 24(1). See also federal (*PBSA*, s 19(1)); Alberta (*AEPPA*, s 36(2)); British Columbia (*BCPBSA*, s 31(2)); Manitoba (*MPBA*, s 25(3)); New Brunswick (*NBPBA*, s 54 and Reg, ss 43(1)(b)); Newfoundland and Labrador (*NLPBA*, s 36(1) and Reg, s 9); Nova Scotia (*NSPBA*, s 63(2) and Reg, s 32(1)); Quebec (*QSPPA*, ss 44–47); Saskatchewan (*SPBA*, s 30(a) and Reg, s 27(2)).

21 Alberta (*AEPPA*, s 36 and Reg, s 33(5)); British Columbia (*BCPBSA*, s 31 and Reg, s 24(5)); Manitoba (*MPBA*, s 25); Newfoundland and Labrador (*NLPBA*, s 36(4) and Reg, s 9(4)); Saskatchewan (*SPBA*, s 30 and Reg, s 27(6)).

22 *PBA*, s 58(2) and Reg, ss 24(1), (2), and (7). See also federal (*PBSA*, s 19 and Directives 7(2) & 7(3)); New Brunswick (*NBPBA*, s 54 and Reg, s 43(3)); Nova Scotia (*NSPBA*, s 63(2) and Reg, ss 32(1), (6), & (7)); Quebec (*QSPPA*, s 44).

interest rate for crediting employee contributions may be set as a minimum rate, but may not be set as a maximum rate.[23] The pension plan must also state the manner and method of crediting interest. That prescribed method must be applied consistently and can only be changed by a plan amendment.[24]

3) Employee Contributions

a) Contributory or non-contributory

The *PBA* does not require that employees contribute to a pension plan, although the terms of the plan may require employee contributions. A pension plan that requires employee contributions is called a "contributory" plan. A "non-contributory" pension plan is one whereby only the employer contributes.[25]

b) *Income Tax Act* limitations

The *ITA* places limits on employee contributions to a defined benefit pension plan. In an attempt to ensure that an employee's contributions are somewhat proportionate to the pension benefits promised in the plan text, current service contributions by an employee may not exceed the lesser of 9 percent of the employee's compensation for the year from participating employers and $1,000 plus 70 percent of the total pension credits earned for that year.[26] There are exceptions to this rule.[27]

Contributions made by the employee or employer reduce the employee's available contribution room for contributions that may be made to that employee's registered retirement savings plan (RRSP) in respect of that year. The *ITA* regulations put limits on the maximum total con-

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23 FSCO Policy 1200-300 (March 1991).

24 FSCO Policy 1200-200 (March 1991).

25 See, for example, FSCO Policy F800-300 (May 1990). See also Chapter 5, Section C(5)(d).

26 *ITA*, Reg, s 8503(4)(a). This rule applies to employee contributions made after 1990. See also the definitions in *ITA*, s 147.1(1) for what constitutes compensation from a participating employer. Remuneration that can be treated as part of the earnings base for the purpose of determining contributions may include salary, bonuses, vacation pay, commissions, taxable allowances, the value of taxable benefits, and any other payments for services during the year that are reasonable under the circumstances: *ITA*, ss 5 & 6. The *ITA* also prescribes rules for Pension Adjustment (PA) limits.

27 For example, larger employee contributions may be permitted where the calendar year includes periods of reduced service, such as periods of disability, reduced pay, or temporary absence, and past service contributions may be permitted to the extent reasonably necessary to fund the benefits accruing in such periods. See *ITA*, Reg, ss 8503(4)(a)(ii)–(iii).

tributions that may be made to fund an employee's pension, as well as a maximum pension that can be provided from those contributions.[28]

c) Must be remitted by employer

Where a pension plan is a contributory plan, employees must make their required contributions in the prescribed manner and at the prescribed times.[29] Where the plan is a MEPP or a JSPP, employees must also make their required contributions in respect of any going-concern unfunded liability and generally, solvency deficiency.[30]

Employee contributions must be remitted to the pension fund by the employer. This can be done by payroll deduction or otherwise, but still it is the employer's responsibility, not the employee's, to ensure the contributions are remitted to the pension fund.[31] Generally, regular employee contributions must be remitted no later than thirty days after the end of the month in which the contributions were deducted.[32]

d) Suspension of employee contributions

An employee may suspend contributions to the pension plan, but only if he or she is on a statutory or temporary contractual leave of absence or the pension plan expressly permits suspension of employee contributions.[33] Unless a suspension provision is included in the plan document, an employee will ordinarily be required to continue to contribute and accrue benefits in accordance with the terms of the pension plan.[34]

e) Optional contributions

A pension plan that provides defined benefits may offer employees "optional benefits."[35] Where a pension plan has optional benefits, employ-

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28 See Chapter 5, Section D(3)(e).

29 *PBA*, s 55(3).

30 *PBA*, s 55(4).

31 *PBA*, Reg, s 4(2)(a). This rule also applies to MEPPs and JSPPs: see s 6(2)(a).

32 *PBA*, Reg, s 4(4)(1). This rule also applies to MEPPs and JSPPs: see s 6(3)(1.). See also federal (*PBSA*, s 39(3) and Reg, s 9(14)(c)); Alberta (*AEPPA*, s 50(1) and Reg, s 49(1)(a)); British Columbia (*BCPBSA*, s 43(3) and Reg, s 37(1)); Manitoba (*MPBA*, Reg, s 4.2); Newfoundland and Labrador (*NLPBA*, s 30 and Reg, s 8(1)(a)); Nova Scotia (*NSPBA*, s 62(2) and Reg, s 5(3)(a)); Quebec (*QSPPA*, s 43); Saskatchewan (*SPBA*, s 42 and Reg, s 37). In New Brunswick the rule is fifteen days after the end of the month in which contributions were deducted (*NBPBA*, s 49 and Reg, ss 35(2)(a) and 35(3)(a)).

33 Chapter 5, Section B(4).

34 FSCO Policy F800-950 (August 1993).

35 Upon proclamation of new legislative provisions, this will be covered under new *PBA*, s 40.1(1). The form and substance of the optional benefits will be described in regulations that, as of the time of publication, had not been released.

ees may make "optional contributions."[36] Optional contributions cannot be made by the employer, nor may they be used to satisfy the employer's contribution obligations in respect of the basic pension benefits.[37]

4) Employer Contributions

a) Introduction

Because an employer's contributions to the pension fund must be sufficient to ensure that the plan will be fully funded and able to provide the pension benefits promised under the plan, the *PBA* sets out strict rules for the remittance of employer contributions.

b) Regulatory requirements

An employer is required to fund the pension benefits; its required contributions must be made in the manner and at the times prescribed in the regulations.[38] Employer contributions associated with the normal cost of funding the pension benefits must be remitted no later than thirty days after the end of the month in which the contributions were deducted.[39] Some jurisdictions require that employer remittances be made at least quarterly.[40] For contributions to defined contribution pension plans, most jurisdictions generally require that employer contributions be made monthly, thirty days after the end of the month to which those contributions relate.[41] An employer's contributions accrue

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36 Upon proclamation of new legislative provisions, "optional benefit" and "optional contribution" will be defined in *PBA*, s 1(1).

37 Upon proclamation of new legislative provisions, this will be covered under new *PBA*, s 40.1(2). Optional benefits may be exercised by an employee once he or she terminates employment and plan membership. The form and substance of the conversion of optional contributions into optional benefits will be described in regulations that, as of the time of publication, had not been released.

38 *PBA*, s 55(2).

39 *PBA*, Reg, s 4(4)(3). Where the plan is a MEPP or a JSPP, the rule is thirty days after the end of the month or as specified in the collective agreement, whichever is earlier: see *PBA*, Reg, s 6(3)(2). See also Alberta (*AEPPA*, s 50(1)(b) and Reg, s 49(1)(d)); British Columbia (*BCPBSA*, s 43(3) and Reg, s 37); Manitoba (*MPBA*, s 26(1) and Reg, s 4.18(2) and 4.3(2)); Nova Scotia (*NSPBA*, s 62(2) and Reg, s 5(3)(b)); Quebec (*QSPPA*, s 41); Saskatchewan (*SPBA*, s 42 and Reg, s 37).

40 See federal (*PBSA*, Reg, s 9(14)(a)); Newfoundland and Labrador (*NLPBA*, s 30 and Reg, s 8(1)(d)). In New Brunswick, the rule is 120 days after the end of the month in which the cost is incurred if the plan is in a state of surplus and ninety days if the plan is in a state of unfunded liability (s. 49 and Reg, ss 35(3)(c)(ii), (iii)(A), & (iii)(B)).

41 See federal (*PBSA*, Reg, s 9(14)(e)); Alberta (*AEPPA*, s 50(1)(b) and Reg, s 49(1)(b)); British Columbia (*BCPBSA*, s 43(3) and Reg, s 37); Manitoba (*MPBA*, Reg,

interest on a daily basis from the date that they become due until they are remitted to the pension fund.[42]

The *PBA* permits a person other than the employer to make the contributions "on behalf" of the employer;[43] however, this is not permitted under the *ITA*, which requires the employer itself to remit its contributions.[44] An employer's and an employee's contributions must be made in cash, not in kind.[45]

Whether a person is an "employer" within the meaning of the *PBA*, and is therefore required to make contributions under the pension plan, is a question of mixed fact and law and depends on the context in which the question arises. The meaning of employer for the purposes of plan funding has been given a very broad interpretation, broader than the common law prerequisites for employment.[46] The *PBA* defines an "employer" as the entity from whom an employee in a pension plan "receives remuneration." While the common law definition is more strictly circumscribed, reference to the concepts of control, ownership of tools, and risk of profit or loss will nevertheless be looked at in determining whether the employee is employed by that entity for funding purposes under the *PBA*.[47]

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s 4.3(1)); New Brunswick (*NBPBA*, s 49(2) and Reg, s 35(3)(c)(i)); Newfoundland and Labrador (*NLPBA*, s 30 and Reg, s 8(1)(b)); Nova Scotia (*NSPBA*, s 62(2) and Reg, s 5(3)(b)); Quebec (*QSPPA*, s 41); Saskatchewan (*SPBA*, s 42 and Reg, s 37). In addition, some jurisdictions provide an exception to this rule where the defined contribution plan includes provisions for contributions based on profits, in which case the rule is that contributions must be made within ninety days after the end of the fiscal year: Alberta, British Columbia, Manitoba, Newfoundland and Labrador, and Saskatchewan.

42 *PBA*, ss 58(1) &(2) and *Toronto-Dominion Bank v Usarco Ltd* (1991), 42 ETR 235 (Ont Ct Gen Div) [*Usarco*].

43 *PBA*, s 55(2).

44 *ITA*, Reg, s 8502(b) prescribes that "permissible contributions" that may be made to a registered pension plan include contributions from an employee and contributions made by an employer in respect of its employees and former employees.

45 This applies to normal cost and special payments: see FSCO Policy F800-125 (August 1993, revised February 1994).

46 See, for example, *St Marys Paper*, above note 2; *Dustbane Enterprises Limited v Ontario (Superintendent of Financial Services)*, [2002] OJ No 2943 (Div Ct); *Victorian Order of Nurses for Canada v Ontario (Superintendent of Financial Services)*, 2009 CarswellOnt 5474 (FST) [*VON*]; and *Sisters of St Joseph for the Diocese of Toronto in Upper Canada* at *Morrow Park*, [1999] OLRB Rep. November/December 1101, [1999] OLRD No 3925.

47 See *VON*, *ibid* at para 46. The FST determined that VON was not the "employer" for funding purposes under the *PBA* because (a) the employment contracts between VON's independent branches and the employees evidenced VON's lack

An employer is required to contribute to the pension plan in order to fund the pension benefits in accordance with the plan's terms. Where a pension plan's terms do not incorporate the *PBA*'s minimum contribution requirements, the statutory obligation prevails so long as the plan in fact, law, and substance meets the *PBA*'s definition of a "pension plan":[48]

> The *PBA* and regulations impose an obligation on an "employer" to ensure that a pension plan is adequately funded, both on an ongoing basis and on a wind-up of the plan. This obligation exists quite apart from the particular funding requirements set out in the pension plan itself.[49]

c) Refund of employer over-contribution

In the event that an employer contributes more money to the pension fund than it is required to in a given time period, the *PBA* permits reimbursement of such amount to the employer.[50] Before the employer is able to be reimbursed for an "overcontribution," the administrator must apply for the Superintendent's consent.[51] An application for a refund of an employer's overcontribution must be made within the later of two years after the date the overpayment was made and six months after the administrator reasonably ought to have become aware of the overpayment.[52]

In addition to the regulatory scheme, courts have entertained employer applications to be reimbursed for mistaken overpayments to the pension fund, based on the equitable remedy of unjust enrichment.[53]

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of true control over these branches, (b) each VON branch owned and maintained its own assets, and (c) as not-for-profit entities, VON branches received operational funds from the government or private donations.

48 *Canada (Attorney General) v Confederation Life Insurance Co* (1995), 24 OR (3d) 717 (Gen Div), aff'd (1997), 145 DLR (4th) 747 (Ont CA).

49 *St Marys Paper*, above note 2 at 460–61.

50 *PBA*, s 62.1(1). See also, FSCO Policy R350-103.

51 *PBA*, s 62.1(2). The application to the Superintendent must contain all information necessary for him or her to make a decision regarding the refund. applies to an application for the consent of the Superintendent for reimbursement: (a) where an employer pays an amount in respect of a pension plan that should have been paid out of the pension fund, or (b) where an employer makes an overpayment into the pension fund. "Overpayment" is a defined term in the policy.

52 *PBA*, s 62.1(4).

53 *Ontario Pension Board v Hosack* (2004), 41 CCPB 294 (SCJ).

5) Administrator responsibilities

a) Introduction

The pension plan administrator is the person vested with the ultimate responsibility to collect pension contributions. The gravity of an administrator's duties with respect to contribution remittances underscores the importance of funding and plan solvency as a minimum pension standard.

Under the *PBA*, the administrator must "ensure" that all contributions are paid when due.[54] Because an administrator is a fiduciary in relation to the pension fund, the responsibility to collect remittances forms part of the statutory standard of care under the *PBA*,[55] as well as one at common law pursuant to the duty of loyalty and good faith toward beneficiaries.[56] The administrator is the person with the opportunity, and obligation, "to recognize reasonably apparent danger signals"[57] when employer contributions are not timely. As a result, the scope of an administrator's duty is not limited to a passive monitoring of the remittances, but, rather, an administrator is actively obliged to promptly make inquiries as soon as a contribution is not remitted when due and "pursue the delinquent employer to collect overdue monies together with any outstanding interest that has been lost as the result of the delay in payment."[58] This principle applies both to single and multi-employer pension plans.[59] An administrator's failure to enforce contribution remittances is a "serious matter," one that could engage a regulatory prosecution against the administrator or employer.[60]

b) MEPP rules

In a MEPP, the administrator is also responsible for collecting remittances. In addition, there is an obligation on each employer that participates in a MEPP to transmit to the administrator a copy of the collective agreement or other statement that sets out the contributions

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54 *PBA*, s 56(1).

55 FSCO Policy F800-175 (May 1990).

56 *Froese v Montreal Trust Co of Canada* (1996), 137 DLR (4th) 725 at paras 46 and 59 (BCCA), leave to appeal to SCC refused, [1996] SCCA No 399 [*Froese*]. See also *Weldon v Teck Metals Ltd*, 2012 BCSC 1386, where the Court held that this duty relates to the trustee's role in receiving and holding funds, and does not extend to advising on the terms of the pension plan.

57 *Froese*, *ibid* at paras 28 and 46.

58 FSCO Policy F800-175 (May 1990).

59 *Ibid.*

60 *Corewall Inc v Ontario (Superintendent of Pensions)* (1995), 12 CCPB 103 at para 34 (PCO).

the employer is required to make and any other obligations of the employer under the pension plan.[61] The purpose of this provision is to facilitate the administrator's discharge of its obligations under the *PBA*, as there would be little other way for the administrator to know the amount of contributions it is required to enforce in respect of each employer. Also, because the nature of MEPP administration often requires agents, such as a trade union or third-party administrator, to assist or act as an intermediary in the collection of contributions, the *PBA* permits the administrator of a MEPP to require persons involved in contribution remittances and fund investment to be bonded.[62] Where the administrator engages an agent or agents to receive contributions under the plan, the administrator is required to give the agent a copy of the regular periodic actuarial valuation reports prepared in respect of the plan.[63]

c) Enforcement

Where an employer has not remitted timely contributions, an administrator has certain statutory notice requirements and remedial rights. If a contribution is not paid when due, the administrator must notify the Superintendent.[64] This rule only applies to an administrator of a single-employer pension plan.[65]

A pension plan administrator also has a lien and charge on an employer's assets in connection with any pension contributions required to be remitted to the pension fund[66] and, if necessary, is authorized to commence court proceedings to obtain the payment of contributions owing.[67] In MEPPs, this statutory authorization gives an independent cause of action to the administrator to enforce compliance without the

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61 *PBA*, s 61.

62 *PBA*, s 60.

63 *PBA*, Reg, s 16.2. This rule applies both for MEPPs and single-employer plans.

64 *PBA*, s 56(2) and *PBA*, Reg, s 6.1. This notification must be made within sixty days after the day on which the required contribution became due. The Superintendent has the option to investigate and, if necessary, order compliance or initiate prosecution proceedings: *PBA*, ss 87 and 109 &10.

65 *PBA*, Reg, s 49.1.1.

66 *PBA*, s 57(5).

67 *PBA*, s 59. See also *Usarco*, above note 42; *Edmonton Pipe Industry Pension Plan Trust Fund (Trustee of) v 350914 Alberta Ltd*, 2000 ABCA 146 [*Edmonton Pipe Industry*]; *IWA Forest Industry Pension and Ltd Plans (Trustees of) v Jackson & Sons Logging Ltd*, [1993] BCJ. No 2961 (SC). It is conceivable that these powers might raise the potential for a conflict of interest where the administrator and the employer are the same entity.

necessity of resorting to a labour relations grievance, which would be under the carriage of the union, not the administrator.[68]

6) Custodian Responsibilities

a) Introduction

As a check and balance on the administrator, the *PBA* requires the administrator of an employer-sponsored pension plan, at the beginning of each fiscal year, to give to the custodial trustee of the pension fund a summary of the required pension contributions due that year.[69] This is done because the custodian is the entity that holds the assets of the pension fund and, ultimately, receives all contributions. The trustee is, therefore, in a good position to serve as a "watchdog" over contribution remittances. This rule does not apply if the administrator is also the trustee of the pension fund.[70] The rule is also unnecessary in MEPPs and JSPPs, because the administrator and employer are at an arm's-length relationship and there is less potential for a conflict of interest in the monitoring of employer contributions by the administrator.

It is possible for the custodian to be held to a fiduciary standard of care at common law vis-à-vis the employees in connection with pension remittances.[71]

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68 The administrator of a MEPP may usually take legal action against a delinquent employer pursuant to the trust agreement that establishes the MEPP. Participating employer agreements between the employer and administrator, under which an employer agrees to participate in the pension plan and be bound by its rules, the *PBA*, and the trust agreement, are also legal instruments that denote an employer's contractual obligation to contribute. An administrator's cause of action is independent of any rights reserved by the union under the collective agreement to initiate a grievance in respect of delinquent contributions, provided this is prescribed in the collective agreement. See also *IWA Forest Industry Pension and Ltd Plans (Trustees of) v Jackson & Sons Logging Ltd*, *ibid*; *IWA Forest Industry Pension Plan v MacKenzie Sea Services Ltd*, 2003 BCSC 983.

69 *PBA*, s 56.1(1) and Reg, s 49.1.2. This summary must be given within ninety days after the plan is established, for the first fiscal year; and within sixty days after the beginning of the second fiscal year and of each subsequent fiscal year of the plan: *PBA*, Reg, s 6.2(1). If there is a change in the summary of contributions, the administrator must give the trustee a revised summary within sixty days after the administrator becomes aware of the change: *PBA*, Reg, s 6.2(2).

70 *PBA*, s 56.1(1.1).

71 See Chapter 6, Section C(2)(c).

b) Duty to notify

A custodial trustee must notify the Superintendent if it is not given the summary of required contributions from the administrator.[72] Once the trustee receives the summary, the trustee is required to notify the Superintendent in the event contributions are not paid when due in accordance with the summary.[73]

7) Statutory Deemed Trust

a) Introduction

The *PBA* establishes a statutory deemed trust with respect to contributions owing, but not yet remitted, to the pension fund.[74] The purpose of the deemed trust is to exempt contributions owing to a pension plan, which are held by an employer, from being seized or attached by other creditors of the employer. The deemed trust applies only to contributions not yet remitted to the pension fund—it does not make the pension fund itself, per se, impressed with a trust,[75] nor does the deemed trust apply with respect to other assets of the employer that are not associated with pension contributions.

b) Application

Generally, the deemed trust operates in an ongoing plan and on plan wind up. The deemed trust covers employee contributions held by an employer prior to deposit in the pension fund,[76] and employer contri-

72 *PBA*, s 56.1(2). The trustee must give the Superintendent this notice within thirty days after the day on which the summary was required to be given: *PBA*, Reg, s 6.2(4).

73 *PBA*, s 56.1(3). The trustee must give the Superintendent notice that a contribution was not paid when due within sixty days after the day on which the contribution became due: *PBA*, Reg, s 6.2(5).

74 *PBA*, ss 57(1)–(4). See also Alberta (*AEPPA*, s 52).

75 *Crownx Inc v Edwards* (1991), 7 OR (3d) 27 at para 54 (Gen Div), aff'd (1994), 120 DLR (4th) 270 (Ont CA). It should be observed that in an earlier Ontario court decision, the court stated that "it is common ground that pursuant to s 23(3) of the Act [the deemed trust provision in the pre-1987 *PBA*] the Plan is a trust:" see *King Seagrave Ltd v Canada Permanent Trust Co* (1985), 51 OR (2d) 667 (HCJ), aff'd in the result [1986] OJ No 2124 (CA). However, in that case, unlike in *Crownx*, not much turned on this finding given the court's principal conclusion in *King Seagrave* that the plan in that case was subject to a true trust based on the application of common law principles. In any event, the pension fund may not be seized nor attached by creditors of the employer as it does not form part of the assets of the employer: see Chapter 5, Section C(7).

76 *PBA*, ss 57(1) & (2).

butions that are due, but not yet paid into the pension fund.[77] Amounts equal to the required contributions are deemed to be held in trust by the employer until paid into the pension fund, and the plan administrator has a lien and charge on the assets of the employer for an amount equal to the deemed trust.[78]

Where a pension plan is being wound up, the deemed trust covers all employer contributions that have accrued up to the date of wind up but have not yet become due.[79] The employer is "deemed to hold in trust the amount necessary to satisfy the wind-up deficiency," but that the wind-up deemed trust entitlement "arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future."[80]

The deemed trust extends over these contributions, whether the assets are commingled in the general revenue accounts of the employer or held in a separate account.[81] The deemed trust also extends to the interest accruing on employer and employee contributions that are owing, but not yet remitted, to the pension fund.[82]

c) Limitations

There are a number of important limitations on the application of the statutory deemed trust. First, the deemed trust covers the regular,

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77 *PBA*, s 57(3).

78 *PBA*, s 57(5).

79 *PBA*, s 57(4). See also *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at paras 26-47 [*Indalex*].

80 *Indalex*, *ibid* at paras 45–46. In dissent, Cromwell J would not have included the wind-up deficiency in the statutory deemed trust, stating that "the wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up" (*ibid* at para 121). Citing a previous edition of this text, he concluded that a wind up gives rise to new liabilities since a wind up accords statutory entitlements and protections to employees that would not otherwise be available: *ibid* at para 145.

81 *PBA*, s 57(6).

82 *PBA*, ss 58(1) & (2) and Reg, s 24; and *Usarco*, above note 42. See, however, *Ivaco Inc (Re)* (2005), 47 CCPB 62 at para 13 (Ont SCJ), aff'd (2006), 83 OR (3d) 108 (CA), leave to appeal to SCC discontinued, [2006] SCCA No 490, where the court distinguished its earlier decision in *Usarco* on the facts and declined to give effect to the deemed trust on the basis that in the earlier decision, "while there was a bankruptcy petition outstanding at the time of the motion, no one was pressing it forward," whereas "in the present case . . . there are major creditors who wish to proceed forthwith—and for the reason that such a bankruptcy will enhance their position (i.e., the pension deficit claims will become unsecured and rank *pari passu* with the other unsecured claims)." See also *Harbert Distressed Investment Fund, LP v General Chemical Canada Ltd*, 2007 ONCA 600, leave to appeal to SCC refused, [2007] SCCA No 539.

"normal cost," contributions together with any "special payment" (that is, contributions required to fund a plan deficit) which were required to have been made by the employer, but were not. The deemed trust does not extend to the obligation of an employer to fund pension obligations that have not yet become due or which "crystallize" only upon the wind up of the pension plan. In these circumstances, a creditor will have a "secured position which will prevail against these additional obligations . . . which have not yet required to be paid into the fund."[83]

Second, the statutory deemed trust does not exempt pension contributions in the hands of an employer from being made available for distribution among an employer's creditors in bankruptcy and insolvency proceedings.[84] Although section 67(1)(a) of the *Bankruptcy and Insolvency Act* (*BIA*)[85] exempts property held by the bankrupt "in trust" for another person from being divisible among creditors, a provincially-created statutory deemed trust (such as the *PBA*) is not operative for the purposes of the *BIA*, unless the trust, in addition, "has all the requisite elements of a common law trust."[86] As explained:

> While in a non-bankruptcy situation, the [employer's] assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities in favour of the pension beneficiaries by s 57(3) of the *Pension Benefits Act* (Ontario), in a bankruptcy situation, the priority of such a statutory deemed trust ceases unless there is in fact a "true

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83 *Usarco*, *ibid* at para 26.

84 *Ivaco Inc (Re)*, above note 82 and *Indalex*, above note 79. The Ontario Superior Court in *Ivaco* also noted that "there is no provision in [the *PBA*] that the monies be paid out to the pension plan at any particular time" (para 17). As such, even though the deemed trust operates prior to bankruptcy, if it is not acted upon until after bankruptcy, "those deemed trusts may be defeated, in the sense of being inoperative to give a priority, in the event of a bankruptcy. The *BIA* does not contain any provision that the priority position is maintained in a bankruptcy." See also *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24 [*Henfrey*].

85 RSC 1985, c B-3, as amended [*BIA*].

86 *Edmonton Pipe Industry*, above note 67 at para 41. Because bankruptcy is a matter under federal jurisdiction, provincial statutory deemed trusts that do not conform to "general trust principles" cannot operate "to reorder the priorities in a bankruptcy." Therefore, although deemed trusts are effective in accordance with the provincial legislation when a person or business is solvent and operating, upon bankruptcy "the funds that are subject to a deemed trust, but are not held in accordance with general trust principles, will not be excluded from the property of the bankrupt under s 67(1)(a) of the *BIA* and will be distributed in the priority prescribed by the *BIA*:" see *GMAC Commercial Credit Corp–Canada v TCT Logistics Inc* (2005), 74 OR (3d) 382 at para 15 (CA) [*GMAC*]. See also *Henfrey*, above note 84; *Usarco*, above note 42.

trust" in which the three certainties of trust law are found to exist, namely (i) certainty of intent; (ii) certainty of subject matter; and (iii) certainty of object.[87]

If, therefore, an administrator or employees can establish that a "true trust" extends over the assets of an insolvent employer, those assets will be exempt from attachment by creditors and a proof of claim on behalf of employees may be allowed. Generally speaking, "[f]or these three certainties to be met, the trust funds must be segregated from the [employer's] general funds."[88] It is important to observe that for certainty of subject matter to be met, the trust funds must be "identifiable" and "traceable." Historically where, prior to a bankruptcy, an employer has failed to remit to the pension fund employee pension contributions that it deducted from payroll and, instead, has commingled the contributions with its general revenues and used them for business operating expenses, the contributions became converted funds that are no longer identifiable and traceable. In such circumstances, the pension contributions lose their character as trust property held by a bankrupt employer and a claim by employees to recover their funds was disallowed by the trustee in bankruptcy.[89]

Third, a bank's security under section 427 of the *Bank Act*,[90] both prior to and after an employer's bankruptcy, has priority over any assets impressed by the *PBA*'s statutory deemed trust.

Finally, in 2005, Parliament enacted the *Wage Earner Protection Program Act*[91] (*WEPPA*) which amended the *BIA* and the *Companies'*

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87 *Ivaco Inc (Re)*, above note 82 at para 11.

88 *Ibid.*

89 *Re Graphicshoppe Ltd* (2005), 78 OR (3d) 401 (CA), rev'g (2004), 74 OR (3d) 121 (SCJ) [*Graphicshoppe*]: Supporting the court's reasoning was the fact that prior to the date of the employer's bankruptcy, the employer's account had a negative balance and therefore, none of the employee contributions remained intact. In a strong dissent, Juriansz JA held that the employees' trust claim should be allowed, as there was "no doubt that the pension contributions were the employees' money, and it is conceded that [the employer] held that money in trust upon deducting it from the employees' pay." In the minority's view, the pension contributions were an "indivisible asset" that could be traced to the employer's general account, based on the principle that "the mere commingling of trust funds with the trustee's own funds does not destroy a trust and, as such, does not in itself eliminate a beneficiary's right to claim a proprietary remedy" (paras 65, 66, and 105). See also, generally, *Edmonton Pipe Industry*, above note 67 and *GMAC*, above note 86. See also *Law Society of Upper Canada v Mazzucco*, 2009 CarswellOnt 200 at paras 52–54 (SCJ), distinguishing *Graphicshoppe*.

90 SC 1991, c 46.

91 SC 2005, c 47, s 1 [*WEPPA*].

Creditors Arrangement Act[92] (*CCAA*) to provide that normal pre-filing[93] pension contributions owing, but not yet remitted, to the pension fund at the time of a bankruptcy or receivership will have priority status ranking above secured creditors. Historically, pension claims did not have priority status under the *BIA* and an employee's pension claim was an unsecured claim.[94] As a result of the *WEPPA*, in respect of a prescribed pension plan, the *BIA* offers security for unpaid amounts on the date of bankruptcy equal to the sum of all contributions deducted from employees' remuneration for payment to the pension fund; the normal cost that was required to be paid by the employer into the fund; and all amounts required to be paid by the employer to the pension fund on account of defined contribution benefits.[95]

8) Contributions During Employer Financial Hardship

a) Introduction

As stated by the Ontario Court of Appeal:

> A bankruptcy is a disaster. A company has failed; in many cases it will not survive. Creditors, who provided goods and services in good faith, may lose substantial sums of money. Employees of the bankrupt company instantly lose their jobs.[96]

When an employer becomes insolvent, the receiver or trustee in bankruptcy, as the case may be, is put in place to realize the assets of the debtor company and distribute the proceeds to the creditors. The re-

92 RSC 1985, c C-36 [*CCAA*].

93 The *BIA* makes the distinction between regular pension payments, i.e., normal pre-filing contributions, which are protected, and special contributions (i.e., payments made in order to make up for fund's deficiency), which are not given priority over secured creditors under the *BIA*.

94 *Abraham v Canadian Admiral Corp (Receiver and Manager of)* (1998), 39 OR (3d) 176 (CA), leave to appeal to SCC refused, [1998] SCCA No 276. See the strong dissent in *Abraham* by Laskin JA, who focused on the public policy reasons to prefer employee pension contribution claims over bank claims (at para 70):

> It seems to me to be unjust on policy grounds, and contrary to "the realities of the arrangement" for the bank to permit its borrower to carry on business and thus enhance the value of its security and then deny compensation to those responsible for its enhancement. Workers improve the value of inventory by their labour and services.

95 *BIA*, s 81.5.

96 *Re Royal Crest Lifecare Group Inc* (2004), 46 CBR (4th) 126 at para 21 (CA), aff'g (2003), 40 CBR (4th) 146 (Ont SCJ) leave to appeal to SCC refused, [2004] SCCA No 104 [*Royal Crest Lifecare*].

ceiver might look to terminate the company's operations, sell off its assets, and distribute the proceeds to the creditors; or, alternatively, continue the operations of the company as a going concern for the time being with a view to selling it. In the event the first strategy is adopted, the pension plan is wound up because no further contributions will be made. A number of rules under the *PBA* apply when a pension plan is wound up in these circumstances.[97]

However, if the receiver adopts the second strategy, it may look to the current employees to assist in operating the company. Both the receiver or trustee and the employees want to know the nature of the receiver's obligations to the employees in terms of wages, pension contributions, vacation pay, termination pay, grievances, seniority, etc. This section provides a brief overview of the legal status of pension contributions when a receiver or trustee takes over the operations of the employer, or the employer is involved in a restructuring pursuant to the *CCAA*.

b) Regulatory concerns

For better or for worse for the employees, the *PBA* is stoically steadfast to the principle of employer remittance and funding. There is little, if any, room for flexibility where an employer is experiencing cash flow difficulties. This principle can be illustrated by the following "Q&A," published by the Ontario regulator:

> An employer sponsoring a defined contribution plan is facing serious economic hardship, and is unable at this time to pay the employer's contributions to the company pension plan. In order to avoid winding up the plan, the employer wants to temporarily suspend all employer and employee contributions for a defined period of time. Would such a plan amendment be permitted?
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> No. Any amendment to a pension plan suspending contributions to the plan would contravene the funding rules in the *PBA* and Regulations since vesting continues to accrue although no contributions are made to the plan. Consequently, no amendment suspending contributions to the plan is permitted.[98]

c) Historic approach—*St Marys Paper*

A historically important decision that illustrates the *PBA*'s requirement that all contributions be remitted, without exception, when due is the

97 See Chapter 9, Section C(4).

98 FSCO Policy F800-801 (December 1993–January 1994).

case of *St Marys Paper*.[99] In this decision, the employer was bankrupt and the trustee in bankruptcy negotiated with both unionized and non-unionized employees as to the terms of their continued engagement to operate the paper mill pending its sale. One of the terms was that the trustee would fund the normal costs of the pension plans, but would not be responsible for any special payments. Despite the agreement, the pension plan administrator appointed by the regulator took the position that by engaging the employees, the trustee had become an employer under the *PBA* and was obliged to fund the unfunded liabilities under the plans. The Court of Appeal majority agreed, reasoning:

> [The *PBA*] does not allow for special deals which dilute or might eliminate these minimum funding requirements.
>
> . . .
>
> The employer's obligations include the obligation to make special payments attributable to the unfunded liabilities of the plan. An employer cannot choose which of its funding obligations in respect of an ongoing pension plan it will honour. If it could, the basic protection provided to members and former members of pension plans by the *PBA* would be substantially diminished in their value.[100]

In dissent, Abella JA (as she then was) commented that regulatory flexibility in pension contribution arrangements during an employer's insolvency can only benefit the employees:

> The *PBA* is legislation designed to protect employees' pension plans from arbitrary erosion and should be interpreted accordingly. I would prefer to interpret the *PBA* in a way which both respects the unique role of the trustee in circumstances such as these, and encourages conduct which inures to the benefit of employees covered by pension plans. A more technical reading of the *PBA*, rendering the trustee an inadvertent employer under the Act by its current service cost payments, discourages both.[101]

The difference in opinion between the majority and minority panels in *St. Marys Paper* illustrates the deep tension between, on the one hand, the important public policy objective of the *PBA* that aims to ensure that all minimum standards are complied with and, on the other, the need for flexibility in certain distressing scenarios where that flex-

99 *St Marys Paper*, above note 2.
100 *Ibid* at paras 32–33.
101 *Ibid* at para 64, Abella J, dissenting.

ibility lends itself to compromise with employees where not only their pensions are at risk, but also their jobs.

d) Current state of the law

In response to *St. Marys Paper*, Parliament amended the *BIA* by enacting section 14.06(1.2),[102] which provides for the protection of a trustee or receiver, who operates the business of a debtor and has become an employer, from inheriting any obligations of the debtor that arose prior to the bankruptcy or receivership, including obligations that would have arisen under federal or provincial law, such as pension contributions. As a result of this amendment, the extent to which an employer's pension contributions continue during an insolvency is generally a matter involving the orders of the bankruptcy court together with any bargain reached between the trustee or receiver and the employees.[103]

Following the amendments to the *BIA*, the trend among bankruptcy courts was to issue "boiler plate" *ex parte* interim receiver orders granting broad powers, exemptions, and immunities that the receiver may or may not have needed and that could affect the rights of persons not before the court, including employees of the debtor.[104] However, the courts have since moved away from granting such broad orders. For example, a bankruptcy court declined to include a provision for successor employer immunity as part of the initial order, indicating that the order might be modified later and that, in the meantime, the trustee would have to work with the union and other employees regarding demands for the payment of pension contributions, union dues, and a grievance procedure.[105] The court expressed its concern about the immediate fairness to employees of a broad immunity order:

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102 *BIA*, s 14.06(1.2) has since undergone further amendments. The current version provides that:

> Despite anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or continues employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,
> (a) that is in respect of the employees or former employees of the debtor of a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and
> (b) that exists before the trustee is appointed or is calculated by reference to a period before the appointment.

103 See also *CCAA*, s 11.8(1), which is a similar provision to *BIA*, s 14.06(1.2).

104 See, for example, *Big Sky Living Inc (Re)*, 2002 ABQB 659; *Royal Crest Lifecare*, above note 96 and *GMAC*, above note 86 at paras 24–27.

105 *Royal Crest Lifecare*, *ibid*.

> The trustee will also have to appreciate that if it does not accede to the union demands for union dues, pension contributions and grievance-type procedures, then conceivably after a period of time (which may vary in length) the personnel which it has employed may become disenchanted with continuing at the various locations and value may evaporate or start to do so unless "corrective" or "amelior-ating" measures are . . . taken.
>
> Further, it seems that any purchaser from a trustee would have to take into account in determining how much to bid and/or agree to pay the liabilities that the purchaser as new employer will or may "inherit."[106]

In another decision, the Court dismissed a motion by an employer undergoing a restructuring under the *CCAA* where the employer wished to cease making required employer contributions to its pension plans. The employer sought to freeze its obligations to its Canadian workforce pending the resolution of its discussions and negotiations in the USA with its American workforce unions and the conclusion of the US Chapter 11 proceedings. The Court rejected the submission and ordered the employer to "make good on its arrears unless otherwise agreed between its unions" and the federal pension regulator, but warned those parties that the employer might legitimately be asking them for concessions in order to keep the company as a going concern.[107] This case was decided "on the basis of fairness and equity," rather than on the proposition that all pension contributions must in all cases be paid by a *CCAA* debtor absent a specific agreement.[108]

Pension contribution and labour relations issues during an insolvency or restructuring are far from settled, despite the fact that Parliament has attempted to further protect employee wage and pension entitlements following their employer's bankruptcy.[109] For example, the *BIA* creates a super-priority for claims related to unremitted pension

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106 See *ibid* at paras 31–32 (Ont SCJ). See, however, *Royal Oak Mines Inc (Re)* (2001), 27 CCPB 163 (Ont CA), where the interim receiver of a bankrupt employer was found not to be required to make pension contributions to the pension fund, without specific direction and authority from the court, because the order appointing it said that it was not the employer. It was not appointed to operate the business; the operation was continued by the debtor employer.

107 *United Air Lines, Inc (Re)* (2005), 45 CCPB 151 (Ont SCJ).

108 *Ibid* at para 8. However, see also *Collins & Aikman Automotive Canada Inc, Re* (2007), 63 CCPB 125 [*Collins*], where the Ontario Superior Court upheld a provision in an initial *CCAA* bankruptcy order stating that the company was entitled, but not required, to continue making special payments.

109 See above note 95.

contributions outstanding when an employer becomes bankrupt.[110] Also, no restructuring proposal or plan under either the *BIA* or the *CCAA* may be approved by the court unless the plan or proposal accounts for the payment of outstanding and ongoing pension contributions.[111]

Despite these additional protections, courts overseeing corporate restructurings have increasingly struggled with the perceived need to balance the social purpose of protecting employee pensions with the economic rights of secured creditors with claims over the assets of the employer.[112] The Supreme Court of Canada, in attempting to strike an appropriate balance in one decision, held that it was unfair to give a bankruptcy court final say on a successor employer application under the *Labour Relations Act*, where to do so subordinates the interests of employees to those of other creditors.[113]

e) Normal versus special payments

Courts overseeing a corporate restructuring, when making operational orders during the proceeding, have tended to distinguish between an employer's normal cost contributions and special payments owed to the pension fund. There are several examples of courts being willing to authorize the suspension of special payments during the period of employer financial hardship or restructuring.[114] However, there appears to be no relevant examples where a court has approved the suspension or cessation of normal cost contributions.[115]

f) Federal workout scheme

In 2010, the federal government made amendments to the *PBSA* to introduce the concept of a "workout scheme" for "distressed pension

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110 *BIA*, s 81.5.

111 See *BIA*, s 60(1.5) and *CCAA*, s 6(6).

112 *GMAC Commercial Credit Corporation–Canada v TCT Logistics Inc*, 2006 SCC 35 at para 2 [*GMAC Commercial Credit Corp–Canada*]. See also *Syndicat national de l'Amiante d'Asbestos Inc v Mine Jeffrey Inc*, [2003] RJQ 420 (CA), where a monitor was appointed under the *CCAA*, and, like an interim receiver, was given control over the debtor's property and the authority to carry on its business. The court found that the monitor was bound to abide by the terms of the collective agreement where there is a certified trade union in the workplace.

113 *GMAC Commercial Credit Corp–Canada*, *ibid*.

114 See, for example, *Collins*, above note 108, followed in *Re AbitibiBowater Inc (Arrangement relatif à)*, 2009 QCCS 2028 and *Re Fraser Papers* (2009), 76 CCPB 254 (Ont SCJ).

115 Massimo Starnino & Mary Picard, "Freedom 55 Lost? The Recent Treatment of Pensions in Insolvency Proceedings" (October 2010) 25 National Debtor/Creditor Review 33 at 42.

plans."[116] The scheme allows employers, trade unions, employees, and pensioners to negotiate funding arrangements where the employer is unable to meet its funding obligations. These provisions allow employers to restructure their contribution requirements without having to file for protection under the *CCAA*.

To enter into the workout scheme, the pension plan must meet the definition of a "distressed pension plan."[117] If eligible, the employer must declare that it does not expect to be able to make its upcoming special payments.[118] Once declared, the employer is relieved from making special payments for up to nine months. During this time, the pension plan's stakeholders may negotiate a revised funding schedule, subject to the approval of the Minister of Finance.[119]

9) Contribution Holidays

a) Introduction

Sometimes during the operation of a pension plan, a surplus will arise.[120] In these circumstances, an employer will often look to that surplus to meet its contribution and funding obligations under the pension plan. An employer takes a "contribution holiday" when it does not make a remittance into the pension fund in a given year to meet its normal cost funding obligations and, instead, applies the notional surplus in the pension fund toward that obligation. Employees may also take contribution holidays, when authorized by the pension plan terms.

This section identifies the regulatory and legal principles applicable to the taking of contribution holidays.[121]

b) Policy considerations

Employees sometimes object to the practice of employer contribution holidays, arguing that surplus, when it exists in an ongoing pension plan, serves as a "cushion" for a rainy day in the event investment experience in the fund does not meet expectations or the employer experiences fi-

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116 Bill C-9, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 4, 2010 and Other Measures*, 3d Sess, 40th Parl, 2010 (assented to 12 July 2010), SC 2010, c 12.

117 For example, the scheme does not apply if the employer has been liquidated or assigned into bankruptcy.

118 *PBSA*, s 29.03.

119 *PBSA*, s 29.3.

120 See Chapter 10, Section A(1)(c).

121 For a more thorough discussion of this issue, see Eileen E Gillese, "Contribution Holidays" (1995) 15 E & TJ 136.

workforce, with employees relocating to jobs with the same employer in a number of different provinces during their careers. The question here is whether to adopt a "final location" approach to determining the employee's rights on plan wind up or whether to adopt a so-called "checkerboard" approach. Under the final location approach, the laws of the jurisdiction where the employee has terminated employment applies to all pension credits earned throughout the employee's career with the employer. Under the checkerboard approach, alternatively, each period of service in different jurisdictions is forever subject to that jurisdiction's laws so that on termination of employment, each period during which pension credits were earned is subject to different legislative requirements.

To illustrate, where an Ontario-registered plan is partially wound up, does the *PBA* apply to an employee's pension credits earned in Ontario if the employee is working in Alberta at the time of the wind up? Is that employee entitled to surplus in respect of the period of service he or she earned in Ontario (the checkerboard approach) or is he or she only entitled to immediate vesting, the principal right conferred in Alberta to employees affected by a partial wind up (the final location approach)?

Each approach has its advantages and disadvantages as far as the administrator, employer, and employees are concerned. It is thought that most Canadian pension regulators consider the final location approach as the better one.[210] However, as stated, this question is not entirely settled and will likely require a further judicial determination in the absence of legislative clarification.

4) Employer Funding Obligations

a) Introduction

As is the case in an ongoing pension plan, an employer responsible for a plan that is wound up has an obligation to make contributions to the pension plan to ensure that all benefit obligations payable under the plan are met.[211] It is in this respect that the *PBA*'s funding provisions on wind up reflect "the vested nature of pension plans."[212] An employer's

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210 The Canadian Association of Pension Supervisory Authorities [CAPSA] has proposed that the final location approach should govern, generally: see *Agreement Respecting Multi-Jurisdictional Pension Plans* (Toronto: Canadian Association of Pension Supervisory Authorities, 2011) s 7.

211 *Monsanto*, above note 64 at para 44.

212 *Dayco (Canada) Ltd v CAW-Canada* (1993), 102 DLR (4th) 609 at 646 (SCC) [*Dayco*].

failure to comply with its funding obligations on wind up is a "serious matter" that may engage regulatory prosecution.[213]

Sometimes, particularly in circumstances where the plan is wound up because of the employer's insolvency and there is no successor employer who has agreed to assume the pension obligations, there will be no one to fund the benefits. This section explains an employer's funding obligations on plan wind up and the rules that apply in the event the employer or the pension fund are insolvent at the time of wind up. Also discussed are the general principles relating to claims made under the Pension Benefits Guarantee Fund (PBGF) and the very different funding rules and exceptions that are applicable on the wind up of a MEPP or JSPP.

b) Payment of contributions due

On plan wind up, the employer is required to pay into the pension fund all contributions and amounts owing under the plan terms, the *PBA,* and regulations that are due and accrued and that have not yet been paid into the fund.[214] The employer must remit the contributions necessary to pay all accrued pension benefits.[215] This obligation exists in all jurisdictions.[216] This rule applies only to contributions that were due as at the wind-up date and does not apply to special payments owing by the employer and that have arisen as a result of the wind up, which are discussed below. Because accrued payment obligations are employer contributions that were already "due" upon wind up, the *PBA*'s deemed statutory trust extends to the quantum of these funds.[217]

Generally, an employer must fund its special payments over five annual payments commencing at the effective date of the wind up.[218] There are exceptions to this rule for certain MEPPs and JSPPs and also where temporary solvency funding relief measures have been implemented.

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213 *Corewall Inc v Ontario (Superintendent of Pensions)* (1995), 12 CCPB 103 (PCO).

214 *PBA*, s 75(1)(a). See also Chapter 7, Section B(4)(b). See also *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at paras 29–32 [*Indalex*]; *Toronto-Dominion Bank v Usarco Ltd* (1991), 42 ETR 235 (Ont Ct Gen Div).

215 *PBA*, s 75(1)(b); *Indalex, ibid.*

216 Federal (*PBSA*, s 29(6)); Alberta (*AEPPA*, s 73); British Columbia (*BCPBSA*, s 51); Manitoba (*MPBA*, s 26(3)); New Brunswick (*NBPBA*, s 65); Newfoundland and Labrador (*NLPBA*, s 61); Nova Scotia (*NSPBA*, s 80); Quebec (*QSPPA*, s 228); Saskatchewan (*SPBA*, s 54(1)).

217 See Chapter 7, Section B(7).

218 *PBA*, s 75; *PBA*, Reg, s 31.

If there is a surplus in the plan at the time of the wind up and if the plan permits it, the employer may be able to satisfy its contribution obligations under this provision by taking a contribution holiday.[219]

c) Pension plan has a wind-up surplus

If the wind-up report discloses a surplus in the pension fund after all benefits and wind-up liabilities are accounted for, then no special payments must made by the employer to the pension fund. This rule is the same whether the employer was solvent or insolvent upon the wind up.

Where the plan has a wind-up surplus, the administrator or employer has an obligation to deal with and distribute the surplus.[220] The employer may be a beneficiary of any surplus distributed upon the wind up.[221] If the employer is bankrupt and the plan is wound up with a surplus, the employer's secured or other creditors may be beneficiaries of the surplus.

d) Employer is solvent and plan has a wind-up deficiency

A wind-up report filed by the plan administrator may disclose a deficit in the pension fund.[222] Because of the statutory benefit enhancements and acceleration of pension entitlements, a wind up increases the aggregate liabilities of the pension fund. The wind up triggers benefits that would not ordinarily be paid to some employees, such as grow-in benefits. As a result, the employer becomes liable for the additional costs associated with funding so-called wind-up liabilities.

A wind-up deficiency arises where the assets in the pension fund are insufficient to pay all accrued benefits, including wind-up liabilities, owing to employees. Where a pension fund had a solvency deficiency prior to wind up, the solvency deficiency becomes a wind-up deficiency.

Where a wind-up report discloses a wind-up deficiency, the employer will be required to make special payments to fund the deficiency.[223]

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219 See Chapter 7, Section B(8).

220 See Sections C(2)(f) and C(3)(i), above in this chapter.

221 See Chapter 10, Section C.

222 *PBA*, Reg, s 30.

223 *PBA*, s 75(1)(b). Included here are amounts required to be paid by an employer to maintain the "50 percent cost-sharing" level required by *PBA*, s 39(3) (see Chapter 5, Section C(5)(d)) and all benefits guaranteed by the PBGF. The employer must pay the amount by which the Ontario wind up liability, exclusive of the unfunded portion of non-plan-vested benefits, exceeds the value of plan assets allocated for payment of pension benefits accrued with respect to employment in Ontario. The employer is not liable for the unfunded portion (based on the wind up funded ratio) of non-plan-vested benefits: FSCO Policy W100-102 (December 2004).

In determining who the employer is for the purpose of funding a wind-up liability, the relevant criterion is which person or organization pays remuneration to the employees accruing benefits in the pension plan.[224]

If an employer in a prior year has paid more than its minimum-required contributions, it may apply all or a portion of the so-called "prior year credit balance" against the normal cost or special payments due and not yet paid on the wind-up date.[225]

Generally, the employer may either fund the wind-up deficiency immediately or, failing which, the wind-up report must set out a proposal for the funding over a period of time. In the event the employer funds the wind-up deficiency immediately, the Superintendent may proceed with approving the wind-up report as if there was no deficiency arising on the wind up.[226] If the wind-up deficiency is not paid off immediately, the proposal in the wind-up report must generally provide for the employer to pay it off, at a minimum, by equal annual instalments over a five-year period.[227]

Until the wind-up liability is fully funded by the employer, the plan's funded status must be reviewed annually by an actuary and the administrator must file supplementary wind-up reports on the same basis.[228] Most other jurisdictions have similar rules.[229]

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224 *Victorian Order of Nurses for Canada v Ontario (Superintendent of Financial Services) et al* (2008), 78 CCPB 244 (Ont FST).

225 See *PBA*, Reg, ss 4(3), 5(13), and 5(16)–(16.2) and FSCO Policy W100-106 (September 2008).

226 Where the employer funds the deficit by a lump-sum payment and the actuary files a certification that all wind-up liabilities have been fully funded, the benefits can be paid: FSCO Policy W100-102 (December 2004).

227 *PBA*, s 75(2) and Reg, s 31(2). As a minimum, the deficit must be funded by annual special payments, payable annually in advance, over a maximum period of five years commencing at the effective date of wind up: FSCO Policy W100-102 (December 2004).

228 *PBA*, Reg, s 32. The annual supplementary actuarial report must be prepared by an actuary and must satisfy all standards normally applicable to a valuation report. The report should provide a gain and loss analysis for the period since the last report filed and specify the special payments required to liquidate the remaining wind up liability obligation. Where a report shows that no further amount is to be funded, any surplus may revert to the employer, subject to the surplus withdrawal procedures and requirements in the *PBA*: see FSCO Policy W100-102 (December 2004).

229 Federal (*PBSA*, s 29(6) and Reg, ss 8–9); Alberta (*AEPPA*, s 73 and Reg, ss 48, 55, and 63); British Columbia (*BCPBSA*, s 51 and Reg, ss 35(3.1)–(3.3)); Manitoba (*MPBA*, s 26(3) and Reg, ss 4.5, 4.6, 4.7, and 7.11); New Brunswick (*NBPBA*, s 65(4) and Reg, s 49(12)); Newfoundland and Labrador (*NLPBA*, s 61 and Reg, s 25); Nova Scotia (*NSPBA*, s 80 and Reg, s 38); Quebec (*QSPPA*, ss 228 & 229);

During the period that an employer is making special payment to fund a wind-up deficiency, the *PBA* permits certain pension benefits to be reduced to an amount proportionate to the extent that the benefits had been funded.[230]

e) Employer is insolvent and plan has a wind-up deficiency

A wind-up report may disclose a wind-up deficiency, yet the employer is unable to fund it because the employer is insolvent or bankrupt. In fact, this may have been the reason for the plan being wound up in the first place.[231] Such a scenario is disastrous for both the employer and the employees and is the worst possible scenario that can arise on a plan wind up.

As a result, employees will face potential reductions in their benefits. It is in this sense, where employees face potential reductions in their benefits, that employees bear significant risks by participating in defined benefit pension plans.

The general rule in the *PBA* is that where the money in a pension fund is not sufficient to pay all the pension benefits and other benefits on the wind up of the pension plan, the benefits must be reduced.[232] Ontario has unique rules regarding the manner of reductions because of the PBGF, which offers some benefit protection in the event of fund insolvency.[233] Subject to the application of the PBGF, employee benefits must be reduced by first refunding employee contributions to the employees, following which, remaining accrued pension benefits are reduced *pro rata* to the remaining wind-up deficiency.[234] Similar rules apply in other jurisdictions.[235] In the case of a wind up of a multi-juris-

Saskatchewan (*SPBA*, s 54(1)). In Nova Scotia, the employer does not have to fund any wind up deficiency related to grow-in benefits: (*NSPBA*, Reg, s 37(8))

230 *PBA*, Reg, s 29(9). See also *NSPBA*, Reg, s 37(7).

231 The employer's bankruptcy is an enumerated ground for the Superintendent to wind up a pension plan. See *PBA*, s 69(1)(c). See also Chapter 7, Section B(8).

232 *PBA*, s 77. See also British Columbia (*BCPBSA*, s 45(1)); Manitoba (*MPBA*, s 21(23)); New Brunswick (*NBPBA*, s 66); Newfoundland and Labrador (*NLPBA*, s 66); Nova Scotia (*NSPBA*, s 82); Quebec (*QSPPA*, s 216).

233 See Section C(5), below in this chapter, on the application of the PBGF.

234 *PBA*, Reg, ss 29(7)–(9), 30(2), and 33–34. See also FSCO Policy W100-441 (November 2011).

235 See Manitoba (*MPBA*, Reg, s 7.13); Nova Scotia (*NSPBA*, Reg, ss 37(6)–(8)). Some jurisdictions permit the prioritization of accrued benefits that do not have an unfunded liability ahead of accrued benefits that do have an unfunded liability, or otherwise permit benefits to be reduced in a manner approved by the Superintendent: Alberta (*AEPPA*, Reg, s 55(5) and Policy Bulletin #6), British Columbia (*BCPBSA*, Reg, s 39), New Brunswick (*NBPBA*, Reg, ss 49(6) and (8)(a), and 50), Newfoundland and Labrador (*NLPBA*, Reg, s 24), Saskatchewan

dictional pension plan in which there are insufficient assets to cover all benefits and wind-up liabilities, the method for allocating assets and reducing benefits among the employees in the jurisdictions other than where the plan is registered is dealt with in accordance with the requirements of each applicable jurisdiction.[236]

Where the employer is insolvent and the plan is being wound up in a deficit, employees become creditors of the insolvent company. Under the provincial law, the *PBA*'s "deemed trust" provisions are available to the employees to recover employer contributions that have accrued up to the date of the wind up, but have not yet become due,[237] although the extent to which the deemed trust will be operational in an insolvency proceeding depends on the nature of the proceeding. Where the insolvency leads to a proceeding under the *Bankruptcy and Insolvency Act* (*BIA*), the deemed trust is not available as the Supreme Court, in a series of cases, has held that a province cannot alter priorities under the *BIA* by creating a deemed trust.[238] Where an insolvent company attempts to restructure under the *Companies' Creditors Arrangement Act*, the deemed trust may still be operational.[239] However, the application of the deemed trust can be limited by the doctrine of paramountcy by a court making an order under the *Companies' Creditors Arrangement Act*.[240]

The Superintendent may approve agreements made by the relevant parties in restructuring proceedings under the *CCAA* and *BIA*.[241] The Superintendent may order the preparation of specified reports in these circumstances.[242]

f) MEPP and JSPP exceptions

The trade-offs of joint governance, whether it be in the form of a MEPP or a JSPP where an employer's contribution obligations to the pension plan are fixed in a collective agreement, are most pronounced on pen-

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(*SPBA*, s 40). In Quebec, the benefit reduction formula is based on a scheme that depends on how recently amendments were made to the plan conferring those benefits. Generally, the more recent the amendment the larger the proportional reduction in the benefit: *QSPPA*, s 216.

236 *PBA*, Reg, s 30 and FSCO Policy W100-102 (December 2004).

237 See Chapter 7, Section B(6). See also, *Indalex*, above note 214.

238 See, for example, *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24.

239 *Indalex*, above note 214 at para 52.

240 *Ibid* at para 60. See also *Re Timminco Ltd*, 2012 ONSC 948.

241 *PBA*, s 81.1. As of the date of publication, s 81.1 had not been proclaimed and regulations had not yet been released.

242 *PBA*, ss 87–88.

sion plan wind up.[243] Because of the unique nature of bargained contribution rates in MEPPs and JSPPs, the funding rules are different for such plans while they are ongoing.[244] They are also different when such a plan is wound up.

There are two significant differences that exist on a plan wind up between a MEPP or JSPP and a single-employer plan. First, when the administrator winds up a MEPP and the wind-up report discloses a wind-up deficiency, there is no obligation in the *PBA* for any one employer to fund the deficiency, even if the employers participating in the plan are solvent. In short, the *PBA*'s rules that require an employer to fund a plan's wind-up deficiency do not apply with respect to JSPPs.[245] Instead, an employer under a JSPP is only required fund benefits on wind up to the extent that the plan documentation requires it.[246] Moreover, employees participating in a JSPP are also required to fund benefits on wind up in accordance with the plan documentation.[247] Employees are made aware of these risks annually in their annual pension statements.[248]

Second, where a MEPP or JSPP is wound up with a wind-up deficiency, employees' benefits must be reduced, as they must be reduced in an employer-sponsored plan. However, the PBGF does not cover MEPPs and JSPPs. Employees are also advised of this risk annually in their annual pension statements.[249]

These two differences between MEPPs and JSPPs on the one hand, and employer-sponsored plans, on the other, is reflective of the fact that employers participating in the former need not pay premium assessments to the PBGF while the plan is ongoing; but it is also in further recognition, from a public policy perspective, that, absent any bargain to the contrary, employees who participate in the governance of their plans should bear as much risk in the plan as do the employers that jointly govern and contribute to it.

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243 On joint governance and plan design generally, see Chapter 6, Section A(1)(d), and Chapter 3, Sections B(1)(c) & (d).

244 See Chapter 7, Sections B(2)(b) and C(4)(f).

245 *PBA*, s 75(3).

246 *PBA*, s 75.1(1).

247 *PBA*, s 75.1(2).

248 *PBA*, Reg, s 40(1)(t)(ii) provides that the annual statement must state that "if, on wind up of the plan, the assets of the plan are not sufficient to meet the liabilities of the plan, pension benefits may be reduced."

249 *PBA*, Reg, s 40(1)(t)(i) provides that the annual statement must state that "the pension benefits established under the pension plan are not guaranteed by the Guarantee Fund."

g) Multi-Jurisdictional Pension Plans

Where a pension plan being wound up includes employees in more than one jurisdiction, the assets and liabilities must be identified and allocated by jurisdiction of employment. Each allocated portion of the pension fund is wound up in accordance with the legislation of that jurisdiction.[250] Any remaining assets are allocated among the different categories of employment in proportion to the allocation of the liabilities.[251]

5) Pension Benefits Guarantee Fund

a) Introduction

The Pension Benefits Guarantee Fund (PBGF) is unique to Ontario. The PBGF is an insurance fund established by the Ontario government in 1980 to protect employees participating in employer-sponsored defined benefit plans in cases of employer insolvency. The PBGF is designed to ensure that a specified level of pension benefits will be paid to employees in the event that a pension plan is wound up in a deficit position and the employer is insolvent and, therefore, unable to fund the wind-up deficiency. With the exception of certain types of designated, prescribed, and "qualifying" pension plans, all employers who sponsor a pension plan and who employ persons in Ontario are required to contribute annual premiums to the PBGF. The amount of employer premiums is based on a sliding scale "assessment" and employers who operate plans with the largest solvency deficiencies are required to contribute the largest premiums. The rationale behind this premium formula model is that employers with the largest solvency deficiencies presumably have the greatest cash flow concerns and, therefore, their employees are the most vulnerable.

Ontario is (and always has been) the only Canadian jurisdiction with a PBGF, although other jurisdictions have at times considered implementing one.[252] The United States has, since 1974, sponsored its own comparable insurance fund for private employment pension plans.[253] From a policy perspective, employees and trade unions are, not surprisingly, in favour of the PBGF since it increases the security of employee pension benefits. With the continued increase in employer insolven-

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250 FSCO Policy W100–108 (April 2008).

251 *PBA*, Reg, s 30(2)(d). See *PBA*, s 70; *PBA*, Reg, ss 30 and 35.

252 See, for example, the consultation paper by the Department of Finance Canada, *Strengthening the Legislative and Regulatory Framework for Defined Benefit Pension Plans* (Ottawa: Department of Finance, 2005).

253 Pension Benefits Guarantee Corporation, being Title IV to the *Employee Retirement Income Security Act, 1974,* 29 USC Chapter 18.

SULLIVAN
ON THE
CONSTRUCTION OF STATUTES

Sixth Edition

by

Ruth Sullivan

CHAPTER 7

Plausible Meaning

INTRODUCTION

§7.1 Most courts concede that departure from the ordinary meaning of a legislative text is permissible so long as the interpretation adopted is one that the words can reasonably bear. At first glance, this appears to establish a meaningful constraint on departures from ordinary meaning. However, for a number of reasons, some explored in this chapter, the constraint is more illusory than real.

§7.2 The Chapter begins by examining the plausible meaning rule and the frequently made claim that an interpretation that adds words to a legislative text is a form of amendment and is therefore impermissible. It draws attention to the distinction between reading down and reading in, which is often overlooked when such claims are made. An interpretation that adds words to a text so as to narrow (read down) its application is not necessarily impermissible.

§7.3 The Chapter ends with a look at the courts' jurisdiction to adopt a "strained" interpretation.

THE PLAUSIBLE MEANING RULE

§7.4 ***Formulation of the rule.*** Under Driedger's modern principle, a court's primary duty is to harmonize the grammatical meaning of the text with the other indicators of legislative intent gleaned from reading the text in the entire context. However, reliance on these other indicators is subject to the following constraint: the interpretation ultimately adopted must be one that the words of the text can reasonably bear. This is the plausible meaning rule.

In *Re: Sound v. Motion Picture Theatre Associations of Canada*, LeBel J. wrote: "Although statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament."[1]

In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, Charron J. wrote: "...The Court cannot disregard the actual words chosen

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[1] [2012] S.C.J. No. 38, 2012 SCC 38, at para. 33 (S.C.C.). See also *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. No. 73, [2002] 4 S.C.R. 3, at para. 58 (S.C.C.); *Ivanhoe Inc. v. United Food and Commercial Workers, Local 500*, [2001] S.C.J. No. 47, [2001] 2 S.C.R. 565, at para. 153 (S.C.C.); *Berardinelli v. Ontario Housing Corp.*, [1978] S.C.J. No. 86, [1979] 1 S.C.R. 275 at 284 (S.C.C.).

by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted."[2]

In *Saulnier v. Royal Bank of Canada*, Binnie J. wrote: "...We cannot wish away the statutory language however much practical sense is reflected in the result reached by the courts below."[3]

These are all expressions of the plausible meaning rule.

§7.5 ***Plausible meaning and adding words to the text.*** In resolving interpretation disputes, courts often reject a proposed interpretation on the grounds that to accept it would require the court to add words to the legislative text. The reasoning of the majority in *R. v. McIntosh*[4] is typical. In that case, the issue was whether the self-defence provision in s. 34(2) of the *Criminal Code* should be read as applying to non-provoked assaults alone, leaving provoked assaults to be dealt with exclusively under s. 35. In rejecting this interpretation, Lamer C.J. wrote:

> [T]he contextual approach allows the courts to depart from the common grammatical meaning of words where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually.... The Crown is asking this Court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function.[5]

Similarly, in *R. v. Hinchey*, the majority of the Supreme Court of Canada rejected the interpretation adopted by the minority on the grounds that it amounted to "a virtual rewriting of the provision":

> ... the effect of [my colleague's interpretation] is to add an additional physical and mental element to the provision. I would note that this element is not a feature of Parliament's drafting, but was read into the section by my colleague.[6]

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2 [2011] S.C.J. No. 25, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 40 (S.C.C.).

3 [2008] S.C.J. No. 60, [2008] 3 S.C.R. 166, 2008 SCC 58, at para. 15 (S.C.C.). See also *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. No. 73, [2002] 4 S.C.R. 3, at para. 58 (S.C.C.); *Ivanhoe Inc. v. United Food and Commercial Workers, Local 500*, [2001] S.C.J. No. 47, [2001] 2 S.C.R. 565, at para. 153 (S.C.C.); *Berardinelli v. Ontario Housing Corp.*, [1978] S.C.J. No. 86, [1979] 1 S.C.R. 275 at 284 (S.C.C.).

4 [1995] S.C.J. No. 16, [1995] 1 S.C.R. 686 (S.C.C.).

5 *Ibid.*, at 701. See also *Teva Canada Limited v. Sanofi-Aventis Canada Inc.*, [2014] F.C.J. No. 286, 2014 FCA 67, at para. 73 (F.C.A.); *Canada (Attorney General) v. British Columbia (Provincial Court)*, [2013] B.C.J. No. 543, 2013 BCCA 72, at para. 7 (B.C.C.A.); *Sam's Auto Wrecking Co. (Wentworth Metal) v. Lombard General Insurance Company of Canada*, [2013] O.J. No. 1413, 2013 ONCA 186, at paras. 42-43 (Ont. C.A.); *R. v. McColl*, [2008] A.J. No. 907, 2008 ABCA 287, at paras. 50, 54 (Alta. C.A.); *R. v. Druken*, [2006] N.J. No. 326, 2006 NLCA 67, at paras. 52-56 (Nfld. C.A.); *D.E. (Guardian ad litem) v. British Columbia*, [2005] B.C.J. No. 492, 2005 BCCA 134, at para. 27 (B.C.C.A.); *Bentley v. Canada (Employment Insurance Commission)*, [2002] F.C.J. No. 171, 2002 FCA 49, at para. 5 (F.C.A.).

6 [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128, at 1137 (S.C.C.).

...

> I repeat that judges should not attempt to rewrite a statute under the guise of interpreting it.[7]

It is difficult to know what to make of language such as this. In practice, courts add words to or otherwise rewrite provisions on a daily basis. In *National Trust Co. v. Mead*,[8] for example, the Supreme Court of Canada concluded that the true meaning of the words "successors and assigns" in s. 40(2) of the *Limitation of Civil Rights Act* was "corporate successors and assigns, or individual assigns where the mortgage has been assigned without an assumption agreement between the mortgagee and the assignee".[9] In effect, this added some dozen and a half words to the section; yet no one would suggest that the interpretive effort of the Court in this case was illicit or even unusual. Similarly, in *Metal Fabricating & Construction Ltd. (Trustee of) v. Husky Oil Operators Ltd.*, the Court interpreted the words "a payment to [a person] who is liable to pay withheld taxes" as meaning "a payment to [a person] who is liable to pay withheld taxes in a representative capacity in cases where the person is a legal representative."[10] Arguably in such cases, the court does not amend the legislation, but rather spells out in explicit terms what was implicit in the legislation.[11]

§7.6 ***Paraphrase vs. amendment.*** Judicial pronouncements on rewriting legislation presuppose a meaningful distinction between permissible paraphrase on the one hand and impermissible amendment on the other. When paraphrasing, interpreters restate the law declared by the provision in their own words; in effect, they redraft the provision so as to more clearly set out the law the legislature intended to enact. Such paraphrase inevitably adds words to or otherwise changes the wording of the text. This redrafting is permissible in so far as the paraphrase accurately expresses the legislature's intent.

§7.7 On this analysis, paraphrase is not just an acceptable part of interpretation; it is the essence of interpretation. It is the interpreter's best effort to accurately formulate the law the legislature intended to enact as it applies to particular facts.

§7.8 In contrast to paraphrase, amendment changes not just the words in which the law is expressed but the law itself. Such a change is illegitimate because it

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7 *Ibid.*, at 1151.

8 [1990] S.C.J. No. 76, [1990] 2 S.C.R. 410 (S.C.C.).

9 *Ibid.*, at 423-24.

10 [1997] S.J. No. 647, 153 D.L.R. (4th) 432, at 444-45 (Sask. C.A.).

11 Even in the heyday of literal construction, the courts always regarded implicit meaning as part of the literal or ordinary meaning of legislative language. As Lord Watson explained in a much quoted passage from *Salomon v. A. Salomon & Co.*, [1897] A.C. 22, at 38 (H.L.): "[W]hat the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words *or by reasonable and necessary implication.*" [Author's emphasis]

usurps the legislature's role. It is one thing to identify and give effect to the unstated or imperfectly stated intentions of the legislature; it is quite another thing to disregard those intentions.

§7.9 Although the distinction between paraphrase and amendment is crucial in statutory interpretation, it is not an easy one to draw. Much of the confusion in this area arises from the tendency of some courts to characterize any interpretation that adds words to a legislative text as amendment rather than paraphrase. This characterization ignores the important distinction between reading down and reading in. When this distinction is taken into account, amendment can be understood as consisting of (1) most if not all reading in and (2) reading down that cannot be persuasively justified.

§7.10 ***Reading down vs. reading in.*** The terms "reading down" and "reading in" are used in both statutory interpretation and Charter application. In statutory interpretation, they refer to interpretative techniques designed to give effect to the intended scope of legislation; in Charter application, they refer to remedies designed to adjust the intended scope because the legislation as enacted violates guaranteed rights or freedoms in a way that cannot be justified under s. 1. In both contexts, however, reading down refers to narrowing the scope of a legislative provision, while reading in refers to expanding its scope.[12]

§7.11 The point to be made here is that reading down and reading in may *both* require the interpreter to add words to the legislative text. The difference lies in the impact of the added words: reading down adds words of *restriction or qualification*, whereas reading in adds words that *expand* the reach of the legislation.[13]

§7.12 In *Montréal (City) v. 2952-1355 Québec Inc.*,[14] for example, the Supreme Court of Canada had to interpret art. 9(1) of Montreal's Noise By-law, which was in the following terms:

> **9.** ... [T]he following noises, where they can be heard from the outside, are specifically prohibited:
>
> (1) noise produced by sound equipment, whether it is inside a building or installed or used outside;

A majority of the court interpreted this provision to mean that noise was prohibited only if it interfered with the peaceful enjoyment of the environment. In effect, the court added the words "that interferes with the peaceful enjoyment of the environment" to the text of s. 9(1) after the word "noise". The effect of do-

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12 For further discussion of reading down and reading in the context of statutory interpretation, see Chapter 9, at §9.74-9.75; for discussion of reading down and reading in the Charter context, see Chapter 16, at §16.16-16.19.

13 The scope of a text may also be enlarged by striking words of restriction or qualification. Striking words is discussed below at §12.34*ff.*

14 [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 (S.C.C.).

ing so was to narrow the scope of the provision so that not all noise heard outside a building was captured, but only disruptive noise. In his dissenting judgment in the case Binnie J. characterized the majority's interpretation as amendment:

> In my view, with respect, my colleagues resort to a combination of reading expressions "up", reading expressions "down", reading words "out" and reading words "in" that goes beyond what a court is authorized to do by way of interpretation and amounts to impermissible judicial amendment.[15]

McLachlin C.J. did not accept this characterization. She wrote:

> The historical and purposive analysis of the provision enabled us to determine that the lawmaker's purpose was to control noises that interfere with peaceful enjoyment of the environment....The delimitation of the By-law's scope does not, as Binnie J. claims, constitute judicial amendment that is inconsistent with the plain meaning of the provision. Rather, it is the result of a judicious interpretation that resolves the provision's ambiguity in accordance with the modern approach to interpretation.[16]

The majority decision in the Montreal By-law case is an example of reading down. Whether the majority's interpretation is legitimate depends on whether its reasons for limiting the scope of the legislation are justified by cogent indicators of legislative intent and relevant legal norms. It may or may not meet this test, but it cannot be dismissed as illegitimate simply because it adds words to the legislative text.[17]

§7.13 At first glance, reading down and reading in may seem to be symmetrical techniques and remedies, two sides of the same coin. However, the courts are right to distinguish them and to be much more cautious in using the reading in technique or remedy. As an interpretation technique, reading down merely makes explicit what the court finds to be implicit in the legislative text. It is impossible for drafters to spell out every qualification or limitation that might ap-

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15 *Ibid.*, at para. 110.

16 *Ibid.*, at para. 34. See also *R. v. Boudreault*, [2012] S.C.J. No. 56, 2012 SCC 56, at paras. 9, 32-33 (S.C.C.); *Blue Mountain Resorts Limited v. Ontario (Labour)*, [2013] O.J. No. 520, 2013 ONCA 75, at para. 59 (Ont. C.A.); *Felipa v. Canada (Citizenship and Immigration)*, [2011] F.C.J. No. 1355, 2011 FCA 272, at paras. 17, 66 (F.C.A.); *Manitoba Public Insurance Corp. v. University of Waterloo et al.*, [2007] M.J. No. 321, 2007 MBCA 107, at paras. 44-46 (Man. C.A.).

17 See *Apotex Inc. v. Merck & Co. Inc.*, [2009] F.C.J. No. 712, 2009 FCA 187, [2010] 2 F.C.R. 389, at paras. 88-89 (F.C.A.), leave to appeal refused [2009] S.C.C.A. No. 347 (S.C.C.), where the Noel J.A. on behalf of the Court wrote: "The Federal Court Judge confronted this argument (reasons, at paragraphs 98 to 101). In particular, he ... endorsed the view that 'reading down' as opposed to 'reading in' is a legitimate technique of statutory interpretation to the extent that a contextual interpretation indicates that a narrow scope was intended. In this case adding the word 'lost' narrows the scope of the expression 'damages or profits' and therefore 'reads down' the provision in a manner that is consistent with the intent of Parliament. I can detect no error in this reasoning."

propriately apply in a given set of circumstances. Otherwise, provisions would go on for pages. Modern legislation is drafted in general terms, effectively delegating to official interpreters the work of adapting the language to particular facts and reading down its scope when there is a good reason to do so.

§7.14 Reading in is different. It does not purport to operate within the scope of the legislative text, but rather to expand that scope to matters that are neither explicit nor implicit in the legislation. It expands legislation to matters that cannot come within any plausible understanding of the wording adopted by the legislature.

§7.15 ***Failure to distinguish reading down and reading in.*** The problems that arise from failure to distinguish between words of qualification and words of expansion can be seen in the dissenting judgment of the Supreme Court of Canada in *Bristol-Myers Squibb Co. v. Canada (Attorney General).*[18] The issue there was the scope of s. 5(1.1) of the *Patented Medicines (Notice of Compliance) Regulations* made under the *Patent Act.* The Regulations were made in part to clarify the rights of generic drug manufacturers. Subsection 5(1.1) applied "where a person files ... a submission for a notice of compliance in respect of a drug that contains a medicine found in another drug that has been marketed in Canada pursuant to a notice of compliance issued to a first person and in respect of which a patent list has been submitted." The majority adopted a restrictive interpretation of this language, excluding submissions where the "medicine found in another drug" was not itself subject to a patent. This narrow interpretation was justified primarily on two grounds. First, as drafted, the provision was over-inclusive and had to be read down to bring it in line with its limited purpose. Second, reading down was necessary to avoid the absurdity that would result from the broader interpretation.

§7.16 The dissent's response to this reading characterized it as amendment rather than interpretation because it added words to s. 5(1.1):

> Biolyse's interpretation [which was adopted by the majority] would require the Court to read in the term "patented" in s. 5(1.1), something that would go entirely against a plain reading of the section which clearly refers to "medicine" a defined term. It has been recognized that in interpreting a statute or regulation words should not be added or deleted, and the readers should not try to fill in any gaps that they think they see....[19]
>
> ... Biolyse urges the Court to read into the NOC Regulations words which do not appear. Such a demand, as acknowledged by the Federal Court of Appeal, is tantamount to crossing the line between judicial interpretation and legislative redrafting....[20]

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18 [2005] S.C.J. No. 26, [2005] 1 S.C.R. 533 (S.C.C.).

19 *Ibid.*, at para. 117.

20 *Ibid.*, at para. 174.

The dissent's failure to distinguish words of limitation from words of expansion invites confusion — as evidenced by the following:

> Contextual interpretation does not justify departures from ordinary rules of statutory interpretation; in particular, reading in words cannot be justified in the absence of a demonstrable ambiguity.[21]

In so far as this passage suggests that adding *qualifying* words to a text is inappropriate save in cases of demonstrable ambiguity, it is inconsistent with Driedger's modern principle. Contextual interpretation is the very tool required to determine whether reading down is permissible, that is, to determine whether it can be justified as interpretation or must be condemned as amendment. Furthermore, in so far as the passage suggests that reading in (as defined here)[22] is permissible given a demonstrable ambiguity, it is highly questionable.[23]

§7.17 As shown by *Dupuis v. Manitoba Public*,[24] courts have also been known to mischaracterize a refusal to read down as illicit reading in. The legislation at issue in *Dupuis* was s. 70(1)(c) of the definition of "dependent" in the *Manitoba Public Insurance Corporation Act*:

> (c) a person whose marriage to the victim has been dissolved by a final judgment of divorce or declared null by a declaration of nullity of marriage, and who, at the time of the accident, is entitled to receive support from the victim under a judgment or agreement....[25]

The question was whether the respondent was a dependent of her former husband, a victim of a fatal car accident. At the time of death, the former husband was subject to a judicial order to pay the respondent monthly child support. At first instance, the Automobile Injury Compensation Appeal Commission held that the respondent was "entitled to receive support" within the meaning of paragraph (c) even though the support was for her children. On appeal, the Court of Appeal held that the support referred to in the paragraph "must be support payable to and for the person identified in that sub-paragraph."[26] It later wrote: "The Commission, in its zeal to provide a wide and liberal interpretation to the provisions of the *Act*, must still do so within the context of the *Act*. This it has not done in the present case. It is reading in words and/or definitions that are simply not there. In doing so, it was in error."[27]

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21 *Ibid.*, at para. 103.

22 The dissenting judges probably use the expression "reading in" to mean "adding words to the provision". But even on that reading, the statement is misleading. Ambiguity is not a prerequisite to paraphrasing a text so as to spell out its intended scope in that context.

23 The courts' jurisdiction to read in or cure gaps in the legislative scheme is considered in Chapter 12.

24 [2007] M.J. No. 127, 2007 MBCA 53 (Man. C.A.).

25 C.C.S.M., c. P.215.

26 *Dupuis v. Manitoba Public Insurance Corp.*, [2007] M.J. No. 127, 2007 MBCA 53, at para. 14 (Man. C.A.).

27 *Ibid.*, at para. 17.

§7.18 In fact, it is the Court of Appeal that has added words to the definition, namely "payable to and for the person" after the word "support". Since these are words of limitation, the Court of Appeal has read down the definition; and, since dependent children of the victim are dealt with elsewhere in the definition, this reading down appears to be well justified. The Commission was not guilty of reading in, but rather of failing to read down when there was a good reason to do so.

§7.19 To summarize, while reading in may on occasion be justified as a constitutional remedy, it is not ordinarily considered a legitimate interpretive technique; it is ordinarily considered to amend the text rather than paraphrase it. Reading down, on the other hand, is a legitimate interpretive technique provided the reasons for narrowing the scope of the legislation can be justified. The fact that an interpretation requires the addition of words to a text is not in itself a reason to reject it.

§7.20 ***Plausible meaning as a constraint on interpretation.*** In principle, the plausibility requirement is an important constraint on interpretation: the range of meanings that can plausibly be attributed to a text constitutes an outer limit within which interpretation must occur if it is to be legitimate. In practice, however, there is less to this constraint than meets the eye. The first problem is that the concept of plausible meaning is vague and has been left largely unexplored by the courts. Before the rise of textualism,[28] plausibility was assessed primarily in terms of intention: an interpretation was plausible if it promoted the legislature's goals. Since the rise of textualism, plausibility has been assessed primarily in terms of language: an interpretation is plausible if the words of the text can reasonably bear that meaning. On this approach, plausibility turns on the linguistic intuitions of the interpreter. These intuitions obviously differ among interpreters, and in cases of disagreement there is no way for courts to critically assess competing intuitions and determine which should prevail. While judges are competent language users, they are not linguists.

§7.21 The capacity of the plausible meaning rule to discipline interpretation is further undermined by the rules and doctrines that permit courts, in some circumstances, to adopt a strained interpretation or to cure a drafting error. And even though courts cannot fill gaps in a legislative scheme, in some circumstances they can rely on implied meaning or the common law to do so. Finally, courts have a limited jurisdiction to discourage measures that defeat the spirit of legislation while ostensibly complying with its letter.[29]

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28 For an explanation of "textualism" and its place in the evolution of statutory interpretation, see Chapter 2, at §2.23.

29 The courts' jurisdiction to cure drafting errors, fill gaps and defeat avoidance measures is examined in Chapter 12.

judgments about the ambiguity of a text are apt to vary from one interpreter to the next.

§15.16 ***Overview.*** In this chapter, presumed intent is dealt with under the following headings:

- strict and liberal construction
- strict construction of penal legislation
- strict construction of legislation that takes away rights
- strict construction of legislation that derogates from established law
- liberal construction of social welfare legislation
- presumptions of fault
- explicit policy analysis

Presumptions respecting the entrenched constitution, common law and international law are dealt with in subsequent chapters.

STRICT AND LIBERAL CONSTRUCTION

§15.17 ***Traditional distinction.*** Under the doctrine of strict and liberal construction, statutes are regarded as falling into one of two classes: penal or remedial. Historically, penal statutes were broadly defined as statutes that curtailed liberty or took away property or otherwise interfered with the rights of subjects. To protect individuals from the superior power of the state, penal statutes received a strict construction. The concept of remedial statutes was less sharply defined. This category included statutes designed to cure mischief, advance religion or confer public benefits.[19] In keeping with their benevolent purpose, remedial statutes were liberally construed.[20]

§15.18 The difference between strict and liberal construction is largely one of attitude and elasticity. Legislation that is strictly construed is applied with reluctance, as sparingly as possible. General terms are read down; conditions of application are fully and carefully enforced. Any doubts or ambiguities are resolved in favour of non-application. Liberal construction, by contrast, favours and facilitates the application of legislation to advance the remedial goal. The language of the statute is applied as fully as the conventions of meaning permit. Technicalities and formalism are avoided. If reasonable doubts or ambiguities arise, they are resolved in favour of those seeking the benefit of the statute.

§15.19 Historically, it seems, the penal impact of legislation was more apparent to judges than its benevolent social purpose. Corry points out that after 1700 few statutes were found to be remedial. During the eighteenth and nineteenth

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19 J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1936), 1 U. Toronto L.J. 286, at 296.

20 *Ibid.*, at 296-98.

centuries, strict construction was a potent weapon against legislative initiatives that were judged to interfere unduly with liberty or rights.[21]

§15.20 ***Modern approach.*** In all Canadian jurisdictions, the legislature has attempted to abolish judicial reliance on strict construction by enacting a provision along the following lines.

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.[22]

In the clearest possible language, this statutory directive abolishes the distinction between strict and liberal construction and requires all legislation, penal legislation included, to be interpreted in a purposeful manner, regardless of the impact on private rights or freedom. Initially this provision did little to stop the courts from relying on strict construction. In fact, for many years the provision was largely ignored.[23] However, in recent decades, as the courts have come to adopt a purposive approach to interpretation, they have come to see the remedial side of legislation and to accept that it should be liberally interpreted so as to achieve the legislative purpose.[24]

§15.21 The modern attitude toward remedial legislation is illustrated by the judgment of the Supreme Court of Canada in *Clarke v. Clarke*.[25] After reviewing the objects of Nova Scotia's *Matrimonial Property Act*, as set out in its preamble, the Court concluded:

> ...The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized. In interpreting the provisions of the Act the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction which will give effect to that purpose.[26]

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21 *Ibid.*

22 R.S.C. 1985, c. I-21, s. 12. See also R.S.A. 2000, c. I-8, s. 10; R.S.B.C. 1996, c. 238, s. 8; C.C.S.M. c. 180, s. 6; R.S.N.B. 1973, c. I-13, s. 17; R.S.N.L. 1990, c. I-19, s. 16; R.S.N.S. 1989, c. 235, s. 9(5); S.O. 2006, c. 21, Sch. F, s. 64(1); R.S.P.E.I. 1988, c. I-8, s. 9; CQLR, c. I-16, s. 41 [am. 1992, c. 57, s. 602]; S.S. 1995, c. I-11.2, s. 10; R.S.N.W.T. 1988, c. I-8, s. 10; R.S.N.W.T. (Nu) 1988, c. I-8, s. 10; R.S.Y. 2002, c. 125, s. 10.

23 See E. Tucker, "The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peter's" (1985), 35 U.T.L.J. 113.

24 See, for example, *Re Canada 3000*, [2006] S.C.J. No. 24, [2006] 1 S.C.R. 865, at para. 84 (S.C.C.); *Kelvin Energy Ltd. v. Lee*, [1992] S.C.J. No. 88, [1992] 3 S.C.R. 235, at 256-57 (S.C.C.); *Canadian Assn. of Industrial, Mechanical & Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] S.C.J. No. 107, [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437, at 480 (S.C.C.); *Re British Columbia Development Corp. v. Friedman (Ombudsman) and Attorney General for British Columbia*, [1984] S.C.J. No. 50, [1984] 2 S.C.R. 447, at 137 (S.C.C.).

25 [1990] S.C.J. No. 97, [1990] 2 S.C.R. 795 (S.C.C.).

26 *Ibid.*, at para. 21. See also *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 31, 33-34 (S.C.C.).

§15.22 Acts designed to correct injustice or to protect vulnerable groups from unfair treatment or hardship are "remedial" in an obvious sense. However, the concept is not limited to this type of legislation but extends to any legislation designed to secure a social benefit or correct a defect in existing law. In *Elan Corp. v. Comiskey*, for example, the Ontario Court of Appeal classified the *Companies' Creditors Arrangement Act* as remedial. Doherty J.A. wrote:

> Before turning to these issues, it is necessary to understand the purpose of the Act and the scheme established by the Act for achieving that purpose. The Act first appeared in the midst of the Great Depression.... The Act was intended to provide a means whereby insolvent companies could avoid bankruptcy and continue as ongoing concerns through a reorganization of their financial obligations. ...
>
> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> ...
>
> The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose...[27]

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27 [1990] O.J. No. 2180, 1 O.R. (3d) 289, at 306-307. In *Kerr v. Danier Leather Inc.*, [2007] S.C.J. No. 44, [2007] 3 S.C.R. 331 at para. 32 (S.C.C.), the Supreme Court of Canada wrote: "The *Securities Act* is remedial legislation and is to be given a broad interpretation ... It protects investors from the risks of an unregulated market... The Act supplants the 'buyer beware' mind set of the common law with compelled disclosure of relevant information." In *Richardson Greenshields of Canada Ltd. v. Kalmacoff*, [1995] O.J. No. 941, 22 O.R. (3d) 577 (Ont. C.A.), leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 260 (S.C.C.), the Court found s. 339 of Ontario's *Trust and Loans Companies Act* establishing a derivative action for shareholders to be remedial. See also *Castonguay Blasting Ltd. v. Ontario (Environment)*, [2013] S.C.J. No. 52, 2013 SCC 52, [2013] 3 S.C.R. 323, at para. 9 (S.C.C.); (*Environmental Protect Act* is remedial); *Westmount (City) v. Rossy*, [2012] S.C.J. No. 30, 2012 SCC 30, [2012] 2 S.C.R. 136, at paras. 21, 47, 51 (S.C.C.) (Quebec's no-fault insurance scheme is remedial); *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] S.C.J. No. 6, [1997] 1 S.C.R. 32, at paras. 20-22 (S.C.C.) (*Expropriation Act* is remedial); *BL v Saskatchewan (Ministry of Social Services)*, [2012] S.J. No. 201, 2012 SKCA 38, at para. 66 (Sask. C.A.) (child welfare legislation is remedial); *2130489 Ontario Inc. v. Philthy McNasty's (Enterprises) Inc.*, [2012] O.J. No. 2521, 2012 ONCA 381, at para. 26 (Ont. C.A.) (legislation governing franchise agreements is remedial); *Ontario (Disability Support Program) v. Walsh*, [2012] O.J. No. 2980, 2012 ONCA 463, at para. 23 (Ont. C.A.) (*Ontario Disability Support Program* Act is remedial); *Ontario (Ministry of the Environment) v. Castonguay Blasting Ltd.*, [2012] O.J. No. 1161, 2012 ONCA 165, at para. 31 (Ont. C.A.), affd [2013] S.C.J. No. 52 (S.C.C.) (environmental protection acts are remedial); *Credit Canada Limited v. Welcome Ford Sales Ltd.*, [2011] A.J. No. 592, 2011 ABCA 158, at para. 43 (Alta. C.A.) (*Bankruptcy and Insolvency Act* is remedial); *VSL Canada Ltd. v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2011] N.B.J. No. 281, 2011 NBCA 76, at para. 38 (N.B.C.A.) (workers compensation legislation is remedial); *Tarion Warranty Corporation v. Kozy*, [2011] O.J. No.

While judicial respect for the remedial impulses of the legislature is an important and salutary development, the direction set out in s. 12 and other Canadian Interpretation Acts is not happily formulated. It was introduced at a time when legislation was normally drafted in precise and very detailed terms. For such legislation, it makes sense to require interpretation to be both purposeful and liberal. However, for legislation drafted in general terms, a purposeful interpretation often requires a restrictive interpretation — one in which the scope of the general language is narrowed so as to exclude applications that are outside the purpose.

§15.23 The legislative direction to interpret *all* legislation as remedial is also unfortunate in so far as it suggests that courts should no longer rely on the values underlying strict construction — the enjoyment of individual liberty, privacy, property rights and the like. While these are not the only values worth protecting, they remain an important part of Canadian legal culture. Legislation that invades privacy or takes away rights *should* be interpreted strictly — unless other, more compelling considerations suggest otherwise.

STRICT CONSTRUCTION OF PENAL LEGISLATION

§15.24 ***The strict construction rule.*** Penal legislation is legislation that creates offences punishable by fine, imprisonment or forfeiture of a right or privilege. This includes all offences found in the *Criminal Code*. Whether it includes regulatory offences is more doubtful. In *Merk v. Local 771*, responding to the argument that the provision to be interpreted should receive a strict construction, Binnie J. wrote:

> In my view, with respect, this approach is of limited value when interpreting a regulatory statute such as *The Labour Standards Act*. If it is concluded in all the relevant circumstances that the legislature intended a broad approach, that is the approach that will be adopted.[28]

§15.25 Because of the potential for serious consequences, penal legislation is strictly construed. In *Marcotte v. Canada (Deputy A.G.)*, Dickson J. wrote:

> No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be

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5768, 2011 ONCA 795, at para. 13 (Ont. C.A.) (*Ontario New Home Warranty Program Act* is remedial).

28 *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 771*, [2005] S.C.J. No. 72, [2005] 3 S.C.R. 425, at para. 33 (S.C.C.). See also *R. v. Agpro Grain Inc.*, [1996] S.J. No. 177, at para. 26 (Sask. Q.B.): "I conclude that the legislation and regulations in issue here should be interpreted purposely rather than strictly. The offences created are … regulatory offences and 'not true criminal offences'…."

December 17, 1996 HOUSE OF ASSEMBLY PROCEEDINGS Vol. XLIII No. 55

The House met at 2:00 p.m.

MR. SPEAKER (Snow): Order, please!

The members will have noted by now that there has been placed on each member's desk a personalized copy of the Bible, and this is presented by Gideons International, along with a letter which outlines the work that the Gideons International have been doing throughout the world.

In that regard the Chair would like to welcome a delegation to the Speaker's Gallery today, led by Mr. Laurie Chaulk, who is the field representative from Atlantic Canada, and Hazel Chaulk, the national president of the Ladies Auxiliary, and a number of representatives from the St. John's and Mount Pearl chapters of Gideon International.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Minister of Health.

MR. MATTHEWS: Thank you, Mr. Speaker.

I am delighted today to be joined in the Speaker's Gallery by a number of friends and colleagues from the Gideon organization, an organization with which I have had some association, and continue to, for the past twenty years.

For those of you who may not be familiar, in the unlikelihood that there is anybody who is not familiar with the organization known as Gideons International, I might just refresh your memory and mind by saying that it is an interdenominational group of business people and lay people who over the past seventy odd years have worked together across denominational lines to provide Scriptures to people in at least 172 countries of the world.

Mr. Speaker, the aim and objective of the organization is to ensure that individuals, to the greatest extent possible, have access to the Holy Scriptures for their personal use, and to that extent the Gideons have a long and historic record of programming that sees that happen in Grade V classes in all of our schools in the country where access is available, and that includes most of the schools of this Province.

In addition to that, of course, you will be familiar with the Gideon Bible as being something that is readily seen in hotel rooms, and in prisons and hospitals and other areas.

I am delighted as being one of the Gideon brethren that is here today to say on behalf of all members, I believe, of this Legislature, thank you to them for their consideration, for their diligence in not only ensuring that we have available to us in this Chamber and this House, as legislators, a copy of the Holy Scriptures, but also in the broader endeavour in which they work, and that is providing Scriptures generally around the world.

Thank you very much, Mr. Speaker, and thank you to the Gideons.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I wish to join with my colleague, the Minister of Health, to share his comments relative to the work of the Gideons not just in Newfoundland and Labrador and throughout the country, indeed, throughout the world.

Mines and Energy; the hon. the Minister of Education; Mr. Lush; Mr. Penney; the hon. the Minister of Works, Services and Transportation; the hon. the Minister of Development and Rural Renewal; the hon. the Minister of Tourism, Culture and Recreation; the hon. the Minister of Government Services and Lands; Mr. Oldford; Mr. Canning; Mr. Smith; Mr. Ramsay; Ms Hodder; Mr. Woodford; Mr. Mercer; Mr. Reid; Ms Thistle; Mr. Sparrow; Mr. Wiseman.

MR. SPEAKER: All those against, please stand.

CLERK: The hon. the Leader of the Opposition; Mr. Hodder; Mr. Shelley; Mr. Edward Byrne; Mr. Fitzgerald; Mr. Jack Byrne; Mr. Osborne; Mr. Ottenheimer; Mr. French; Ms Jones.

Mr. Speaker, twenty-five `ayes' and ten `nays'.

MR. SPEAKER: I declare the motion carried.

On motion, a bill, "An Act To Implement The Comprehensive Integrated Tax Coordination Agreement Between The Government Of Canada And The Government Of Newfoundland And Labrador," read a second time, ordered referred to a Committee of the Whole House on tomorrow. (Bill No. 45)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I understand we are going to break for supper at 6:00 p.m. but I would like, before we do that, to call second reading of a bill, "An Act Respecting Pension Benefits". (Bill No. 46)

Motion, second reading of a bill, "An Act Respecting Pension Benefits". (Bill No. 46)

MR. SPEAKER: The hon. the Minister of Government Services and Lands.

MR. McLEAN: Thank you, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. McLEAN: I rise to introduce second reading to a new Act called the Pensions Benefits Act. This Act was originally initiated by the Department of Finance back through the reform process and, Mr. Speaker, the new Act has many positive aspects. It brings our provincial legislation in line with that of other Canadian jurisdictions and provides for the affordability of pensions within the Province and within Canada.

Mr. Speaker, I will just read off a few of the notes from the new Act so that if there is any further discussion and questions we could do it in Committee or third reading - Committee, I guess.

It provides fair and consistent treatment to employees and enhances benefits for members of pension plans. It promotes increased security of pension benefits and assists Newfoundlanders and Labradorians in preparation for retirement.

This Act provides, among other benefits, protection of spouses, including recognition of common-law spouses upon death of a member, and a framework for a division of benefits upon marriage breakdown.

This new bill enables employees to be members of pension plans earlier than previously permitted. It now enables part-time employees to be members of pension plans, as well.

Mr. Speaker, I am just highlighting a few of the items that are brought forward in this new pensions Act. It enables employees to receive benefits under a pension plan after two years of membership.

AN HON. MEMBER: How tall are you, `Ernie'?

SOME HON. MEMBERS: Hear, hear!

AN HON. MEMBER: What kind of shoes do you wear?

MR. McLEAN: I say to the member opposite, I am tall enough and I wear a man-sized shoe.

SOME HON. MEMBERS: Hear, hear!

MR. McLEAN: Mr. Speaker, this new bill also increases provisions to enable terminating plan members to transfer pension benefits upon termination of employment. These are new sections of this Act that were not in the previous one.

This new bill increases spousal protection upon death of a member before and after retirement. It introduces an earlier retirement option at age fifty-five. It recognizes common-law spouses for survivor benefits. This new bill also provides for spouses, following divorce or legal separation, to sever ties with the member and to receive their own pension covering the marriage period.

AN HON. MEMBER: Uh-oh!

SOME HON. MEMBERS: Hear, hear!

MR. McLEAN: He is getting married on New Year's Day, hey? You should have got married last week.

Mr. Speaker, this bill also ensures that benefits be equally cost-shared by employees and employers. It is called a 50 per cent rule, which will be part of the new benefits of this Act.

The new Pension Benefits Act addresses various pension issues in accordance with a national consensus on pension reform, and will serve to encourage employee participation in pension plans in the Province. This new Act brings it in line, certainly, with the other jurisdictions in Canada.

Pension plans are a vital part of the retirement income system for the Province and for Canada. The intent of the Pension Benefits Act is to provide minimum standards for all employer-sponsored pension plans in the Province, and to ensure monies that are allocated by employers and employees for retirement purposes are remitted on time, invested wisely, and used to provide retirement income.

Canada has three pillars in its retirement income system: Old age security, Canada Pension Plan, and employer-sponsored pension plans and personal retirement savings plans. The change in this portion of the population aged sixty-five and over will have a dramatic impact on the ability of government to fund the social security programs now in place. Employer-sponsored pension plans and personal retirement savings plans will continue to play a major role in assisting working Newfoundlanders and Labradorians and their families in preparing for retirement.

Mr. Speaker, the Pension Benefits Act regulates all employer-sponsored pension plans and ensures that monies contributed by both employers and employees are utilized for the purpose of providing retirement incomes.

While the Pension Benefits Act governs approximately 90,000 persons and 240 registered pension plans, the public sector plans, including MHAs, uniformed services, teacher and public service pension plans, will be exempt from the major provisions of the Act because of the funded liability.

Mr. Speaker, I am pleased to be able to introduce to second reading this legislation, which will provide increased pension benefits for workers in the Province.

Thank you, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Speaker.

Mr. Speaker, I am pleased to stand in my place today and say a few words with respect to this Bill 46.

MR. EFFORD: That is a note (inaudible).

MR. J. BYRNE: I just made a few notes as the minister was speaking, I say to the Minister of Fisheries and Aquaculture.

MR. EFFORD: The `Jack' attack.

MR. J. BYRNE: You should always pray that you never have a `Jack' attack, my son.

Mr. Speaker, the minister stood in his place and introduced this bill, and he talked about a lot of positive things coming from this bill, a lot of positive steps and amendments and so on.

MR. EFFORD: (Inaudible).

MR. J. BYRNE: There is no point in your talking to me across the House when I am talking because I cannot hear you, I say to the Minister of Fisheries and Aquaculture, unless you speak up.

Mr. Speaker, he talked about many positive aspects of this proposed legislation. He says now that it is going to be in line with other Canadian jurisdictions, and that very well, in itself, may be a good thing. But it appears to me, this Administration seems to think anything that is good on the mainland, or anything that is operating on the mainland of Canada, is automatically a good thing for the people of Newfoundland and Labrador. In actual fact, in most instances it is a matter of fact that you have to wait and see whether, indeed, it is a good thing for the people of Newfoundland and Labrador, when they are putting in legislation that is comparable to other provinces in the country.

The minister talked about the portability of pensions. Obviously, that can be a good thing for people who are in the pension plans, that they can transfer -

MR. EFFORD: (Inaudible).

MR. J. BYRNE: I can adjourn the debate at any time at all, I say to the Minister of Fisheries and Aquaculture, if he wants.

The portability of pensions can certainly be a good item. It can be a positive thing for the people who are involved in the various pensions that this bill covers and applies to.

The explanatory note of this bill - it is a very thick bill; it is something like the Minister of Fisheries and Aquaculture. This bill would revise the law respecting pension benefits. It is a very short explanation but a very thick, thick bill.

The minister did not go into a lot of detail with respect to the - he said it enhances the benefits.

MR. EFFORD: (Inaudible) clause-by-clause.

MR. J. BYRNE: I say to the Minister of Fisheries and Aquaculture, we will be getting into it clause-by-clause. It may come sooner than you think, and you may be sorry you said that. Every member on this side of the House will probably be speaking to it clause-by-clause. I do not think that the members on the other side of the House will speak to it clause-by-clause, because there are quite a few clauses in this bill. Looking at it now, there are eighty-one clauses, Mr. Speaker. Can you imagine nine people - well nine, for sure, on this side of the House - getting up and speaking? Nine times eighty-one, Mr. Speaker, that would be quite a few speeches, I would say.

SOME HON. MEMBERS: Hear, hear!

MR. J. BYRNE: Now, they may have a calculator on that side of the House who can sit down and figure it out - well, sobeit.

MR. CANNING: You are turning red.

MR. J. BYRNE: Red? Well, it will be the first time I turned red here. The Member for Labrador West would not turn me red, I tell you that, Mr. Speaker.

You saw a prime example yesterday of what I thought of the colour red, especially when it is in print. I wiped off the desk, just like that, the red Liberal book. Mr. Speaker, the Minister of Finance -

MR. H. HODDER: (Inaudible).

MR. J. BYRNE: I do not know where it went. It may have crawled away somewhere, I say to the Member for Waterford Valley.

The minister was quite sincere in introducing this bill, no doubt about it, and he believes that everything is in it, no doubt in my mind. I am wondering, though, if the minister has actually sat down and read this clause-by-clause. I do not know whether he did or not, Mr. Speaker.

Now, the Minister of Fisheries -

MR. McLEAN: (Inaudible).

MR. J. BYRNE: Three times? Well, now, I have to put that on record, Mr. Speaker. The Minister of Government Services and Lands just said he read this bill three times. I have to compliment him. Now, if the Government House Leader is in agreement, I will adjourn debate and come back later and finish off my few words at 7:00 p.m.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: I am not going to do it yet. Now, the Minister of Industry, Trade and Technology - you can thank him. He is the one who had to butt in then and say something.

MR. TULK: `Jack', are you going to adjourn the debate or what?

MR. J. BYRNE: Not yet, no.

MR. TULK: Well, you said you would.

MR. J. BYRNE: I said, if the minister was in agreement I would.

MR. TULK: Well, I am ready.

MR. J. BYRNE: Okay, Mr. Speaker, seeing it is 5:57, I will adjourn debate. I will pick up on the Minister of Industry, Trade and Technology later.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, we have agreement that we will have supper and be back at 7:00 p.m.

MR. SPEAKER: It is the agreement that we recess until 7:00 p.m.

Recess

MR. SPEAKER (Penney): Order, please!

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Speaker.

I will just continue on with a few words, as I adjourned debate on Bill 46, "An Act Respecting Pension Benefits". As I said before, when the minister was on his feet introducing the bill he mentioned a number of points. He did not go into a lot of detail with respect to the bill, itself, but going through it, there are some good things. The minister referred to a few of them. He did not say a lot about them, but he did refer to them.

He talked about clauses in the bill with respect to preparation for retirement. Now, "An Act Respecting Pension Benefits" would be dealing with people's retirement, there is no doubt there. The one factor in the bill, not to get into clause-by-clause at this point - it is only second reading; but there is a clause there that deals with the definition of spouses and common-law spouses. What will happen in due course - there is nothing in the existing legislation, I believe, to actually define spouses or common-law spouses - in actual fact, the pensions now will be, I suppose, if a couple are living together for a certain period of time - I think it may be three years - they could be entitled to a percentage of a person's pension. That is probably a positive thing. I would imagine if a couple wants to spend three years or five years of their time together, they go through a lot of different events in their lives over that period of time and certainly, they should be entitled to that as if they were married. A married couple, of course, if they decide to split up, divorce, or what have you, this bill also addresses the situation with respect to divorce.

The bill also deals with the situation where, if a person is involved in a pension for over two years, I think the minister said, they would be entitled to refunds on the pensions if they decide to end their employment, I would imagine.

Back to divorce, the minister made a few comments on that. The pension covers marriage - well, I cannot read my own writing now, but -

AN HON. MEMBER: But you are making a lot of sense.

MR. J. BYRNE: I am making a lot of sense.

Mr. Speaker, this bill has a lot of potential. The point that the minister made with respect to the situation within Canada itself now, and how the future generations who are going to be requiring their pensions - for example, my parents were entitled to the Canada Pension, the old age pension, and the -

AN HON. MEMBER: Your parents are entitled to Canada Pension?

MR. J. BYRNE: The old age pension, and my father with respect to his own employment pension when he worked with the Federal Government. The way things are going in this day and age, with the way the economy is, and with the `baby boomers', as they are referred to, what is going to happen in the future with pensions in this country? I do not know if there are too many people who can answer that question at this point in time, but it certainly seems that people will have to basically fend for themselves. There is some doubt, too, as to whether the pensions - the Federal Government pensions, the old age pension, or what have you - will be sufficient in the future to cover all of the people who will be making claims on pensions, in particular, I suppose, the `baby boomers'. The `baby boomers' were, and are now at the present stage, Mr. Speaker, paying into pensions - they are paying into all the Federal Government pensions if they are employed, of course. And they will take advantage, hopefully, of drawing on those pensions.

The problem is, now, with the population decrease, certainly the population of Canada. In certain provinces, of course, the population is increasing, but we wonder at this time if, in the future, there will be enough people in the workforce to actually put sufficient money into it to cover the drastic drain on pension schemes in the future.

The minister mentioned about people having to put money aside for their own pensions in registered retirement savings plans. I imagine that is what he was referring to. Of course, there are a lot of private industry pensions

out there also, but it seems to be getting harder and harder all the time now to contribute to registered retirement savings plans. In order to survive these hard times, people seem to be drawing more and more upon their registered retirement savings plans.

The experts will tell you that is not a good thing to do, because, of course, when you withdraw from your registered retirement savings plans, you pay a heavy tax at that time. Also, it adds to your income for the year - if you are lucky enough to have registered retirement savings plans. It adds it to your income, so in actual fact, you may wind up paying higher income tax at the end of the year. You may be having to put a lot more money into the system than you took out to get over the hump. That is the sad part about registered retirement savings plans and the present state of the economy.

The minister spoke on a number of points. He talked about the transfer of pensions on the termination of employment. Now, I think that is a good move, that once a person is employed and wants to transfer his contributions to his pension plan, then he can transfer it. Of course, he would be able to carry the pension money with him. In actual fact, when I worked with the government back in 1983, after seven years - I left in 1983 - I transferred my pension, what little money I had coming to me, into a registered retirement savings plan. That was a good move for me at the time. Obviously, that type of thing is a positive step.

The other point that the minister mentioned was the 50 per cent rule. If I understand him correctly and read this right, the employer now will be required to contribute 50 per cent on any given pension plan. I am not quite familiar with that, but I would take it to say that in the old Act, from what I know, there was no actual definition of what an employer was required to contribute. This now will require employers to contribute 50 per cent.

MR. FUREY: (Inaudible).

MR. J. BYRNE: I would say what? I ask the Minister of industry, Trade and Technology. What did he say?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: I do not know what he said either - he is usually not that intelligent anyway. Mr. Speaker, I will continue on. The Minister of Industry, Trade and Technology is trying to say a few smart words over there. He very seldom gets on his feet to speak to bills. Only when he gets into Question Period, if he is asked questions, he tries to answer them; but he very seldom answers - he twists it.

AN HON. MEMBER: (Inaudible) only when he is told.

MR. J. BYRNE: Only when he is told. Do you have that much control? I ask the Government House Leader. Do you have much control over the Minister of -

MR. OSBORNE: `Jack', I have to correct you on that. He is one of the better ones for giving answers - most of them over there will not.

MR. J. BYRNE: You think now that is what I wanted to say? The Minister of Industry, Trade and Technology, if he gives an answer well, let us just say they are long-winded answers, for sure. He is very long-winded. He gets up to give an answer and you would not know but he is giving a speech. But at least he is on his feet every now and then speaking to whatever concerns that are presented.

MR. FUREY: (Inaudible) my member.

MR. J. BYRNE: Your member. I listened to what the member had to say. I do not necessarily agree with it, but I listened to what he had to say.

MR. FUREY: You disagree with your colleague, then?

MR. J. BYRNE: We disagree all the time on points of issue. It is a free, open party. We have our own opinions.

MR. FUREY: (Inaudible).

MR. J. BYRNE: What can I say? Well, I would not want you to be going up in that poll too often, I say to the Minister of industry, Trade and Technology, it puts too much pressure on you to stay there.

MR. TULK: Where is that brown envelope we carried over to you?

MR. J. BYRNE: The what?

MR. TULK: That brown envelope. `Roger' pulled that off on me some fast.

MR. J. BYRNE: Who?

MR. TULK: `Grimes'.

MR. J. BYRNE: I have no clue as to what you are talking about. The Government House Leader is trying to accuse his colleague over there now of doing something that I am not quite sure is very professional. But I know there was something that landed on my desk in a white envelope. I opened it up. God knows what was in it, I say to the Government House Leader. I do not know of what he is trying to accuse the Minister of Education, but he is accusing him of something.

Mr. Speaker, back to the 50 per cent rule - before, we got off the topic.

AN HON. MEMBER: Tickets to the Chrétien dinner last night, boy (inaudible).

MR. J. BYRNE: Tickets to the -

MR. FUREY: Do you have those notes read out yet, or what?

MR. J. BYRNE: Oh yes, Mr. Chrétien - the Prime Minister's dinner last night. I just saw him on the news and he said: `Well, I apologize for thinking. I made a mistake about thinking. I made a mistake if I was thinking.' Now, that is the statement the Prime Minister made. So he made a mistake if he were thinking. Thinking - now there you go.

MR. CANNING: (Inaudible).

MR. TULK: You are likely to go up on an air bus there now.

MR. J. BYRNE: The only time, I say to the Member for Labrador West, that I am not thinking, is when I am asleep.

MR. TULK: We will ship you out on an air bus come Christmas.

MR. J. BYRNE: On a what?

MR. TULK: On an air bus.

MR. J. BYRNE: I say to the Government House Leader, he has a lot of bills before this House that he is trying to get through, Mr. Speaker, trying to rush through this House, and he is over there now, trying to prolong my debate, when, here I was, coming in to sit down and not to say too much.

MR. SPEAKER: Order, please! Order, please!

I ask the hon. member to restrict himself to the contents of the bill.

MR. J. BYRNE: Thank you, Mr. Speaker.

I shall restrict myself to the bill.

Now, just to reiterate what I had said earlier, Mr. Speaker, on the minister's comments with respect to this bill, I would imagine what the minister had to say -

MR. SPEAKER: I also ask all hon. members to stop interrupting.

MR. J. BYRNE: Thank you, Mr. Speaker, a very good ruling. Thank you very much.

To reiterate what the minister said with respect to this bill. Of course, what he said would have to be relevant, I would think, Mr. Speaker, and as I said earlier, he talked about the bill being in line with other jurisdictions within Canada. And maybe so, maybe it will be in line with other jurisdictions within Canada. But that does not necessarily mean it is a good thing.

Now, I am starting to speak a little bit slower, because the Minister of Education just came in and he likes me to speak slow so that he can understand what I am saying, Mr. Speaker. So the minister -

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Pardon?

AN HON. MEMBER: Seventy-eight on a thirty-three speed.

MR. J. BYRNE: There you go.

MR. TULK: Bring that (inaudible) relevant.

MR. J. BYRNE: I have to stick to relevance on this, Mr. Speaker.

In relevance, with respect to this bill, what the Government House Leader is saying is, if I do a good job on the bill, by the results of a certain poll that was done not long ago, I will rise even higher in the polls. That is what he is saying, Mr. Speaker. Therefore, the relevancy is there and I shall try to do my best.

MR. TULK: Could I get a copy of that speech?

MR. J. BYRNE: You can have 1,000 copies, you can have 10,000 copies of this speech, you can have 50,000 copies of this speech, you can have 100,000 copies of this speech, you can have 200,000 copies of this speech, you can have what you want. All you have to do is go outside to Hansard and ask them for X number of copies. Mr. Speaker, the number of copies that the Government House Leader wants of this speech is completely and totally up to himself. He can request it from Hansard and I am sure they will be only too glad to run them off for him; they would even deliver them to his office.

MR. TULK: (Inaudible) a white Christmas.

MR. J. BYRNE: Mr. Speaker, a white Christmas, everyone wants a white Christmas. They were trying to find out if there was a Santa Claus and the post office delivered thousands and thousands of letters to the judge. Well, the Government House Leader can have thousands and thousands and thousands of copies of this speech. And I am doing a good job, Mr. Speaker.

Now, I am going to skip over a few notes that I have here, Mr. Speaker, I do not know how much time I have left.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Notes, look, look, I say just look. My son, we are only getting warmed up here now.

Mr. Speaker, this bill, "An Act Respecting Pension Benefits", is subject to the approval of the minister. Now, the superintendent is subject to the approval of the minister - or anything that he does. In other bills that went through this House, Mr. Speaker, since we came here, the Expropriation bill, the Thorburn Road Planning Act, a number of other bills, gives him a lot more authority, more authority all the time to the minister of that department. Now, Mr. Speaker, this bill is doing the exact same thing again.

It is getting to the point that a superintendent who is going to be, of course, under the jurisdiction of the minister, cannot do too much without the approval of the minister. Section 6.(2) "The superintendent, subject to the approval of the minister, has the control and supervision of the administration of this Act, and has the following powers and duties: (a) to examine all pension plans and all amendments to those plans that are filed for registration under this Act;" The superintendent has the power to do that, and rightly so, but, it is subject to what the minister says, and if the minister tells him to do one thing or not to do another, well, then, accordingly, he has to dance to the minister's tune.

MR. TULK: Say that again - I did not hear.

MR. J. BYRNE: Say it again? I will say it again. There are some people, Mr. Speaker, who did not hear what I had to say. There are a few points which have to be read out, that the people of the Province should know: what authority the superintendent has, under this bill, Mr. Speaker, and I will get into that in a few minutes.

One of the superintendent's duties is (b) "to register and issue certificates of registration in respect of all pension plans that are filed for registration under this Act and comply with the standards for registration;" Now, Mr. Speaker, that is just what you would expect a superintendent of registration for this Act to be responsible for; that is not a problem. I think most people would agree, that is a regular duty, a common duty of an individual in that position.

Also, he or she has the right (c) "to refuse to register a pension plan that does not comply with this Act;" Now, Mr. Speaker, he/she has the right to refuse a plan that does not comply with this Act, but where are the regulations? What regulations, Mr. Speaker, would be in place to say if the pension plan complies or does not comply with this Act? Will the minister have the authority to say: yes, that it does comply with the Act or it does not comply with the conditions of the Act? Will the minister have the sole authority to say yes, to X company or to whomever, that it complies, or no, it does not comply with the Act? So, Mr. Speaker, will the superintendent have the authority? Will there be regulations in place for the superintendent to make that decision or will the superintendent's decision be overridden by the minister to say, no, it does not comply or, yes, it does comply. So maybe we will have to put in place some regulations to deal with that specific incident.

Also, the superintendent has the right (d) "to carry out periodic or other inspections and audits of registered pension plans;" Quite rightly, that should be within the authority or the jurisdiction of the superintendent - no problem at all, Mr. Speaker.

MR. FUREY: (Inaudible).

MR. J. BYRNE: I say to the Minister of Industry, Trade and Technology, that has happened a few times; I know it happened a few times to me. I almost said something that time. I would say it but it will be taken wrong and negative comments would be made.

MR. FUREY: (Inaudible) a few times like that.

MR. J. BYRNE: Yes, like that. That is the truth, I say to the Minister of Industry, Trade and Technology.

Mr. Speaker, the superintendent has the right (e) "to revoke the registration and cancel" -

AN HON. MEMBER: Your voice is cracking `Jack'.

AN HON. MEMBER: He loses his voice a scattered time.

MR. J. BYRNE: Mr. Speaker, I have at least another six or seven speeches to make tonight on various bills so I had better - I will speak more quietly.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: It is coming. The superintendent has the right, (e), "to revoke the registration and cancel the certificate of registration for a pension plan that ceases to comply with the requirements of this Act;"

Now, back to the previous point I was making: will it be left completely up to the superintendent to make that decision, Mr. Speaker, or will it be up to the minister to make that decision, and/or will there be regulations put in place - or are there regulations in place now - I do not believe there are - but will there be regulations put in place that will guide the superintendent of registration with respect to this Act? Or will there be regulations put in place that will guide the minister to determine if the pension plan should be cancelled? ..."the certificate of registration for a pension plan that ceases to comply with the requirements of this Act;" So who is going to make that decision? another weakness in this bill.

As I said earlier, the minister can have a lot of authority here, too much authority, as do ministers in other departments. Now, the minister or the superintendent has the right, (g) "to assess and collect fees for the registration and annual supervision of pension plans; and" (h) "to perform other functions and duties that the Lieutenant-Governor in Council may assign."

Now, Mr. Speaker, "to assess and collect fees": The question is, what fees? For what services? How much would these fees be? Will there be a certain scale of fees that will be in the regulations, or there will be regulations? Will the minister have the authority to tell the superintendent what fees should be charged, how much the fees should be, when the fees should change? Will it be a yearly change? Will it be like an annual increase automatically to these fees? The minister can have a lot of authority with respect to this bill.

Also, in section 6(4), "The superintendent may place a pension plan under trusteeship and appoint one or more persons to act as trustee of the plan where, in the opinion of the superintendent, it is necessary to do so." In the opinion of the superintendent: Would you not believe again that there should be regulations in place that the superintendent would be required to follow? There is no mention of it here, not that I know of. As I said, what are the guidelines the superintendent will refer to when forming such an opinion? Now, that can be pretty - what would be the right word? -lackadaisical, or it could be pretty well open to his own discretion, or opinion, that these regulations would be put in place; a bit too loose for me, Mr. Speaker.

Also, the superintendent, under section 6(5)(b), can decide where "special circumstances exist." Special circumstances exist: again open to the discretion, to the opinion of the superintendent. Again, as I said earlier, it is under the control of the minister, and the minister can be the god, the minister can be the overruling factor in anything that happens within this bill. We see that in a lot of bills. There is no doubt about it that the minister has a lot of authority. I have no major concern with that, as long as the minister has someone to answer to, and some regulations to guide him. Now, we still do not know what the special circumstances will be.

Again, just to repeat, the minister has the authority to set the special circumstances through the superintendent. So, in actual fact, if you really want to sit back and think about it, something like this could become political. I am not saying it would - that would depend, of course, on the minister in the position at the time, or it could actually depend on the person who is filling the position of superintendent.

Here, also, is a very important point, Mr. Speaker: Section 8.(1) "The minister may" (b) "authorize the Canadian association of pension supervisory authorities to exercise or perform powers and functions of the superintendent".

Now, I say to the minister, this is a very important point and he should be listening to this one. Is this what the minister intends, that in actual fact, the Canadian association of pension supervisory authorities could exercise and perform powers and functions of the superintendent? In actual fact, the powers of the superintendent could

be going outside the Province to guide the enforcement of this Act. So, actually, we could have someone from outside the Province controlling what is going on inside the Province of Newfoundland and Labrador.

Mr. Speaker, it does not make sense to me. Is that what is supposed to happen? I expect, in Committee, we will address that. The minister will probably have to take a look at it. Is the government planning to transfer control over provincial pensions to another pension authority? That is the question I ask the Minister of Government Services and Lands with respect to that section.

Now also, as I mentioned earlier, in Section 10, "The minister may set fees for the administration of this Act." The question, of course, is, what types of fees, the amount of these fees, as I mentioned earlier, and what guidelines are in place for the determination of these fees? Mr. Speaker, these are a few of the concerns, a few of the questions that I have with respect to this bill. I am sure there are people on this side of the House who have more to say.

AN HON. MEMBER: Make it mistake-free.

MR. J. BYRNE: Mistake-free? Who? No one is perfect. There is only one man who is going to walk on water around here and he is - How much time do I have left, Mr. Speaker?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Yes, I say to the Minister of Industry, Trade and Technology, that is a good one. It certainly applied to you, no doubt about it. I wish that I had the opportunity that the Minister of Industry, Trade and Technology has had in the past little while - and I am not talking about his winnings either, Mr. Speaker, with the Lotto 649. But he is busy - a busy man all the time.

I may as well continue, Mr. Speaker. This bill allows the pension fund to be maintained by a board, agency, commission or corporation made responsible by an act of Legislature and the administration of the pension fund. Now, why is this clause so broad, I ask you, Mr. Minister? Who knows who will be responsible for a pension fund? What guidelines would the government employ in their determination of what body would be eligible to administer a pension fund? Now that is the point that I have brought up on a number of occasions with respect to the guidelines. It is prevalent throughout this bill, Mr. Speaker, that there are no guidelines for many of these clauses in this bill. There are no guidelines, there are no conditions put forward, with respect to this bill. I think that is something that needs to be addressed, and the minister should address it in Committee.

Also, Mr. Speaker, in section 19(3), "the superintendent may register a pension plan if the superintendent is of the opinion that registration is justified in the circumstances of the plan and the members." Now, what does that say to you? Just what written guidelines are in place for the superintendent when formulating his opinion? Every time I get to anything in this bill it always comes back to guidelines and regulations, of which there are none from my perspective.

I'm going to sit down for a few minutes and see what other members have to say on this bill.

Thank you for your time, Mr. Speaker.

MR. SPEAKER: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Speaker.

How do you follow an act like that? How do you step into the shoes of the Member for Cape St. Francis after at least his 120th soliloquy and speech in this House in the last three and a half weeks? I was reading Hansard last week and from page 1 to page 15 the Member for Cape St. Francis, on and on and on.

I won't belabour the issue too much. I stand to make a few reference points to the bill, An Act Respecting Pension Benefits, more to what I don't see in the Pension Benefits Act and what I think government should

contemplate seriously over the coming years, and even over the coming weeks. Program review: It is an opportune time. The Minister of Justice is chairing a program review committee that is looking at ways in which we can save government money. I have some suggestions.

AN HON. MEMBER: The Premier saved some last week, didn't he.

MR. E. BYRNE: He saved some, yes. No doubt about it. I have another suggestion for you on how to save some more. I think, Mr. Speaker, what we should be looking at, what isn't in this particular piece of legislation, is reform to the MHA pension act. That is what we need to talk about. Yes we do, indeed we do need to have a chat about reform of the pension act of government members in this House.

Maybe we should start considering a way in which all of can look at limiting liability, forever and a day, of the taxpayer of the Province. Some reforms of pension plans that have gone on across the country have looked at a notion of portability of pension plans or a portable RRSP type of option. When members leave, if they are eligible for pension, no matter if they are eligible or not, whatever contributions are made up until a period of time, personal contributions matched by government, when the day is done, when they are finished sitting in this House and their day is over, that they take that portable RRSP with them; and the taxpayer of the Province is, forever and a day, not on the hook. That is a topic that -

MR. DICKS: Good idea, let's see how it works.

MR. E. BYRNE: Pardon me?

MR. DICKS: Good idea. Let's start with (inaudible) and see how it works.

MR. E. BYRNE: Well, you can start with me. I would have to serve eighteen years consecutively. Let's start with the Minister of Finance and Treasury Board and see how it works. We can start with the Government House Leader and see how it works. We can start with other ministers who are weeks away from reform pension plan and see how it works.

The truth is, Mr. Speaker, there are other areas in terms of pension reform we should look at. The government has control over this, government has the ability to handle it. I had representation from a group of iron workers not so long ago, I think it was back in August or November. About fifty of them came in. In total they represented about 700 to 800 people who worked at the Hibernia site who contributed to a pension plan but who right now - they were permanent workers, they left the site when the type of work that they were scheduled to do was completed, it was over, it was done. Not one of those workers can take their pension plan with them, dealing with one of the particular unions.

It is an important point, because there is a lot of money, a lot of investment, leaving this Province in terms of the administration of pension funds. We aren't talking hundreds of thousands of dollars, we are talking hundreds of millions of dollars.

In one particular case, which I want to just bring to the attention of the House, these forty or fifty people - about forty-five I think came to see me and we met for over an hour-and-a-half - they worked in excess of twelve to eighteen months at the Hibernia site. They were permit workers so to speak. They were part of the union while they were on site. Once their job was completed, their task was completed, the job that they were hired for was completed, they left. But their contributions to the international pension plan that were made here, made possible by jobs here, made possible by the exploration of a resource here, their contributions were made into an international fund that crossed the straits and ended up being administered in Toronto, Boston, New York, Chicago and places like that. That is exactly where those funds ended up.

As I said, we are not talking about hundreds of thousands of dollars, we are talking about hundreds of millions. In one particular case, one worker had worked, I think, seventeen-and-a-half months. His contributions alone for that period were about $24,000 to that pension fund, to the local union which in turn sent most of it to the international union for administration. He is not entitled to get any of that back. He cannot access it right now,

he cannot access it in the future, and when he turns sixty or sixty-five, when according to the plan he should be able to get it, he cannot because he is not a member of the local. Now there were 700 people in that position at least - that's with one local - 700 people in that position who contributed significantly, anywhere between $5,000 and $30,000 each over a period of time; a significant amount of money.

Pension reform, Mr. Speaker, is important. The administration of pensions is important. Affordability of pensions is important. A pension is a right that was achieved through collective bargaining, through pressure upon governments to introduce them, pressure upon management, the corporate world of Newfoundland and Labrador and certainly corporate Canada some fifty years ago; but there are institutions like this that are in trouble right now. If the strain and pressure continues on them, we have to look for other ways. If that particular issue with that one local union were resolved, as an example, those people, if they paid into a pension plan, would be able to get that money back. But nobody seems to be sticking up for them, Mr. Speaker, nobody.

MR. A. REID: (Inaudible).

MR. E. BYRNE: No, I didn't say that. It seems as if nobody is sticking up for them. It seems like that, I said. I am not saying that the Member for Carbonear, for example, has not gone to bat on this issue. I am not saying that any member on the government side or on the Opposition side has not either. What I am saying is, to this point in time I have made several representations to the international union and to the local down there, because they are governed by their own administration, they are governed by their own constitution. It is something that each and every union in Newfoundland and Labrador -

AN HON. MEMBER: They don't have to (inaudible).

MR. E. BYRNE: Go ahead.

AN HON. MEMBER: (Inaudible). What we have to make sure of, before Terra Nova starts and all the other work starts in all of those places, is that there has to be something written in the law that (inaudible). You are absolutely right.

MR. E. BYRNE: Dead on. That is what has to happen. What we are talking about - I mean, this has gone on in excess of thirty years.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Yes, exactly. We are talking about multi-billion dollar investment funds, pension funds being administered by people outside of, not only the Province but outside of Canada, that are maintaining satellite offices in Canada just to create the appearance and perception that there is administration of the fund in Canada. That is not true.

The Minister of Municipal and Provincial Affairs is dead on. What needs to happen is a legislative change, a regulatory change, to ensure that that money that has been made or contributed to pension plans as a result of resource exploitation in this Province, as a result of people working in this Province by people in this Province, stays in this Province. I mean, the pooling of resources and the capital that can be made by pooling of resources is an area that we have to really, really think about. We aren't doing enough right now to ensure that.

The administration of pension funds in this particular issue is in trouble. Pension funds across the country are in trouble. It represents the unfunded liability portion with respect to pensions. The teachers' pension plan specifically represents a significant and major problem for this Province, for the teachers, but ultimately for the people of this Province; not just the group that it represents, but our reliability as a government to be able to deal with that problem in the future, to be able to deal with that problem effectively, is really in question. Time is ticking. That is one thing that I don't see in this piece of legislation, or any, I guess, negotiations the Minister of Education is involved in, ongoing, or rolling negotiations with the NLTA over the pension fund contributions.

Mr. Speaker, with respect to the issue raised specifically with the construction industry, there are significant reforms that could be achieved there if government has the will to do it. It certainly has the power to do it. Much more of the administration of pension funds should be able to stay in this Province so we can realize more benefits.

Thank you, Mr. Speaker.

MR. SPEAKER (Barrett): The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I will make a few comments here pertaining to this particular bill on pension benefits. There are a few particular points here. I was just actually going through some of the details there and looking at a few of the specific notes, and certainly listening to the minister when he introduced the bill.

There are some aspects to it here, I think, that are certainly positive and bring it to light. For example, in the past, under various pension plans, upon termination especially too, there hasn't always been - there have been surpluses in particular plans, I think, and opportunity now to be able to relegate this for the individual into an annuity or whatever avenue is open is an option that is available there. Any surpluses there could be allocated to the specific individual or directed as we see fit. It said it requires an employer to fund at least 50 per cent of the value of the pension benefits upon the member's termination, which is certainly appropriate.

Traditionally, there had to be long periods of time in which members could be vested into a specific plan. Certainly now, whether you are working two, eight, ten, twenty or thirty years, whatever, when you work a certain period of time shouldn't you have the opportunity - and the minimum level set here in reference to this is a two-year period, in which you can contribute. It is only appropriate, if the opportunity is there, that you should have certain benefits accrued. You might work for ten employers for three years each for thirty years and not be eligible for any particular type of pension. At least under this legislation now there is an opportunity, under that provision, that you could have benefits that could accrue to you because you change employers.

Today in society, it isn't uncommon at all to have many different employers. In fact, years ago you probably had one employer for life. Now with the job situation, and certainly working for this government too, as members know too well, there is a good chance you are going to need to be looking for another employer. We have seen a fair number, even in large corporations today. It is not just government. Large corporations today, major corporations in this country, have gone through substantial downsizing, rightsizing I guess, as government likes to call it. What it results in is a lot less people out there working, whether it is for government or larger corporations.

IBM, for example, went through a massive change when thousands and thousands of employees went out the door. To go to another employer for only two or three years, then to another one and maybe there is an opportunity with another company, and you keep jumping companies to take on different jobs, to have the opportunity under pension to be able to carry these and to do transfers to these particular funds, has to be perceived as being fully positive. It is not an age where when you go to work you spend thirty years with the one employer and then retire. That does not happen.

The Minister of Industry, Trade and Technology knows full well, when you are working for him or working for government here, they are going to ensure that your employment is going to be of a short duration, I can tell you. Then the minister who is in charge of this program review is going to ensure that at least another 1,000 people will be out looking for another employer, and they would like to be able to carry their pension benefits over from one to another.

I asked, I think, the Minister of Mines and Energy one day here in the House, and the Premier, and he did not know - I am not sure if he checked on it since - whether people who are retired can take that income that is in the plan due to them and buy annuity for them outside, shall we say, a particular plan. He said: No, he does not

know what I am talking about. I mean, the minister has said that so often: He does not know what I am talking about.

DR. GIBBONS: I don't want to know anything.

MR. SULLIVAN: He is not even interested in knowing anything about it.

DR. GIBBONS: That's right.

MR. SULLIVAN: I asked him one day and he said: No, I am not interfering with Hydro. He said: Arm's length, not interfering. A little chat with the minister: Well, I just told them, he said, don't go collect your money until we have a meeting with you. He told Hydro not to collect it. Now, if that is not arm's length - then I came back and asked him and he said: Well, yes, I asked them to do that. So you are either at arm's length or you are not.

We have seen the Minister of Health, I can tell you, regarding arm's length. He is head first in some areas and the next one, he is arm's length. He has his own standards.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: Yes, if he had ten arms I would say he would have his tentacles everywhere.

AN HON. MEMBER: He is an octopus.

MR. SULLIVAN: He is an octopus, yes. He has his own ADM involved in writing reports. Can you imagine? And this relates to -

MR. SPEAKER: Order, please!

I think the hon. member just made an unparliamentary remark.

AN HON. MEMBER: What was that? Which one?

MR. SPEAKER: I think it is unparliamentary to refer to an hon. member as an octopus.

SOME HON. MEMBERS: Hear, hear!

MR. SULLIVAN: Okay. Instead of using a metaphor, Mr. Speaker, I will use a simile, is it? The minister, sometimes acts like he is an octopus. I think that would be acceptable. He just acts like he is and that means -

MR. SPEAKER: I ask the hon. member to withdraw.

MR. SULLIVAN: - he is well-armed, he comes prepared.

MR. SPEAKER: Order, please!

I ask the hon. member to withdraw.

MR. SULLIVAN: I withdraw, Mr. Speaker. I withdraw the remark. It is unparliamentary. I certainly did not intend to call the minister one of those eight-tentacle creatures, is it? They have eight tentacles. I would never call the Minister of Health that, not at all. I can tell you, the Minister of Health was probably called worse than what I called him before, but there are better terms. I think he is out trying to do an honest hard-working job to ensure that people under his employ benefit from the pensions that they are hoping to receive in twenty or thirty years' time.

MR. H. HODDER: He's trying?

MR. SULLIVAN: I said, I think.

MR. H. HODDER: Oh, you think, oh.

MR. SULLIVAN: Yes. I would never want to say anything too definitive about the minister.

MR. H. HODDER: I thought you were going to cross to the other side or something.

MR. SULLIVAN: Not at all. I'm trying to keep this relevant to pensions here. I wouldn't dare want to move too far away from the subject at hand, because there are some important aspects here in this that I feel certainly deserve some merit, and those are the minimum requirements established to qualify pensions and to be able to carry that pension forward. I mean, the portability and movement of pensions, I think, is essential in a changing society. That minister, yes, the Minister of Health, the very minister, has seen to it that hundreds and hundreds of people would love to avail of the opportunities provided here in Bill No. 46. Yes, they would love to be able to do it.

More so, Mr. Speaker, a lot of people would prefer that they never have to use some of the provisions here in this act. So, is the minister preparing, and are they preparing, for people now to get out of this pension plan, to move it out into a private area?

In fact, I think section 15, when I look through it, if I remember correctly - I think it is section 15. I have to find this. Section 15 says: "A pension fund shall be maintained by one or a combination of the following: (a) a government" - okay, that is one option - a public service pension plan." While we are on that topic, before I get any farther, the Hydro pension. I understand, Minister of Finance and Treasury Board - maybe I could ask him tomorrow in question period. The bill we approved about a year ago, I say to the minister, that was going to set up a Hydro pension plan, I understand that isn't done yet. You only had a year. So you haven't done anything with that yet?

AN HON. MEMBER: Officials are working on it.

MR. SULLIVAN: Working on it, okay. They are working on it. A year to set up a pension plan and they are still working on it. Are they going to be here next year, or are you going to have new people?

AN HON. MEMBER: We have dedicated officials working on it.

MR. SULLIVAN: Yes. I would say to the minister, if they are a year working on it and we don't know where we are heading, I think you should look for really dedicated officials to work on it, if you could, because we want to see that.

Under section 15(b) it says it can be maintained by "an insurance company under a contract of insurance." That is possible. We can have pension plans. So maybe all this big debt the Premier talks about, who ever heard tell last February of a $9 billion debt in this Province? Anyone ever hear tell of that? No. We have a $5.9 billion direct debt. We only have actually a $6.9 billion debt, excluding unfunded liabilities, when you consider the $1.5 billion sinking fund surpluses that we have there to apply against that debt. So I mean, we get figures out there in the public view that have never been used before. We never heard tell of this back last year and last spring.

It also states under section 15(c) that "a trust in Canada governed by a written trust agreement under which the trustees are (i) a trust corporation referred under the Trust and Loan Corporations Licensing Act" is referred to; and in (ii), "3 or more individuals, at least 3 of whom reside in Canada and at least one of whom is independent of any employer contributing to the pension fund, to the extent the individual is neither a significant shareholder, partner, proprietor..." and so on.

It goes on to say - and I'm just wondering what the intention is in this particular act - in 15(d): "a board, agency, commission or corporation made responsible... for the administration of the pension fund." Are we looking at making major changes, I ask the minister, in the particular pension fund and the administration of the public

sector pension plan? Of course if we do, the employer on an unfunded liability would be responsible for half the unfunded liabilities in that fund, I would assume.

If we apply that to - let's take the Newfoundland and Labrador Teachers' Association fund. My understanding is that the employer would be responsible for more than 50 per cent in this case, which is the government of this Province, because there was an unfunded liability directly applied and committed to be put there of about $250 million by this government initially. Then, after that amount, once the government's share is put in to match what the teachers had put in, that was spent in the general treasury of the Province, then it should be on a shared basis.

Nobody expects government to fund fully. We expect it to be shared on an equal basis, and that is a basic understanding, I think, in those pension plans. It does reiterate here, and it does hold government responsible. There was one, I think, payment made. I'm sure the Minister of Finance and Treasury Board might know this. I think there was one payment made of $20 million or $25 million, I'm not sure, $20 million dollars I think, that was put in that out of $250 million, which means there is another $200-and some million to go in. The unfunded liability in that fund is about $1.5 billion, which means the other $1.25 billion must be shared equally between the government and the employees, or the teachers, retired, current or future teachers, whatever the case may be.

The same with the public service pension plan. The liabilities that are in that plan now would have to be borne equally by, even if you farm it out and sell it out to some other particular third party or corporation, would have to be done in a similar manner. So I think it is important that we look closely at this bill, because there are various provisions. It does give the superintendent - that is in clause 6(2) - control and supervision of the act. The minister can exercise his powers under this act without any written guidelines to that affect under section 6(2) in this act. Very, very extensive powers are given in that particular section.

Mr. Speaker, we do have in this Province a considerable unfunded liability under our pensions. Of course, we get the pension fund tabled here in the House on an annual basis, that highlights really the importance of contributing, and ensure that we get back on a healthy basis in the Province. Because the Minister of Social Services and the government tell us that we are going to have less people working, tell us we are going to have less paying into the plan, we are going to have more people to support, so we are going to need to do something.

The Minister of Finance and Treasury Board tells us that isn't going to happen. He tells us that isn't going to happen. We are going to grow so much, this economy is going to rebound and be so prosperous here, that we are going to have all this extra money we are going to make up, over $150 million on the harmonization, that we will have to make the Province healthy and to be able to contribute and ensure that provisions in Bill No. 46 here, the pension plan act, are carried out in compliance with specific sections of this act.

I received many calls on this issue. I guess I've received five or six, if that is many, over the past year, from people who are into a plan and want to get their pension out and they can't do it because it is locked in and because of the age restrictions. I guess that has advantages, but sometimes there are various areas where the individuals might want to have certain flexibilities in their particular plan. We don't see flexibilities in that end of it, but we do see the vesting and the locking in provisions here under clause 43 which the minister referred to in the particular act. It has locking in provisions there, and they do set minimum standards.

Different plans now have minimum standards, I think, of vesting there. MHAs about five years, I think. What is it in some other plans generally? I think five years now, generally speaking, in most areas. It is down to five. Now this is going to have a provision here, overall, under that aspect, to have a minimum of two years within the plan to give flexibility to move from one area of the plan to the other.

There are a few points there, I say to the minister, on eligibility and vesting. The 50 per cent rule, for example, on contributions is to be expected.

AN HON. MEMBER: The galleries are filling up.

MR. SULLIVAN: If I keep on speaking here, we are going to have a full House here tonight, I say to the Speaker. They are really starting to move here.

AN HON. MEMBER: (Inaudible) public meeting in LaPoile.

MR. SULLIVAN: Yes, there have been meetings there.

There is also reference too in clause 47 right on down to clause 56. It talks about opportunities and benefits. Under the heading of marriage breakdown it says, when a pension plan has to be divvied up - nobody wants to deal with that provision but there is some provision that, when a spouse has an entitlement the opportunity to be able to reap at least some of the benefits accrued or, as being a contributor, I guess, in some way, shape or form, as determined by the courts, there is an opportunity now to be able to have that amount taken out, relegated and used for that purpose, rather than just being draw from the plan on an ongoing basis. It gives an advantage to individuals who want to get rid of the shackles that they are held on, who have to depend on an ongoing plan without flexibility. It does give flexibility between the spouse and the member now, an opportunity to sort of segregate those and make independent decisions as opposed to one being done under the general heading.

Of course, under clause 57, there is surplus entitlement, an ongoing plan upon termination. If there are certain particular surpluses, it outlines in clause 57(2) an opportunity to be able make some provisions to do something about the transfer of those surpluses there upon termination of the plan. That is important, to be able to make those specific provisions. That is number - let me find it here for a moment now.

AN HON. MEMBER: What are you looking for, 46?

MR. SULLIVAN: No, clause 56. I had a little comment there I was going to make on clause 56. No, it is not clause 56, clause 57.

It says: No part of the surplus may be paid by the employer unless (a) the payment is permitted by regulations; and (b) the superintendent consents in writing to the payment.

Basically, that gives permission because sometimes pension plans can be in surplus and there are others, of course - Unfortunately, the Public Service Pension Plan, the Newfoundland and Labrador Teachers Association and the Members of the House of Assembly plans and other plans are not in the situation now where we have tremendous surplus, I say to my colleagues here. I don't think we will have to deal with that situation in our lifetime. I am sure there are pension plans out there that are fully funded and there is more of an emphasis today upon getting a fully-funded plan because for many years we failed to realize the importance of contributing to a plan.

We do not want future generations to have to make up the difference and pay the price for what we do today. We would like to move in the direction and we have, in certain areas, made up that gap by increasing premiums or by the allocations of per cent. I think in the Newfoundland and Labrador Teachers Association it was reduced from 2.2 per cent down to 2 per cent basically. In addition, with increasing premiums, to be able to be allowed to make up some of that unfunded liability, at least stop the slide. We are going to get into a period now in the next while - and there are undergoing similar problems in the Canada Pension Plan - where there have to be significant increases in premiums to be able to make up the shortfall that is occurring.

So, Mr. Speaker, there are some points here certainly of concern. I am sure overall there are some positive elements here and I am sure when we get an opportunity to get to committee we will take a closer look at it. It gives us time to have a more detailed analysis. There are a lot of bills coming on us at one time, very lengthy, and we are getting through them all. These are just some of the points we wanted to make now and any others we can certainly make in due course.

Thank you.

MR. SPEAKER: If the hon. the Minister speaks now, he will close the debate.

The hon. the Minister of Government Services and Lands.

MR. McLEAN: Thank you, Mr. Speaker.

Just a few notes to close off second reading of this bill.

Mr. Speaker, some of the points that have been made on the bill itself and the areas I think of importance are - certainly the portability of pensions is one of the key issues that we need to deal with. A number of other issues that have been brought forward, compared to the last pension benefits act, are the areas of eligibility for memberships, early retirement, spousal benefits and the division of benefits upon marriage break downs, as some of the hon. members have mentioned. The portability of pension benefits and the surplus distribution are all new items for this particular act and certainly such reform issues have served to encourage employee participation in pension plans.

Mr. Speaker, I would also say that the difference between the publicly funded pension plans and this private one, is that the private sector pension plans are required to operate on a fully funded basis. If unfunded liabilities occur, the public benefits bill provides strick payment procedures to eliminate any unfunded liabilities. As a result, a new bill will not impose financial difficulties to private plans since the plans are and have always been required to continually maintain assets in the fund to cover any incurred liabilities.

Mr. Speaker, this act certainly secures the future for people in the Province who are looking to obtain funds from a pension. This act provides enhanced pension benefit coverage for the people of the Province through the increased payments, procedures and conditions, as well as improved investment regulations and monitoring requirements, and the act promotes increased security of pension benefits promised.

Mr. Speaker, in response to the Member for Cape St. Francis, the previous act required that employees pay 9 per cent and the employer pay 1 per cent. In this new bill, it is 50/50. It is a 50 per cent rule.

Mr. Speaker, I would now move second reading of this bill.

On motion, a bill, "An Act Respecting Pension Benefits," read a second time, ordered referred to a Committee of the Whole House on tomorrow. (Bill No. 46)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I am going to move to Order No. 30, Bill No. 30, "An Act Respecting The Good Faith Donation And Distribution Of Food," second reading of a bill. Once Your Honour has read it, I will introduce the bill.

Motion, second reading of a bill, "An Act Respecting The Good Faith Donation And Distribution Of Food". (Bill No. 30)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, let me very quickly say, as the Premier said the other day, that really, I guess, this bill is a result of - and I say this in a totally non-partisan fashion - the efforts of the Member for Bonavista South and, of course, the agreement of the Premier and the total agreement on this side, that we should move this bill and move quickly on it.

I think we were prepared, and I think the hon. member will say this is correct when he stands up to speak to this bill, as I suspect he will, that indeed the government was prepared to move fairly quickly to see that this bill was made into law, but we found ourselves at the mercy of the single NDP member in this House who felt that we would in some way be distributing substandard food to people in the Province, and promptly went out and moved that kind of feeling in the public.

I have to say to the Member for Bonavista South, that I wish tonight, really, I could move through this bill, do it by unanimous consent, and put it right through to third reading. Unfortunately, I have to say to him that in the past four or five days I have had a number of calls. I think this afternoon the Member for Virginia Waters distributed a petition from some people who have concerns about what this bill might indeed do. I suspect, and I do not want to second-guess anything here, but I suspect it is largely a result of the kind of stuff that was in the paper over the weekend from the Member for Signal Hill - Quidi Vidi.

What I am proposing to do, what we are proposing to do as a government, is to move second reading of this bill, send it to Committee, let the Social Services Committee of the House deal with it, and when we come back in the spring hopefully we will be in a position that we will have satisfied - and I believe that is all it is, at this point in time - the fears of people out there that we are somehow going to treat other people less than we would treat our own.

MR. SULLIVAN: (Inaudible) our conversation.

MR. TULK: Don't get uptight, now. I am doing something that I do not have to do, so don't get too uptight about it.

Mr. Speaker, having said that -

MR. REID: Withdraw the bill if they don't go along with it.

MR. TULK: No. I say to the Minister of Municipal and Provincial Affairs, that I cannot be that partisan, that I will not do that, that I will not follow the Leader of the Opposition and withdraw this bill because we are in dispute on another bill. I will not do that. I will not make his own member suffer for, shall we say, the sookieness of the Leader of the Opposition. I will not do that. I will try to act above the partisan level of the hon. gentlemen.

SOME HON. MEMBERS: Hear, hear!

MR. TULK: Mr. Speaker, having said that, let me say to the Member for Bonavista South, that I believe he wants to speak on this bill, and when he does I am going to move it into committee - I show him the motion today - and that the Social Services Committee report to the House before March 31, 1997, or in case the House is not open they deposit their report with the Clerk of the Legislature.

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker.

Mr. Speaker, I thank the Government House Leader for allowing this bill to be introduced into the Legislature, and I thank the Premier as well. It was a bill that was brought forward by me some eighteen months ago. It was a bill that I believed in at that time, and I thought it would be providing a great service to many of the people in this Province who have no other choice but to use food banks in order to access food and, I suppose, to fulfil a need, when their pay cheque, whether it is from Social Services, unemployment insurance or a TAGS cheque, doesn't allow them enough money to go out and buy food for their families.

MR. E. BYRNE: You are in agreement with the bill, are you?

MR. FITZGERALD: Yes, I say to the member, I'm in total agreement. I would rather see the bill introduced here and go to Committee and be passed. That is what I would like to see done, Mr. Speaker. In that way we would allow this piece of legislation to become active. It would go through, be proclaimed, and become a piece of legislation that would go on the books and allow people to donate food and, I suppose, to provide a need there now rather than later.

I understand where the member is coming from, I understand the minister's concerns. I know the actions of my wealthy socialist friend who sits to my far right there. I'm aware of the actions of that particular gentleman. It was only the other day, when I was out in the corridors of the House there having a scrum, when the Member for Signal Hill - Quidi Vidi walked around behind the reporters saying: I won't support that bill, I don't believe in double standards, I don't believe in serving rotten food, I don't believe in doing any of this.

It might be unfair to stand her and talk about somebody when they aren't present, but what I had intended to say I'm going to say anyway, Mr. Speaker, and I'm going to say it here right now. If that same member believes this is such a bad piece of legislation, and if that same member believes we in this House believe in double standards, I suggest that he probably change his double standard. We are sitting here with a member in this House -

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: - collecting a full pay cheque from this Assembly by working here as a part-time member.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: What I say to that same member - and I wish he were here - is let him take his T4 slips at the end of the year and lay them on the Clerk's Table, and I will take mine, Mr. Speaker. Everything that I make over and above the salary that I make as a representative of the people I will donate to the food banks, and what he makes over and above the salary that he makes in this House of Assembly I suggest that he donate to the food bank.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: Maybe we wouldn't need a piece of legislation like this. It is nothing but shameful for that man to get on with such bull. Nothing but shameful, Mr. Speaker.

AN HON. MEMBER: The champion of the poor and downtrodden.

MR. FITZGERALD: That is exactly what he professes to be, Mr. Speaker. Then he goes out on the airwaves and he talks about how the Opposition will not allow him to respond to ministerial statements. Where is he today? Where is the man today?

SOME HON. MEMBERS: Gone! Gone!

MR. FITZGERALD: Gone! He came in here the other day, and when the Government House Leader passed this bill through first reading he came in and he got all upset again. He said: How come you didn't wait for me to come back? You wouldn't know but the whole House of Assembly revolves around the wealthy socialist to my right. It is ridiculous! Ridiculous!

SOME HON. MEMBERS: Hear, hear!

MR. WALSH: On a point of order, Mr. Speaker.

MR. SPEAKER: Order, please!

The hon. the Member for Conception Bay East and Bell Island, on a point of order.

MR. WALSH: Mr. Speaker, I think it is probably alright for us to have some fun here this evening, but it is probably somewhat unfair for us to be here tonight speaking of a member who is not here, who may very well be out spending some of the $300,000, $400,000 or $500,000 that he made this past week. I don't think it should be done. You should leave the member alone; he is not here to defend himself.

MR. SPEAKER: Order, please!

I ask the hon. member to take his seat for a moment.

To that point of order, it has been ruled in this House on numerous occasions that it is unparliamentary to refer to any hon. member for his presence or absence in the House. The Chair was paying very close attention to what the hon. Member for Bonavista South was saying. He was making reference to a member to his right. He was making reference to a member, a particular member, this other member, but he did not refer specifically to any member by name or by district. So the Chair cannot rule him out of order.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker.

Mr. Speaker, this is a bill that has received a fair amount of debate in this House already. It received a full evening of debate back eighteen months ago. Things have not changed from that particular time, other than the need for this bill is probably worse now than it was eighteen months ago. It is a bill that is not going to serve rotten food, or adulterated food, to the poor or to the people who are using food banks. It is a bill where we can stand up and say that we do not believe in food banks and we do not believe that this particular bill has any place in the Legislature of this Province.

Well, I do not believe in unemployment insurance, and I do not believe in social services, and I do not believe in food banks, but, Mr. Speaker, the thing is, that we have to deal with reality. We do have food banks, we do have unemployment, and we do have social services.

This is a bill that would simply relieve the liability from grocery stores, from any donors of food to food banks, if it is done in a way that if some litigation appears and it was not intended to intentionally hurt or maim or kill somebody. That is what this bill does. We are not talking about food that is outdated. We are talking about food that probably does not appear in a cosmetic fashion in order to be able to be put on supermarket shelves for marketable purposes. That is all we are talking about. We are not talking about food where the expiry date has disappeared. We are talking about food that may be able to be taken from the supermarket shelves and taken to a food bank and distributed before the `best before' date has expired. That is what we are talking about here, nothing more than that. In fact, we are probably talking about better food than most of us here in this House eat, or the food that we are eating every day. That is what it is.

I have talked to people who are very familiar with this piece of legislation in other jurisdictions in this country. Similar legislation exists in five other provinces; it exists in fifty states south of the border, and there is no reason why we cannot introduce it here. I think when it does become effective, and when it is proclaimed into law, that the giving to our food banks, and the response that we will see, will certainly increase many, many fold to what we are experiencing today.

Mr. Speaker, that is all it is. It is a bill that would provide that and only that, and the great fears and concerns out there are certainly unwarranted.

Thank you.

MR. SPEAKER: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I certainly congratulate the Member for Bonavista South who attempted to get this through the House in the last session and it died on the Order Paper. I say now, by referring this to Committee and bringing it back next spring in a new session, with the House being prorogued, it will die on the Order Paper and will have to be

reintroduced again. That is my understanding, that it will die on the Order Paper, which means it will not come up. I say to the Government House Leader, if this goes to Committee and next spring is to be brought back with a new session of the House, the House is prorogued, we would have to bring it back again?

MR. TULK: A point of order, Mr. Speaker.

MR. SPEAKER: The hon. the Government House Leader, on a point of order.

MR. TULK: Let me just say to the hon. gentleman, that when this House closes for Christmas the House is not prorogued.

MR. SULLIVAN: I didn't say that.

MR. TULK: No, no. The House is not prorogued; let me say that to him. We could be here for two weeks before - I know that in most cases most governments prorogue the House, come back one day in February or March and prorogue the House, and then we start a new session.

AN HON. MEMBER: (Inaudible).

MR. SPEAKER: Order, please!

MR. TULK: In this particular case this is not necessary. Let me just say to him, that if the Committee report is back here, as soon as the Committee report is back, I think we will move the bill at least close to unanimously, regardless of whether it is a new session or whether it is a continuation of this one. There will be no hesitation at all, whatsoever.

MR. SPEAKER: Is the hon. the Leader of the Opposition speaking to the point of order?

MR. SULLIVAN: No, not to the point of order, Mr. Speaker.

MR. SPEAKER: There is no point of order. The Government House Leader took advantage of the opportunity for further clarification.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I respond in reference to the Government House Leader when he mentioned that it would come back next spring.

MR. TULK: It will come back, as soon as the committee reports (inaudible).

MR. SULLIVAN: Yes, I know.

The Government House Leader said last spring - that is why I felt it was necessary to indicate that when the House prorogues, which would normally be in March, as an example, and a new session of the House would start with a new Throne Speech, I indicated it would be the second time it would die on the Order Paper and would come back again. I accept the Government House Leader's word that it will come back again.

He did make a point, and I think it is worthy of note, he did indicate that it should go to Committee because the Member for Signal Hill - Quidi Vidi had a concern, and to give it adequate time. He made some reference to it and some petitions -

MR. TULK: On a point of order, Mr. Speaker.

MR. SPEAKER: The hon. the Government House Leader, on a point of order.

MR. TULK: Mr. Speaker, the hon. gentleman can twist and move this around all he likes; I don't care. He can stay there all night at it. The truth of the matter is that I had several representations this weekend after the stuff appeared in the paper from this gentleman over here. I had several representations from people, people I know very well, who are in charitable organizations here in this town that feed people. As a matter of fact, I believe - what is the name of the guy who you used as -

AN HON. MEMBER: (Inaudible).

MR. TULK: Yes, I think there might even be some doubt in his mind now, although he did not call me himself, but having talked to some other people I think there might even -

AN HON. MEMBER: There is no doubt that he is for it.

MR. TULK: Okay, but I know that some of the other people who talked to him have doubt in their mind as to whether we are doing what he said, what the gentleman from Quidi Vidi said. I did commit to those people. I said: We will go back and do this in Committee to allay your fears, and that is what we are doing.

MR. SPEAKER: Is the hon. the Leader of the Opposition speaking to the point of order?

MR. SULLIVAN: No.

MR. SPEAKER: There is no point of order. Again, the Government House Leader is using the opportunity for further clarification.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I certainly do not criticize going to Committee at all, I say to the Government House Leader. In fact, I think it is a process that we could utilize a lot more. If there are concerns out there - I heard Mr. Walters on yesterday. He was very emphatic. He looked at it. He fully endorses it. He represents the Community Food Sharing Association. But there may be other people who are not fully informed and I respect that. I think the Committee is a time to deal with that, and I certainly am very much in favour of bills coming into this House getting put to Committee.

Back to the bill, certainly my colleague from Bonavista South has indicated, and I think, it is a well-intentioned bill. I think at the time he was social services critic and he certainly was dealing with many, many cases. People who he is aware of, as a representative, many of his constituents, too, in situations like all of our constituents, have an opportunity and may benefit from this specific bill.

Some of the concerns out there may be that we may be giving a second-class type of food to people, and that is not the intention. I think anybody who looks at the bill, if someone knowingly does that, or it is not fit for human consumption, there are provisions here to ensure that these people would be liable if they did so. It is there to assist. It will have an opportunity, certainly, over the next while, and if it does not have an opportunity to get back in this session then certainly in the next session, or whenever it happens. I say that the sooner it happens, the better, I think, and that more people can benefit from this.

One of the reasons, I think, my colleague brought it back is that it is coming on the Christmas season and it is an opportunity in a lot of these areas. There are a lot of people out there hurting today, and to have something at this time of the year may entice supermarkets and other large chains to be able to dump some of this extra food on people's tables, to put it out there so that they could have this opportunity.

This is a good time of the year to look at that in a giving spirit, without them having to have the legal repercussions that may be put upon them for putting forth something that they consider - one of the examples

used: maybe the fork of a forklift may go through part of a whole pallet but might only damage but one or two items. These might be discarded, and the rest could be put to good use well within the expiry date.

There are many opportunities there. They use discretion. The Community Food Sharing Association has indicated that. They use discretion. They would never put out food that they do not consider meets the standard there. I felt, with the time of the year - now, anytime it happens is good, but certainly the faster the better. It is an opportunity.

I do certainly congratulate the Premier and the Government House Leader for bringing this bill into the House. I have to congratulate them on that. It is something that my colleague had tried before, but it did not work. It just got put aside. Now they see the need for it, and hopefully we can expedite it in the future as fast as possible so people can benefit from it.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I just wanted to rise for a couple of minutes to compliment my colleague, the Member for Bonavista South, and to say to him, through the House, that we appreciate his efforts. I know that he has done a great deal of research on this particular matter. He has consulted with a number of jurisdictions in the United States at the state level and he has consulted with every province in Canada.

Mr. Speaker, I just wanted to say to the House, that the intent of this bill is not that we would ever, ever, offer food that was of any tainted quality. That is not what this bill is about. This bill is about making donations possible, making sure that food that goes to waste in this country is made available to those who need it. Mr. Speaker, if you look at the bill, it makes it quite clear. It says that if any of the food is adulterated, rotten or otherwise unfit for human consumption, it is not to be distributed.

Now, Mr. Speaker, I know some of the corporate people in this Province very well, and I have been associated with food banks through my church and other agencies for a long time. I can assure you that these people will not cause anything to happen that would in any way jeopardise the health or safety of anyone. Mr. Speaker, we also know from all the reports, how extensive poverty is in our country and in our Province. We know that there are more children in Canada today who are hungry than there were five years ago. There are more children in Newfoundland and Labrador today who are hungry than there were five years ago.

Mr. Speaker, what we are saying is that this bill enables us to be able to address this issue, not in a way that would exonerate the Department of Social Services from its responsibilities nor will it preclude the Department of Health from ensuring that food is monitored correctly and that all of the health care concerns are addressed.

So, Mr. Speaker, we commend our colleague from Bonavista South. We say to the government and to the Government House Leader, that this is appreciated, not for me or for members in this House, but appreciated by the children and parents in Newfoundland and Labrador who have genuine needs and know what the real face of poverty is all about, and are happy to be able to address their concerns in this kind of a way.

So, Mr. Speaker, again I want to say to all hon. members, if you read all the literature - I have in front of me here, The Royal Commission on Education, Our Children Our Future, and there is a lot of literature there. I won't get into reading it all nor do I intend to reference it, but it is there.

AN HON. MEMBER: Read it, boy. Read it all.

MR. H. HODDER: My colleagues here are encouraging me to keep speaking, but I do think that we want to note some of the reports, and commend the government and the Premier, as head of the government, in making

this particular piece of legislation possible, and commend them for sending it off to the Social Services Committee for further review.

Thank you very much, Mr. Speaker.

MR. TULK: Nice move. I would have stood up, said five words and sit down.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker -

MR. SPEAKER: Order, please! Order, please!

If the minister speaks now, he will close the debate.

The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I believe - and I will ask the clerks for clarification - I believe that once we pass this bill in second reading, I am supposed to move a motion.

So, Mr. Speaker, having said that, I too, like the Member for Bonavista South, would wish that we could do this in the spirit of Christmas. I wish that we had had the discussion that we had on Friday, maybe in the first part of November. We would have put it out for ten days to committee and then come back. Unfortunately, we are going to have to bypass this Christmas season, but hopefully next Christmas season this will be in effect to help the people of this Province, especially the children of this Province.

So I will, on that basis, move second reading, Mr. Speaker.

Motion, a bill, "An Act Respecting The Good Faith Donation And Distribution Of Food", read a second time. (Bill No. 30).

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I move, pursuant to Standing Order 54.2(1), that the bill entitled, "An Act Respecting The Good Faith Donation And Distribution Of Food," (Bill No. 30), having received second reading, be referred to the Standing Committee on Social Services, and the report of the Committee be tabled in the House before March 31, 1997, or be deposited with the Clerk of the House before that date if the House is not in session.

MR. SPEAKER: It is moved and seconded that the said bill be referred to the Standing Committee on Social Services pursuant to Order 54.2(1).

On motion, a bill, "An Act Respecting The Good Faith Donation And Distribution Of Food," referred to the Standing Committee on Social Services pursuant to Standing Order 54.2(1). (Bill No. 30)

The hon. the Government House Leader.

MR. TULK: Mr. Speaker, Order No. 28 - to long for me to read - Bill No. 51.

Motion, second reading of a bill, "An Act To Amend The Automobile Dealers Act, The Insurance Adjusters, Agents and Brokers Act, The Insurance Companies Act, The Real Estate Trading Act And The Trust And Loan Corporation Licensing Act". (Bill No. 51)

MR. SPEAKER: The hon. the Minister of Government Services and Lands.

SOME HON. MEMBERS: Hear, hear!

PENSION BENEFITS ACT, 1997, AN ACT TO AMEND (BILL 21)

April 24, 2008 HOUSE OF ASSEMBLY PROCEEDINGS Vol. XLVI No. 16

p. 790-807

Second Reading

MR. SPEAKER: The hon. the Government House Leader.

MR. RIDEOUT: Thank you, Mr. Speaker.

I would like to call for second reading debate, Order 7, An Act To Amend The Pension Benefits Act, Bill 21, standing in the name of the Minister of Government Services.

MR. SPEAKER: It is moved and seconded that Bill 21, An Act To Amend The Pension Benefits Act, be now read a second time.

Motion, second reading of a bill, "An Act To Amend The Pension Benefits Act." (Bill 21)

MR. SPEAKER: The hon. the Minister of Government Services.

SOME HON. MEMBERS: Hear, hear!

MR. O'BRIEN: Mr. Speaker, I am happy to get up in this hon. House today in regards to speaking to this Bill 21 which will amend the Pension Benefits Act.

Before I get into the aspects of the bill, one of the most important aspects of a person's life as they age is their benefit of having a pension that they would have when they retire to get older and enjoy life to the fullest once their work life is over. So, it is very, very important, as the minister responsible for my department, to make sure that we protect the employees in regard to that pension plan, in its fullest, all the way along until their eventual retirement. That is what this amendment does, Mr. Speaker. It ensures the protection of pension plans for workers all over this Province.

There is a need to improve this protection by amending the Pension Benefits Act, and to ensure - and what this amendment does is ensure that funding of deficits in pension plan windups is fully funded; because, if it is not fully funded thus it decreases the benefits to the employee. The benefits that they expected in the front end when they started paying into the pension plan would not be there at the end, once they retire.

Also, you know, the company may very well want to wind up a pension even though the company is not going out of business, or it would wind up a pension plan when it is going out of business. So, this protects this in all aspects; however, under the current legislation, when a plan winds up before the end of a five year period, the employer is only required

to fund the amount owing up to the windup date. So, in addition, any new deficits identified at the windup date are not required to be funded.

This would mean that plan members would have their benefits reduced. It could be reduced by a minimal amount, but it certainly could be reduced by a severe amount. Certainly, that would not be in the best interest of the employee; nor would it be what they would expect at the end of their pension and their work life. Certainly, this is what this is.

Under the Department of Government Services now, and under the Pension Benefits Act, it requires that a pension plan have an actuarial validation report completed at least every three years to assess the funding position of the plan, on both a going concern as well as a solvency basis.

If there is a solvency deficit, the pension plan sponsor is now required to fund that deficit over a five year period. That is what this amendment will do, thus certainly ensuring that the employee is certainly protected over the lifetime of the pension and certainly at the end.

The other thing that I might say, too, Mr. Speaker, in regard to this pension plan, is that most other provinces across the nation have similar legislation, and changing our legislation will ensure pension plans in this Province for employees whose company operates in more than one jurisdiction will receive the same level of funding on plan windup as those in jurisdictions that already have similar requirements.

This amendment, I see as a positive step that provides greater protection for employees when there is a deficit on windup of a pension plan.

With that, Mr. Speaker, I will finish up and I welcome any comments by my hon. members across the House, in the Opposition, and I will try to answer any questions that they may have.

Thank you.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Opposition House Leader.

MR. PARSONS: Thank you, Mr. Speaker.

I appreciate an opportunity to have a few words.

This, of course, is a Pension Benefits Act and no doubt it is a money bill, I guess. We are talking about somebody's money, whether it is this provincial government's money or the pensioners' money –

MS JONES: The taxpayers.

MR. PARSONS: - the taxpayers' money, and people who must hold money in a fund to make sure that once the pension plan, of course, or the person who hopes to draw their pension, that there is money in the fund to look after them.

Because it is a money bill, of course, it gives members an opportunity, pretty wide latitude of money issues and financial issues, to discuss a number of –

AN HON. MEMBER: That is stretching it.

MR. PARSONS: Members opposite say it is a stretch. I guess you might have to wait until you hear what I have to say, unless you would like to predetermine what I have to say now.

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order please!

MR. PARSONS: I was pretty good yesterday at predicting what the Minister of Finance was going to say in response to my private member's motion. I was spot on, but I do not know if the members over there have ESP or mind reading abilities or what, but to suggest that this member should not talk because they know what I am going to say already and it is not related, I think that is a bit of a stretch.

I am sure the Speaker will do that, if it is not related, or maybe the Speaker could give us some direction. Maybe it is not a money bill. Maybe it is a straight administrative bill that deals with pensions, but I would think that it talks about pensions, private pensions, and it is money. Money is in a pension fund, and this government is going to pass a law which orders certain people –

MR. O'BRIEN: (Inaudible).

MR. PARSONS: It may be private money, Mr. Speaker. The Minister of Government Services says it is a private pension fund. Maybe so, but this government is going to pass a law that dictates a certain amendment to the Pension Benefits Act of 1997.

Regardless of who owns the money, or whose pension fund it is, this government is passing a piece of legislation that is dealing with, in this particular case, what money must be left in a pot to ensure people that there is solvency there, or enough money left there to pay the people who paid the pension in.

I think that is a money bill. You can extrapolate that any way you want; I think that is a money bill. Anybody in this Province who does not believe that a pension deals with a money bill, I do not know what it deals with. It talks about people's livelihoods and their

ability to look after themselves and have some dollars, money, in their pocket when they retire.

Now, hopefully we have established the basis of it being a money bill, Mr. Speaker.

AN HON. MEMBER: Let's see what you have to say.

MR. PARSONS: Well, I was going to talk about other money issues. For example, there are lots of money issues that people want to make sure that they know about and they are properly informed about. If I get shut down on this opportunity, I am sure there will be another opportunity that I will get to discuss it on, but it leads with some of the money issues.

I raised questions today of the Minister of Environment and the Minister of Municipal Affairs. That is a very serious money issue. We have one issue - and it is serious environmental issue, by the way, very serious. Anybody who does not take the teepee situation in this Province, where we dispose of our waste, as a serious issue, we are seriously missing the boat. I have no problems whatsoever with the Minister of Environment saying that we have to do something about the teepee incinerators, and I think every person in this Province would agree with that. We need to do something about it. The question is how we get there.

My question today, because it talks about money, somebody in this government has directed that a bunch of people, a bunch of communities in this Province, some municipalities, some local service districts, have to shut down their teepees come December 1. Now, the question I was asked, I went out during our Easter break and I visited every community in my district and held meetings with the community leaders, and every single one, bar none, asked me: Mr. Parsons, how are we going to deal with that order, because it impacts us in our pocket book? If we close the teepee on December 31, what are we going to do with our garbage?

Now that was the question and I did not have an answer for them, quite frankly. I did not have an answer. The Mayor of Ramea provided me with the letter from the Department of Environment dated the eighteenth. Very straightforward, I think it was only like a two or three sentence letter that said, just putting you on notice.

It did not come directly from the minister. It came from some official in the minister's office and said, just to give you notice and heads-up that as of December 31 this year, 2008, you are shutting down your incinerator.

That was it, pretty straightforward. It didn't say anything about what your options might be. It didn't say, well, contact anybody in Municipal Affairs and figure out what you are going to do with your waste, or we are going to do this or we are going to do that. So it was a logical question for these people to ask: What are we going to do with our waste?

I took it upon myself to do some inquiring. What are they going to do with the waste? The councils on the West Coast, I believe Mr. Fenwick in the Port au Port area – I forget the name of the community right now that he is the mayor of. It is a local service district and he is the head, I understand, of the council there. He spearheaded a meeting. I know the Mayor of Burgeo was there, a whole bunch of councillors from the West Coast, and mayors, and they did not have any answers. Between them, none of them had any answers and they needed some answers.

I do believe Mr. Gilbert Smart, who is the Chair of the Western Region Waste Management Committee, met with them and said, yes, we have a serious issue here. We know the order is out there, but we cannot tell you right now what to do with your waste after December 31.

That raised the question: Where is the money going to come from? What money is involved in order for these communities - what are the going to do with their waste, and what is it going to cost?

That is how this question started. The Mayor of Ramea, for example, asked me: Do you think it is possible that we might get an exemption? Because it was only two years ago, he said, that our incinerator was no longer usable, functional. We went to government and, in conjunction with government, they decided that the only option, or the best option, we had a couple of years ago was to build a new one.

They were working on a Waste Management Strategy for the western portion of the Province, and all of the Province indeed, and hopefully some option would come out of it, but in the meantime let's put your new incinerator in place.

The Government of Newfoundland and Labrador gave the community of Ramea 100 per cent financing to do that. It was a need, it had to be dealt with, and the government came to the fore and dealt with it. Now, nobody disagrees with that. Sometimes there are not readily available solutions; you have to do those things.

Here they were saying – a simple question - we just made this massive investment, the government did, of $200,000. We don't have an option as to how we are going to truck our garbage off in Ramea. We don't know the cost of it, so is it possible to get an exemption?

Now that is a pretty straightforward question, but nobody was saying if an exemption was possible. In fact, when I read the news media - and I have a copy here of the February 19 article where the minister was interviewed by the *Telegram*. These closures were to take place in 2010, so the question of the *Telegram* was - because they had gotten some records through freedom of information - they said: Based on the briefing notes we got through FOI, it appears that there might be some possibility of isolated communities getting an exemption.

The minister quite adamantly said – "Not so, says Johnson." is the quote. Her quote is, "There have been no delays. Incinerators have closed as scheduled," she said, indicating that the remaining incinerators "will close the end of this year."

That was February. The order went out in February. She told the media in February that they were going to close. Yet, the questions remain: what to do, and were there exemptions?

That is why I ask the Minister of Environment today, who issued that order: Can anybody get an exemption?

The minister says no, no exemptions. It is on the record, it is done. It closed December 31.

That didn't square with some other information I had, because there is another community in this Province called François, on the South Coast, which we had been told had been given an exemption.

I said no, there has to be some confusion here. The minister says it is not closing, the minister made the order, so you are not going to have your incinerator in François after December 31. They are not going to make exceptions for François.

That is a pretty straightforward question. The minister again today confirmed: no exemptions, that is it, not on, tepees are closing.

My question, then, to the Minister of Municipal Affairs, was: If that is the case, why does the person who heads up the local service district, or used to head it up, in François, why do they think they are getting an exemption?

Lo and behold, there is an e-mail dated April 8, this year, where the MHA for Fortune Bay-Cape la Hune, e-mailed this person in François and said: I met with the minister this morning - uses his name, Minister Denine - you will be getting an exemption.

I am not saying there is anything wrong with the exemption, and I am not saying that government should not give an exemption to some other communities. My question was directed to: Did you, Minister Denine, do this? Does the MHA for that district have good, solid information that she conveyed on to those people in François?

It is one or the other. Either the MHA does not know what she is talking about or she misunderstood what the minister told her, which means she automatically or inadvertently misled the people of François. It is either that or else the minister did tell her, in which case then the question is raised: Well, what is the Minister of Municipal Affairs doing, giving an exemption? Because there is only one minister, as I understand, who can give the exemption from shutting down the incinerator, and that is the Minister of Environment, and she confirmed that there are no exemptions.

It is not rocket science. My questions were directed to: We know the order is there. We know this community has been told that. Does one minister talk to the other minister?

I don't say that facetiously. We have had indications of ministers who have not read their briefing notes until months after getting into a department. We have had ministers who have said: We don't answer questions because we weren't asked.

Don't get upset with people because we asked simple questions that we cannot get answers to. There are lots of precedents – in the last few weeks even – as to why people question the information, or lack thereof sometimes, and guidance from this government.

The government is there to pat themselves on the back, as they should when you do something good, and I am all for that. If you do something good, pat yourself on the back, but all we are asking here - and the members opposite today, during Question Period, they got upset because we asked a question, as if we are trying to embarrass someone. Here we are, we are asking for information. If we write a letter to some ministers, we get told, go to Access To Information, and we cannot get it. Yet, we get in the House here and we ask a question, can we get information? We get half answers. We get all kinds of blarney and we do not get any straightforward; a simple thing.

I asked the Minister of Environment today, four times, do you intend to give any exemptions? Now, to me, there are only three possible answers to that. There are three possible answers, yes, no, or I do not know. That is pretty simple. But no, sir, we did not get a straightforward answer; did not get a straightforward answer.

So I say to the ministers, respectfully, all we are asking is for a straight answer. Get your act together, and if you are going to give an exemption, or you would consider giving an exemption, then there is another piece of information that we would like to have. For example, what is the criteria going to be for an exemption? I can understand if the minister says, we are going to give an exemption to François, we are going to give an exemption to Grey River, because you people are isolated communities. I have no problem with that. That is a legitimate isolation issue, but then the question arises, what about other communities? How do you define isolation?

For example, I have a community in Rose Blanche. Does Rose Blanche qualify? Does Fogo Island qualify? I mean, the community of Fogo Island is connected by a ferry, but a fairly large number of communities on that island, Fogo Island, are they going to get an exemption? Instead of being upfront and saying: boys, we have not figured it out. We get all kinds of diversionary, evasive answers.

The Minister of Municipal Affairs would not even come to his feet and confirm whether that was a true statement or not, that he made to the MHA. There would not be half the trouble if you just openly gave the answers, and that is all we were asking for. It is like the question I asked, again a money question about the cost of a consultant. The order was made by Environment to close down. After that order got made, Municipal Affairs steps in and says we are going to appoint a consultant to figure out the options.

Now, I do not know about anybody else's thinking, but usually if you are going to give an order you think of the ramifications it might have before you give it. That is part of the planning process. Who are we impacting by this order? Have we consulted with them? Do we need to consult with them? What are the pros and what are cons and the directive that we are going to give? That is usually, I understand, a prudent approach to governance. But, what do we have here? We had the order out, we had the minister out saying it stands, there are no exceptions and then we get the Minister of Municipal Affairs saying we are going to get a consultant in now and figure out what options we have for you people who have teepees. Now, I beg to differ again. It might be called small potatoes, but that begs the question: Why wasn't that consultation done before the Minister of Environment decided to shut them down? Why did every community who is impacted by it be left in the lurch and have these concerns? What are we going to do after December 31 with our garbage?

So, now we have money being spent by the Department of Municipal Affairs to go out to do a study to determine what the options are for those communities that have to shut down. Yet, again, we asked a simple question: Who should these people go to, these communities? Waste management, we know, falls under Municipal Affairs; environmental concerns and incinerators fall under the Minister of Environment. Yet, one does not seem to know what the other one is doing. In order to properly, I would suggest, assist the people and guide them as to what they do, give them as much information as you can and give them some guidance as to how they should unravel this issue. But, that is not how it has been handled. This government and this department have hundreds and hundreds of employees. Surely, somebody can put the package of information together and explain to these communities who says what and how we can go about doing this.

That leads me to the question of consultation and impact and exchange of ideas. That is the issue of the Town of Port aux Basques. Yes, it is in my bailiwick. Yes, I have an obligation to raise it because it is a major concern out there. We have everywhere, from the Codroy Valley, which is in Stephenville East, down to Grey River, the end of my district in Burgeo & LaPoile. There is only one representative from the Town of Burnt Islands, and I understand that that individual does not know, only slightly, he only came on council in Burnt Islands a little while ago, and asked to be put on the committee. He asked to go on that committee, the waste management for the Western region, and he got on there. Great for him, good stuff.

That is a funny thing, because the Town of Port aux Basques has been asking for two years to get on the committee. The mayor says, what is going on? We are in Port aux Basques, the bigger community he says. In fact, Port aux Basques currently, and for the last number of months, have been taking all the garbage from down the coast from all these communities and seeing that it is looked after in their incinerator. Yet, they cannot get a member on this board? What is the magic in having a ten person board? Or maybe a better way to put it is: What is the problem with having an eleven person board? This is a government that is open and accountable and accessible and yet one of the major communities in a region who wants to get involved and get on board and play a positive role, which they have always done, is told no.

I understand the Town of Stephenville, a fairly large enterprise, it is the same thing. They cannot get on board and do not have a member. I have no problem with the explanation that the minister gave saying we want input from smaller communities but surely that does not remove or ought not to remove the input of medium-sized communities. The idea is to make a waste management strategy that is eventually going to work for everybody's benefit. How do you ever get the train rolling in the right direction and everybody pulling on the lines at the same time when you have automatically excluded somebody who wants to be involved?

The Minister of Human Resources here today got up and gave a ministerial statement concerning disabled persons. He used the word inclusive, and he is. Other departments and agencies of the government should be equally inclusive, but we do not have that. We have an exclusive situation. A town that wants to get involved, that represents a significant portion of the population, that has the vast majority of the garbage to be dealt with and waste to be dealt with is told: no, you can't play a role. Now, I do not understand that. There are only a few reasons that I can contemplate that might ever exist why you would exclude anyone. Are they stupid? Is there nobody in the Town of Port aux Basques capable of fulfilling a role on that board to help out? I do not think so. Are they troublemakers? I do not think so. Anybody who knows Mayor Button and his council, they are pretty easygoing people. I don't know if they ever caused a ripple for any administration, this one or the prior ones; not that sort of individual. In fact, I spoke to him this morning again because we knew about this issue when we saw the release come out that they put three new people on two days ago, and Mayor Button said: What is going on? He is on the Federation of Municipalities. I believe it is the urban committee of the Federation of Municipalities. He went to a meeting back in February with Minister Denine and the Deputy Minister and that was one of the issues discussed at that meeting: Can we put a member on the Western Region Waste Management Board?

Mr. Button tells me this morning – because I went back and confirmed it. I went to the minister yesterday. I would not raise this issue publicly nor did Mayor Button want me to raise the issue publicly without asking the minister. He said: Mr. Parsons, would you remind Minister Denine that we had that meeting back in February? And he told me, when we made that request – in fact, he was going out the door when I said: Now, Minister, you have heard our concerns? He said: I have heard you and it will be dealt with.

Now, he said, maybe I am missing something, but when a minister tells me, I have heard you and it is going to be dealt with, I had a pretty good indication that I was going to have somebody on the board. Now, he said, I think I would be foolhardy if I were to suggest that Minister Denine didn't commit something to me. He said: I never raised the issue with him anymore after February because I knew it was being looked after, as he said.

There were also indications from other people in Municipal Affairs on the West Coast to the Town of Port aux Basques that it was being looked after and would be dealt with. In fact, the Town of Port aux Basques submitted a name to be on the board. There was no

indication whatsoever that it would not be looked after. Lo and behold, out comes the press release.

Now, the minister talks about representation from small communities. You take the Port au Port region, for example, and the Bay St. George region. We have a Member from Port au Port on the board; fine and dandy, he should be there. We have a member from Bay St. George South, we have a member there from Stephenville Crossing, and we have a member there from Gillams. We have four smaller communities in the Bay St. George region represented on that board. Yet, we don't have Stephenville on there, which is smack dab in the middle of all of them, has the biggest population and the biggest pile of waste. No, Stephenville doesn't have a member on the board.

The same thing out the other way, you have Cape Ray, Port aux Basques, Fox Roost-Margaree, Isle aux Morts, Burnt Islands, Rose Blanche, LaPoile, Grand Bruit, Ramea, Burgeo, Grey River, and the list goes on. You have one member from Burnt Islands and nobody from the Codroy Valley. If you want to get into the names up in the Codroy Valley in terms of the size of the communities, there is a whole pile. There is O'Regans, there is Codroy, there is St. Andrews, there is South Branch, and the list goes on, Doyles, Upper Ferry. Yet, we do not get a member from Port aux Basques, after the minister saying what he said to the mayor. I don't understand. That is not openness and that is not accountability, and that is not inclusive behaviour.

I didn't hear an answer here today from the minister as to why it wasn't possible. That is all we are asking, again. If you have some reason for limiting the size of that board in the Western Region to ten, what is it? What is the harm of having fifteen there, if they show the interest and want to get involved?

We are trying to tackle a major problem in this Province, waste management. As the Minister of Innovation and Trade said, it first hit the table back in 2002. We have been ever since then, six years, trying to unravel it. We have not made a lot of headway, and now we have a situation where communities who want to get involved and help out are being told no. I do not understand it. That is not an inclusive government.

When you want to extrapolate non-inclusive, non-open, non-transparent, it all fits in the same mesh, then. I do not think I asked any questions today of the Minister of Environment or the Minister of Municipal Affairs that were unfair in that context. Why did you make the order before you had the options? Why are you not letting major towns in the area contribute their ideas and their knowledge and support? Are there going to be any exceptions to the order that you made? That is pretty straightforward stuff. That is not rocket science in anybody's book.

Yet, we had a minister stand up four times and evade the question. We had another minister who would not get on his feet and even answer the question that I asked. That is openness and that is accountability and that is transparency?

Have no fear. The people of this Province, whatever we all might be, there is nobody blind and there is nobody going to accept that as a fair answer, what happened here today - nobody.

People will make their own judgments as to who is open and who is accountable. This was a prime example here today of two ministers, and one did not know what the other one was doing. Neither knew what the other was doing, and neither was prepared to give any straightforward, straight-shooting answers here.

I did not ask them complicated, confidential information. I did not ask them to tell me how much the budget is for, or where you are going to spend the budget. I did not even ask: When is the Budget coming down? - which some people are wondering. Yet, we did not get an answer. These are money issues that impact this Province, and there are still no answers to them.

The question, too, talking about the consultant study that is being done, it is my understanding – and again the minister can correct me – it is my understanding that this consultant that they are now going to hire, to go figure out what the options are, which is costing some money - we do not know how much, but it is costing some money – there is going to be a meeting tonight, I understand, in the Town of Burnt Islands, with the representatives on the waste management board that are there. The Town of Port aux Basques has been invited to come to that meeting and, in fact, they are going to be expected to play a major role in helping with setting up, contributing to and implementing whatever options are available for waste management in Western Newfoundland.

So they are good enough to help out and do it all, but they are not good enough to sit on the board. Quite frankly, I do not know what answer to tell them back, because the minister will not tell me why they cannot be on the board. He cannot tell me that having eleven there is going to destroy the effectiveness of the board. He has not given me any reason that they are troublemakers and upstarts who are not going to contribute. So what do I tell the people, or what does anyone tell the good people of Port aux Basques, why you cannot have a member on the board? They are not of the right political stripe? I hope that is not the reason. I would like to think that is not the reason, because they have a job to do as municipal politicians, and the rest of us have jobs to do as MHAs, and I would certainly hope that is not the reason, but I cannot see any other reason, and that is the seriousness of this. That is why these people are genuinely, seriously concerned out there, that you cannot be asked, on the one hand, to step up and do your duty and help out, and be co-operative, and work with us, on the one hand, and then you get this kick in the teeth on the other hand - without an explanation, by the way.

I think they are due an explanation. In fact, I do not think it behooves the Minister of Municipal Affairs not to put them on there. Simply because somebody raises an issue, if it is justified, and a decision that has been made ought to be reversed, it ought to be reversed because it is just to reverse it. Rather than getting your back up and saying, oh you did this, and you did that, and Parsons came in and complained, and therefore you

are not getting a member on the board, let's just see what kind of gumption this minister has, and let's see how right and proper he can be. Because, now that the concern has been brought to his attention and there is no good reason to exclude them, why wouldn't he include them?

I think it is the honourable thing to do, and I think this minister is an honourable person, and I think it will save everybody - the minister, all of his officials on the West Coast, all of his staff who have to work every day, not only on the waste management issue but on every other issue, and there are hundreds and hundreds of issues that the town has to deal with on a ongoing basis with the department. It puts a bad taste in their mouth when they feel that all of a sudden something has gone off the rails for no good reason.

If I were the minister when it was brought to my attention, I would have said: My, we made a mistake; we have to go back and look at this.

There was no such thing as let's go back and look at it and see what is the rights or the wrongs or it – no, done. That is not good enough. I would like to think that part of being open and part of being accountable is that you listen. If something is wrong, you fix it. If it is not right, you make it right.

One of the persons I spoke to, for example, the brother of the Member for Bellevue, is the head of the Local Service District of Grey River. I sat down in his home for an hour during the Easter break. He had the same concerns; we cannot get any answers. A sincere gentleman, concerned about his community, wants to know an answer.

That is all we are asking for. Where are the answers? What are the people in Grey River going to do with their garbage? They shut down their teepee on December 31. By the way, for anybody who does not know the geography, they are talking about this mega-dump for the West Coast being in Wild Cove, Bay of Islands. That is up around Corner Brook, for those who are not familiar with the geography.

Right now, as it stands, the plan is to put a mega-dump in Wild Cove, Bay of Islands, but the people have been told to get rid of their incinerators come December 31. So, all of the people of Grey River, come January 1, have to start stockpiling their garbage in their community. When they get so much of it stockpiled, whatever, in a dumpster or whatever they have to put it in - and they do not know what they have to put it in because they do no know environmentally what is acceptable and safe for that, either, for storage of refuge and garbage - then it has to be shipped out, not trucked out, has to be shipped out on a boat to Burgeo or to Ramea - I would think to Burgeo - where it is going to hook up with some land line.

There is cost with storing it in Grey River, the dumpsters. There is a cost to shipping it out on the boat - and, by the way, what kind of boat? Because there is some concern: is it environmentally proper to ship garbage that you would have stockpiled in Grey River for whatever, a week or two weeks, is it proper, under the environmental regulations, to ship that out on the public ferry service?

They do not even know the answer to that yet. They might have to go get some private contractor or some other way to ship it out. We do not even know if we can put it on the ferry, the provincially funded subsidized ferry that services Grey River to Burgeo. We do not know if that can be dealt with yet. That is another question they do not know.

Then they get it up to Burgeo. Now, there are 154 kilometres from Burgeo up to the head of the Trans-Canada, 154 kilometres. They have to get it up there. They have to get from the head of the Trans-Canada into Corner Brook, which is another forty minute drive, and then they have to get it to Wild Cove. For the information of the people in Municipal Affairs, the community of Grey River, which is a local service district, they do not have a truck. They do not have any municipal employees to look after all of this trucking. They do not know what they are going to do with it. We will save it on the wharf for you in a dumpster, but what happens to it after that? We do not have any money to pay for that. We do not have any tax base in Grey River.

If you do not have answers to some of these straightforward questions to give to these people, can you imagine what is going to happen? Where is it going to be stockpiled and where is the garbage going to go? If it does not get burnt in the incinerator I would suggest there will be a lot of burning going on in back gardens. Where does that get us? You cannot avoid the question.

If we have made the decision to go down the road of getting rid of the teepees, we have to take the responsibility of putting the directions, the options and the help in place for these people. If they are going to do it on a regional basis between Ramea, Grey River, François, Burgeo, and have some unified system to do it, they need to know the answers to that stuff. All we are saying is the answers do not exist right now, and until the answers are found, why would you order those teepees shut down? I would have thought that you would not have put the cart before the horse, Mr. Speaker. I would have thought that you would have some options gone to these people to figure that out, and those figuring out pieces just have not been done.

In fact, not only everybody on this side is opposed and thinks that the waste management strategy leaves some things to be desired, the former Mayor of Mount Pearl - he is currently a member in this House. I will not say his name. It is not parliamentary acceptable, but the Member for Mount Pearl, the former Mayor of Mount Pearl, not the one who is currently the Minister of Municipal Affairs, but the most recent, former Mayor of Mount Pearl, who replaced the former Speaker of the House, he gave a piece in October, 2006. He wrote a story to *The Telegram*. He was the subject of *The Telegram*. He wrote a story to *The Telegram*, Mr. Speaker. In his case, they were opposed to St. John's having all the control of the waste management piece. Why should St. John's have all the representation? A big two-page story, actually. It took up all *The Telegram* that day.

So, it is not only this member who has questions, and it is not only today that the questions arose. Those questions have been on the go for some time and they are legitimate questions. The former Mayor of Mount Pearl asked the questions legitimately,

as he should have. I think he made the point and he made it well, and it is the same point we are trying to make, is that this is an evolving strategy that you do not have all the answers to right now but you need as many people as you can to work together, to co-operate, to get to where you need to go. He was questioning the make up of boards at that time, and that is all that is happening on the West Coast. They are questioning the makeup of the boards and how many people you should and ought to have involved, and they are looking for answers.

In fact, Mr. Fenwick, who was a former member of this House, who heads up one of the local service districts on the West Coast - I mean, this is not just coming from this member and it is not only coming from the Town of Port aux Basques or the Town of Burgeo or the community of Grey River. There is a story in *The Western Star* dealing with the environment, and the mayor - he is the Mayor of Cape St. George, Mr. Fenwick. He says: hiring a consultant is not enough. Now this is the consultant that I referred to when I said the minister - he appointed a consultant.

MR. DENINE: We got to start somewhere, boy.

MR. PARSONS: Yes, I say to the minister, that is a very good comment from the Minister of Municipal Affairs.

Mr. Speaker, I am so pleased that the minister now is prepared to give us his comments from the peanut gallery because I asked him straightforward questions in this House today and he would not come to his feet on some of them. He would not rise to his feet. His comment just now, and it is very telling, talking about appointing a consultant. He has obviously missed the point. He says you have to start somewhere. Wow! Well, Mr. Speaker, that is exactly the point that I have been up here preaching about for the last hour. That is what my questions were all about in Question Period. Why did you appoint a consultant? He tells us now: It is because we got to start somewhere.

Well, my question to the minister again is, and I would love to hear his answer back again: Why did you not appoint the consultant to figure out the options before the Minister of Environment went out and told them all to shut down? Now, that is a pretty straightforward question. You had to start somewhere, as you say. Why didn't you start with that piece before the order went out to shut them down? Why do we now have this same minister who says we got to start somewhere? He is obviously aware of the shutdown order because according to the MHA for Fortune Bay-Cape la Hune, he told her on April 8: yes, we are going to give some exemptions to that. We are going to allow some exemptions to that.

MR. DENINE: (Inaudible).

MR. PARSONS: Well, I have information. Now, maybe the information - the minister says I do not know what I am talking about. Well, minister, the e-mail that I got and the copy that I am going to give to you speaks for itself. The staff member of the Member for

Fortune Bay-Cape la Hune says they spoke with you and there is going to be an exemption in the case of François. Now that is black on white, minister.

I say to you, you ought to have started somewhere with your consultations and you ought to have started before the Minister of Environment is rushing off to shut things down and cause people all kinds of grief. That is all this is about. Nobody here disagrees with getting rid of teepees. Nobody disagrees with having the consultants. Nobody disagrees that you should help these people financially if you have to, but the question is, how do we get there? That is all that has been asked here. Yet, what do you get met with when you try to ask some straightforward questions and get some answers? You get a runaround, and that makes it tougher.

There is nobody in this House who has not made a mistake. I am amongst them lots of times. Sometimes, if you do something that you need to look back and say: Whoa, maybe I did not handle that right. Maybe I did not handle that right. Maybe there is a way to fix this. Maybe I did screw that up a little bit. People are understanding. People are not going to condemn you because you happened to go down a wrong road before you realized it. Maybe it is not even a wrong road. Maybe I am on the wrong road because I do not have the full information. I can only speak from what I know and the people who I have contacted. I did not get up here and create any of this.

When I say I spoke to the Mayor of Ramea, I spoke to him. I spoke to the Mayor of Burgeo. I spoke to the head of the local service district in Grey River. I spoke to the Mayor of Port aux Basques. I can only tell you based on the facts that I have. Now, if there is something wrong with that, clarify it. We do not need to make a big issue out of this, but you tend to force it to be a big issue when you get evasive. Most of these questions that we ask could be answered if somebody says: Yes, okay, we understand you. Here is why we did it. All I got from the minister on the board issue was: No, got ten, that is it, done. That is it, done. Are there going to be exemptions? We still don't have straight answer on that one.

Now, I did not raise the exemption issue from the closures because I thought about it. I did not raise that. The Mayor of Ramea asked me that: Do you think we can get an exemption?

In fact, I never even had an answer until this other document surfaced, when one community got it, apparently. So I said, well, if that is the case, I guess we will all get it, if you justify it. I am just asking now, where the confusion is coming from, that is all. It just makes the job so much tougher when it seems like you are trying to walk uphill all the time to get these answers when you need not be walking uphill. We should be on the level with each other. We should be asking questions, and we should be allowed to get some answers.

On Bill 21, Mr. Speaker, which, as I say, is a money bill, again I think this is a good piece of legislation. We will be supporting this, absolutely; because, from what I understand, when that happened was, in a lot of the pension funds in days gone past they had a

surplus. We did not just recognize it here, of course, it happened all over Canada, and all over North America, that there were some hard times, and the valuations of these – they called it the perfect storm, I believe, in the pension industry, is what one individual, Julie Dickson, who is the Superintendent of Financial Institutions of Canada, said. She said: the perfect storm has hit the pension sector over the last few years. New actuarial rules which reflect increased life expectancy of Canadians, a more market-based approach to valuing pension liabilities, combined with low interest rates and the stock market losses which resulted from the technology meltdown, resulted in challenges for pension plan sponsors and members.

All those four things came together. It was the perfect storm, and you ended up with a lot of pension funds because of all those things. They had x number of members, they were supposed to have x amount of dollars, and in a lot of cases they never had the dollars. The surpluses went to the deficiency. Of course, that is troublesome, because if anybody pays into a pension fund, only to find out down the road that, whoa, I am going to live twenty years after I retire but there is not enough money in my pension fund, what is going on? Where did the money go?

What this is doing, it is going to require people, that you must maintain a certain level of funding, so that you cannot, at the end of the day, say: Sorry, we managed your funds as best we can. We had your pension money but, because of certain circumstances, we do not have it here now and we cannot look after all of you.

This is a legal requirement, as I understand, that this Province now is going to step in line with the rest of Canada and say, if you are administering a plan here for someone, you must make sure that you keep enough funds in there to pay out of the pension when the time comes. That is strictly what this is, and I think that is a good piece of legislation. I think it is needed, and again it is an example of how Legislatures work.

If this thing had not happened somewhere else, in some other jurisdiction, if we had not had this technology meltdown and stock market dips and so on, it might never have been an issue, but it became an issue because somebody experienced it somewhere else. The government, in fairness to the minister and the government, became proactive on it and said yes, we have to protect these people, so they passed this piece of legislation, or want it passed today, and we will certainly be speaking in favour of it.

It is a good piece of legislation. It needs to be done. When the time comes, in all of the different stages of the bill, we will certainly be voting in favour of it.

Thank you, Mr. Speaker.

MR. SPEAKER (Collins): The hon. the Government House Leader.

MR. RIDEOUT: Mr. Speaker, I want to raise a point of order before we carry on with debate of this bill, if there are any further members who wish to speak. I do it because I did not interrupt my colleague, my friend, the Opposition House Leader, I guess, in

almost an hour of debate, or pretty close to it, on Bill 21. I could have, but I chose not to do so. There was no urgency to do it.

I want to make clear that what took place in the House this afternoon in debate in principal, second reading of Bill 21, I do not want, in any way, to be considered any precedent by the Chair for any future references as to what is or is not a money bill.

Bill 21, Mr. Speaker, is, An Act To Amend The Pension Benefits Act, 1997. Let me read the amendment. It is very short. Let me read it for the House and anybody who might be listening. This is the amendment. It says, "Where, on the termination, after April 1, 2008, of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan."

That is the amendment that Bill 21 proposes to the Pension Benefits Act, 1997. It has nothing to do with the expenditure of public funds, Mr. Speaker. The only time a money bill – we refer to them colloquially in the Legislature as a money bill - the only time a money bill is a money bill in this Legislature is when it deals with the expenditure of public funds, when it deals with a budget measure, when it deals with a tax measure, when it deals with a tax bill, when it deals with a loan guarantee bill, when it deals with the expenditure of public money that has to be appropriated by vote of this Legislature. Then, that is a money bill in its purest and simplest form.

We passed bills oodles of times that referred to the private expenditure of money, or control the private expenditure of money. The bill that we did the other day on funeral embalmers, for example, there is a component of public money in that, particularly if you prepay on a funeral. That was not the principle of the bill. The principle was to do something else.

The principle of this bill was to do another matter. It had nothing to do with waste disposal committees. It had nothing to do with environment. It had nothing to do with municipal affairs. It had nothing to do with the expenditure of public money, so I want to make it - I would ask Your Honour, at some point, the Chair at some point, to make it clear that the debate that took place here today, while I have no objection to it, and if I did I should have stood, which I did not, so in that context I do not object, but maybe some time down the road when the Opposition House Leader is Government House Leader, somebody might say: but on April 22, 2008, the then Opposition House Leader proposed that this pension bill was a money bill, the expenditure of public money. The precedent has been set, Your Honour, and the House can do nothing about it only vote to overrule it.

Well, I would not want it to be said that happened on my watch as Government House Leader, and I do not propose that it happen, because I am sure that it is contrary to every rule in the parliamentary rule book, that this – it is a stretch beyond the wildest

imagination that this would be considered a public money bill. It is not, and I would ask for a ruling on that at some time, at Your Honour's pleasure.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. PARSONS: Thank you, Mr. Speaker.

In response to the point of order, maybe I can make things easy for the Chair as well.

First of all, I appreciate the courtesy and graciousness of the Government House Leader. As he says, he could have stood up on a point of order and interfered and interjected, made his point at any time that I was speaking, but, being the gentleman that he is, he did not do that. I appreciate that, number one, the courtesies that you have shown to myself as the speaker.

I would agree, as well, that it should not be a precedent. I would agree, as well, if that is of any assistance to the Chair. I would say that it should not be a precedent. Maybe in the past - certainly since I have been here - we have, from time to time, taken liberties as to what could or could not be done. We are pretty good in terms of dealing with each other consensually and with leave. Maybe in terms of where it fits under the money bill, I have no problem in agreeing that the Government House Leader may well be right in his interpretation of what constitutes a money bill.

I appreciate the fact that, given the timeliness of this issue, he allowed me, without interruption, to have the opportunity to speak on the issue at length. Again, I agree that in future maybe we should all here in the Chamber confine ourselves, when we talk about money bills, to Budget, to Supplementary Supply, Interim Supply, tax bills and expenditure of the public purse. If that would be of any assistance to the Chair, I would have no problem in agreeing that he has raised a valid and justifiable point of order and that we should confine ourselves to the discussion of money bills in the future as per the dictates that he laid out.

Thank you.

MR. SPEAKER: The Chair has heard both arguments here and understands that the Standing Orders are somewhat vague and silent on what constitutes a money bill and what does not. I will take it under advisement for a ruling as expeditiously as possible.

The hon. the Member for Signal Hill-Quidi Vidi.

MS MICHAEL: Thank you very much, Mr. Speaker.

I am glad to take a bit of time to speak to this bill, a bill that is short, a very short amendment to the Pension Benefits Act, but a very important bill, because this amendment to the Pension Benefits Act will ensure that people who are covered by pensions will not be penalized if the assets in the pension fund run out. It is a very small

thing, I think, that we can do for the working people in this Province. People pay into pension plans. It is not just the employer, whether it is a private employer or a public employer. It is not just the employer who pays into the pension plans. Every worker who has a pension plan has paid into it, and the one thing that they should be able to depend on, during the time when they no longer are doing paid labour, is to have that pension that they paid into, no matter how long they paid into it. Sometimes people get a pension that is partial. The way work goes today, a lot of people have more than one job over their working life and they may have a number of partial pension, but all of those partial pensions together add up to their having some kind of life of security after they are no longer doing paid labour.

The least that we can do as legislators in this Province is to make sure that when the time comes to receive their money, there is money there for them to receive, because it is their money. I know the employers put money in as well but it is not just the employers' money, it is the workers' money also. Actually, to put it bluntly, it is about time that this clause is there in the Pension Benefits Act. I am surprised that it was not put in before. Maybe when the government put the almost $2 million into the teachers' pension fund, precisely to avoid the kind of thing happening to teachers that is alluded to in this amendment, to make sure that the pension fund is kept up so that the teachers would continue to receive their pensions, perhaps when the government did that, they realized then that they should cover responsibility for other workers who might be affected, so realized that the Pension Benefits' Act needed the amendment that is being proposed today.

I want to take a moment to talk a little bit about pensions since this amendment is on pensions. We have a responsibility to people who have worked in our public sector. We have a responsibility to them to ensure that they have not just pensions but that they have adequate pensions, that they have pensions that are enabling them to have lives at least as good as what they had when they were working. They need to know that they are not going to be living in poverty. We know that we have that issue in the Province, that we do have pensioners who are living in poverty. We have pensioners who are going to food banks. We have pensioners who cannot afford to pay for all their prescription drugs.

I find it difficult to stand here, with this amendment on the table, and not speak on their behalf today because I continue to hear from these pensioners. I continue to hear from them about the hardships in their lives. All I want to do is to remind government that it has a responsibility for these pensioners, just as it has a responsibility for pensioners in general. This amendment today shows that they realize that they have that responsibility because they are assuring that workers in general will be protected, that there will be money in their pension funds through this legislation. Government recognizes its responsibility to pensioners, and I encourage government to continue to recognize that responsibility in looking at the situation of public pensioners who are living in poverty. I know that there are groups of these workers who speak to government, who approached them, who approached their own MHAs and try to get government to recognize their plight. We have all had them come to us. We have all had them sit down and meet with us. I have no power to make that happen. My colleagues on the other side of the House

do have the power to make it happen. In this day and age, where we do have so many resources at our fingertips now in the Province, when we have money rolling in from the high price of oil, money rolling in, in the royalties that come to us, that if anybody deserves to see something concrete benefiting them because of the new resources that we have as a Province it is the seniors in this Province, it is the pensioners in this Province.

I like to think that this amendment is a moment to help us recognize that responsibility, that it is a moment for us to stop and think about the people we don't see every day, the people who are not here in this room with us, but people who are out there suffering because they don't have enough income, and yet they are people who worked all their lives, who helped built up this Province of ours, who did all kinds of work in the public sector and now are living in poverty.

It is easy for us to lose sight of those people when we sit here in the House of Assembly. It is easy for us to lose sight of the people who elected us to be where we are. I know we all try to get out in our constituencies and we all try to stay in touch with the reality of the people's lives, the reality of the lives of the people who voted for us, but it is easy when we come into this cocoon to forget that we represent them. It is easy for us when we come into this cocoon to also forget that they are watching us when we are here and they want to know that we are aware of them and they want to know that we care about them.

That is why today I do want to remember those people. I do want to remember that they are depending on us, and I say to my colleagues in government they are depending on you. They are depending on you to turn things around. They are depending on you to make sure that they have increased pensions. They are depending on you to make sure that their pensions go up with the cost of living, that they have indexed pensions. This is something that they totally depend on, and they are in your hands.

Today you have shown some concern and as we vote on this amendment on this bill, which I will be doing – I will be voting for it because it is the right and proper thing that we do it – as we vote on it, we have to remember that there are more issues than the one that this amendment deals with, and those issues have to be addressed.

It is shameful that we should have pensioners going to food banks. It is shameful that we should have people who have to choose between what prescription drugs they are going to be able to pay for. People, as I said, who worked hard for this Province, who worked all their lives, who helped build up this Province and now are going around begging. It has to end, and there are many ways in which we can end that, and I will not go through all of the ways in which that can happen.

I will honour the point of order that has been raised by the Speaker of the House on which a ruling has to happen. I will respect his point of order, especially because of the response from the Opposition House Leader to the point of order raised by the House Leader. I will not try to mimic what was done before me. I will respect that, waiting the ruling of the Chair, ruling of the Speaker. I will not go into all of the details of the things that need to be done for the pensioners in our Province and all the things that they are

suffering, but we have to make sure that they are taken care of. So, this is one way to do it. This is one way to do it, to make sure that pension plans do not dry up, that pension plans do not end, that they are there for them for as long as they need them. That is one way. Another way is to look at indexation of pensions, of public pensions. Another way is to make sure that public pensions go up initially before an indexation is laid on them, so that people will have enough money.

We cannot sit here and approve increases for ourselves every year, as we have the power to do. We cannot sit here and do that and not see the need for public sector pensioners, and all pensioners actually, to have indexation of pensions. Now, I know that it has not been a history of pensions, I realize that, but I think it is time to turn that around because the cost of living continues to go up. It goes up, it goes up, it goes up. Pensioners are on fixed income. The amount of money they get does not change. Something has to be done about that and it is a discussion that government has to involve itself in. It is not right that they do not have indexation. As I said, I realize that it has not been the history of pensions, but government has the power to do it. Government does not have the power to tell private plans, to tell private companies that they have to index their pensions. Then, for people who are in private pension plans, government has to find ways to help pensioners to meet the cost of living stress that they are under. With the public sector, however, government does have the power to do that.

With this short amendment - as I said, there are many things around the poverty of pensioners that I could get into, but I will not. With this short amendment, it is a reminder that pensioners are out there, that pensioners need to be cared for. I do not mean that in a paternalistic way, I mean it in a sense of responsibility. They need to know that those of us who are in this room, who are here representing them, that we understand what they go through as people on fixed incomes and we find all the ways possible to help them deal with the cost of living. There are many ways to do it, as I indicated, and I think that the challenge to us is to find the ways to help them with the cost of living that they endure as people on fixed income.

I am going to leave my comments there, Mr. Speaker, to say that I am really glad this amendment has reached the floor. I am really glad that we will be voting for this amendment and I shall be voting for it.

Thank you very much.

MR. SPEAKER: If the hon. minister speaks now he will close the debate.

The hon. the Minister of Government Services.

SOME HON. MEMBERS: Hear, hear!

MR. O'BRIEN: Yes, Mr. Speaker.

Certainly, I welcome the chance to close debate in regards to Bill 21, an amendment to the Pension Benefits Act, 1997. I consider this a very, very important amendment and I welcome the thoughts and words of my colleagues, the Member for Signal Hill-Quidi Vidi, as well as the Opposition House Leader.

I consider this a very, very important bill. It is clear in what it does. It protects employees with regards to their pension in the long term. It certainly addresses any deficits on windup of a pension plan over a five-year period so that it would prevent the benefits that would be derived from that pension plan by an employee in the future from being diminished.

Mr. Speaker, this is a very, very important bill. I also will say, is that my staff in Government Services will continue, and are always continuing, to strengthen our acts and strengthen our pension plans in regards to protecting our employees, and will do so in the future and continue to do so.

Thank you, Mr. Speaker.

I move second reading, Mr. Speaker.

MR. SPEAKER: It is moved and seconded that Bill 21, An Act To Amend The Pension Benefits Act, 1997, be now read a second time.

Is it the pleasure of the House that the said bill be now read a second time?

All those in favour, 'aye'.

SOME HON MEMBERS: Aye.

MR. SPEAKER: All those against, 'nay'.

The motion is carried.

CLERK: A bill, An Act To Amend The Pension Benefits Act, 1997. (Bill 21)

MR. SPEAKER: This bill has now been read a second time.

When shall this bill be referred to a Committee of the Whole House?

MR. RIDEOUT: Presently.

MR. SPEAKER: Presently.

On motion, a bill, "An Act To Amend The Pension Benefits Act, 1997," read a second time, ordered referred to a Committee of the Whole House presently, by leave. (Bill 21)

MR. SPEAKER: The hon. the Government House Leader.

MR. RIDEOUT: Thank you, Mr. Speaker.

AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

RECITALS

I. Each signatory to this Agreement represents the government of a legislative jurisdiction in Canada and is authorized by the laws of the signatory's jurisdiction to sign this Agreement.

II. A pension plan may be subject to the pension legislation of more than one jurisdiction and may be subject to the supervision of more than one jurisdiction's pension supervisory authority, by reason of the nature or place of the plan members' residence or employment or the nature of the business, work or undertaking of the members' employer.

III. Pension plans that are subject to the pension legislation of more than one jurisdiction play a significant role in providing retirement income to many Canadians. To establish an efficient and transparent regulatory environment for such plans, the governments that are party to this Agreement deem it desirable to specify the rules that apply to such plans and allow, to the extent provided for in this Agreement, a single pension supervisory authority to exercise with respect to any such pension plan all of the supervisory and regulatory powers to which such plan is subject.

IV. The laws of the jurisdictions whose governments are party to this Agreement allow for the incorporation of rules for pension plans enacted by Canadian legislative jurisdictions or as otherwise set out in this Agreement, as well as the reciprocal application of legislative provisions and administrative powers by the pension supervisory authorities concerned.

V. The governments that are party to this Agreement agree as follows:

PART I
GENERAL PROVISIONS

SECTION 1.
DEFINITIONS & SCHEDULES

Definitions

1. (1) For the purposes of this Agreement, unless the context indicates a different meaning:

"active member" means, in relation to a pension plan, a person who:

(a) is accruing benefits under the plan; or

(b) is no longer accruing benefits under the plan, but who is deemed by the terms of the plan or the pension legislation that would apply to the person if this Agreement did not exist to have the same status as an active member of the plan as a person determined under clause (a); (« participant actif »)

"pension legislation" means, in relation to a jurisdiction, the legislation identified in Schedule A in respect of that jurisdiction and any subordinate legislation made under that legislation, all as amended or substituted from time to time; (« loi sur les régimes de retraite »)

"pension plan" means, in respect of a jurisdiction, any plan that is subject to the jurisdiction's pension legislation; and (« régime de retraite »)

"pension supervisory authority" means the government ministry, department or agency of a jurisdiction that has supervisory or regulatory powers with respect to pension plans under the pension legislation of the jurisdiction. (« organisme de surveillance »)

Schedules

(2) The following attached Schedules form part of this Agreement:

(a) Schedule A – Pension Legislation; and

(b) Schedule B – Matters Covered by Incorporated Legislative Provisions.

SECTION 2.
APPLICATION
General application

2. (1) Subject to subsection (2) and section 26, this Agreement applies to any pension plan that would, if this Agreement and any other agreement respecting the supervision of pension plans did not exist, be subject to registration with a pension supervisory authority under the pension legislation of more than one jurisdiction whose government is a party to this Agreement.

Restriction

(2) This Agreement does not apply to a pension plan if the pension supervisory authority that would be designated as the major authority for the plan under this Agreement is not subject to this Agreement.

Plan provision not effective

(3) This Agreement applies in respect of a pension plan despite any conflicting provision in any document that creates or supports the pension plan.

PART II
MAJOR AUTHORITY

SECTION 3.
DETERMINATION OF THE MAJOR AUTHORITY
One major authority

3. (1) One pension supervisory authority having jurisdiction over a pension plan shall be the major authority for the plan.

Plurality of active members

(2) Except as provided in sections 5 and 26, the major authority for a pension plan shall be the pension supervisory authority of the jurisdiction with the plurality of active members of the plan, as determined in accordance with subsection (3) and considering only those jurisdictions whose pension legislation would, if this Agreement and any other agreement respecting the supervision of pension plans did not exist, require the plan to be registered with the pension supervisory authority of that jurisdiction.

Determination of plurality

(3) The jurisdiction that, among those referred to in subsection (2), has the plurality of active members of a pension plan shall be determined using the most recent periodic information return that has been filed with a pension supervisory authority in relation to the plan's fiscal year end and on the following basis:

(a) in respect of a provincial jurisdiction, the number of active members of the plan who are employed in that provincial jurisdiction and who would be subject to that jurisdiction's pension legislation if this Agreement and any other agreement respecting the supervision of pension plans did not exist; and

(b) in respect of the federal jurisdiction, the number of active members of the plan who are employed in "included employment" within the meaning of that jurisdiction's pension legislation, where the plan is subject to that jurisdiction's pension legislation.

Equal number of active members

(4) Where the major authority for a pension plan cannot be determined by applying subsections (2) and (3) because two or more jurisdictions have authority over an equal number, greater than zero, of active members of the plan, the major authority for the plan shall be, of those jurisdictions, the authority whose main office is in closest proximity to the main office of the administrator of the plan. For the purposes of this subsection:

(a) the main office of a pension supervisory authority is the office from which the authority conducts most of its supervisory activities; and

(b) the main office of the pension plan administrator is the office from which the plan administrator described in the text of the pension plan conducts most of the plan's administration.

Status as major authority

(5) A pension supervisory authority that becomes the major authority for a pension plan in accordance with this Agreement shall remain the major authority for the plan until the authority loses its status as major authority in accordance with this Agreement.

Minor authorities

(6) Once a pension supervisory authority becomes the major authority for a pension plan, any other pension supervisory authority to which this Agreement extends and that has supervisory or regulatory powers with respect to the plan becomes a minor authority for the plan.

New pension plan registration

(7) Where a pension supervisory authority receives an application to register a pension plan, that authority shall determine whether it is the major authority for the plan within the meaning of this Agreement, and if necessary and as soon as possible thereafter, that authority shall notify the plan administrator as to the relevant authority with which the plan should or may be registered and shall notify the relevant authority about the plan to be registered.

SECTION 4.
ROLE OF THE MAJOR AUTHORITY

Interpretation

4. (1) For the purposes of this section:

(a) a decision includes an order, direction, approval or, if specific recourse is provided, a proposal to make such a decision; and

(b) recourse includes the right to request a hearing, review, reconsideration or appeal.

Role of major authority

(2) The major authority for a pension plan shall:

(a) supervise and regulate the plan in accordance with this Agreement, and on behalf of each of the minor authorities for the plan as required by this Agreement;

(b) subject to subsection (3) and section 9, exercise, with respect to the plan and as required by this Agreement, the functions and powers necessary to carry out this Agreement conferred on the minor authority by the pension legislation of the minor authority's jurisdiction;

(c) apply and enforce any rules specified in this Agreement that are not part of the pension legislation of a jurisdiction; and

(d) determine any matter or question related to the application of this Agreement to the plan in accordance with this Agreement and the procedural provisions of the pension legislation of the major authority's jurisdiction.

Exceptions

(3) Despite clause (b) of subsection (2):

(a) where the major authority for a pension plan and a minor authority for the plan agree that a particular function or power conferred by the pension legislation of the minor authority's jurisdiction shall be exercised in respect of the plan by the minor authority, only such minor authority may exercise such function or power in respect of the plan;

(b) where the major authority for a pension plan and a minor authority for the plan agree that a particular decision concerning the application of provisions of the pension legislation of the minor authority's jurisdiction shall be made in respect of the plan by the minor authority, only such minor authority may make such decision in respect of the plan; and

(c) where pension legislation confers on a pension supervisory authority the power to order or otherwise require the splitting of the assets and liabilities of a pension plan, only such authority may make a decision concerning the exercise of that power with respect to the liabilities of a plan that are subject to such pension legislation and the assets of the plan related to the funding of those liabilities.

Decisions and recourse

(4) Any decision that may be made by the major authority for a pension plan that applies the provisions of the pension legislation of a minor authority's jurisdiction as described in clause (b) of subsection (1) of section 6 is subject to the following rules:

(a) the decision shall be made under the procedural provisions of the pension legislation of the major authority's jurisdiction that would have applied if the matter had arisen under that legislation;

(b) the decision shall be deemed to have been made by the minor authority under the procedural provisions of the pension legislation of the minor authority's jurisdiction that would have applied if the minor authority had made the decision;

(c) when the decision is issued by the major authority, it shall include notice to any person receiving the decision as to:

(i) the substantive provisions of the pension legislation of the minor authority's jurisdiction that were applied in formulating the decision that is made;

(ii) the recourse provided, if any, from the decision under the pension legislation of the minor authority's jurisdiction, including the body before whom such recourse may be exercised;

(iii) the time limit under the pension legislation of the minor authority's jurisdiction for exercising such recourse; and

(iv) where the pension legislation of the minor authority's jurisdiction does not provide for recourse from the decision, any recourse from the decision provided under any other legislation of that jurisdiction, including the body before whom such recourse may be exercised and the time limit for exercising such recourse; and

(d) the right to recourse from the decision shall be determined under the pension legislation or other legislation of the minor authority's jurisdiction as though the decision had been made under the procedural provisions of that legislation.

Continued role of major authority

(5) Exercise of a recourse from a decision referred to in this section does not have the effect of preventing or releasing the major authority from continuing to fulfill its responsibilities with respect to the pension plan as set out in subsection (2).

Enforcement of decisions

(6) The major authority shall enforce any decision referred to in this section once that decision is no longer open to any further recourse, as well as any decision resulting from such recourse that is no longer open to any further recourse.

Communication with major authority

(7) A person shall be entitled to communicate with the major authority for a pension plan in the same manner that the person would be entitled to communicate with a pension supervisory authority under the legislation that would apply to the person if this Agreement did not exist.

Representative

(8) Where a person having any rights or benefits under a pension plan has designated another person or an association that represents people with rights or benefits under the plan to act on his or her behalf with respect to the major authority for the plan, such authority shall, to the extent permitted by law, communicate with that other person or association and, upon request, provide that other person or association with the information and documents to which the person is entitled.

SECTION 5.
LOSS OF MAJOR AUTHORITY STATUS

Loss of major authority status

5. (1) The major authority for a pension plan shall lose its status in that regard on the date described in subsection (2) where, according to the most recent periodic information return that has been filed with the major authority in relation to the plan's fiscal year end, the number of active members of the plan employed in relation to the major authority's jurisdiction, as determined under subsection (3) of section 3 as of the plan's fiscal year end, is:

(a) for the third consecutive fiscal year, less than the number of active members who were employed in relation to any other jurisdiction or jurisdictions;

(b) less than 75% of the number of active members who were employed in relation to any other jurisdiction; or

(c) equal to zero and there are active members of the plan employed in relation to any other jurisdiction.

Date of loss of major authority status

(2) The major authority for a pension plan loses its status in that regard:

(a) in the case provided for in clause (a) or (b) of subsection (1), five days prior to the end of the first plan fiscal year that begins after the date on which the major authority received the information referred to in the relevant clause; and

(b) in the case provided for in clause (c) of subsection (1), upon the later of the fifth day before the end of the current plan fiscal year during which the major authority received the information referred to in that clause or of the expiry of the period of six months beginning on the date the major authority received the information.

New major authority

(3) When the major authority for a pension plan loses its status in that regard in accordance with subsection (2), the pension supervisory authority for the jurisdiction having, as determined in accordance with subsection (1), the plurality of active members of the plan becomes the plan's new major authority if that new major authority is subject to this Agreement.

Equal number of active members

(4) Where the new major authority for a pension plan cannot be determined in accordance with subsection (3) because two or more jurisdictions have authority over an equal number, greater than zero, of active members of the plan, the major authority for the plan shall be, of those jurisdictions, the authority whose main office is in closest proximity to the main office of the administrator of the plan. For the purposes of this subsection:

(a) the main office of a pension supervisory authority is the office from which the authority conducts most of its supervisory activities; and

(b) the main office of the pension plan administrator is the office from which the plan administrator described in the text of the pension plan conducts most of the plan's administration.

Transitional rules

(5) Where the major authority for a pension plan loses its status in that regard in accordance with this section:

(a) all matters related to the plan that are pending before the major authority on the day preceding its loss of status as major authority shall be continued before that authority;

(b) all matters related to the plan that concern a decision, order, direction or approval proposed or made by the major authority and pending before any administrative body or court on the day preceding the loss of the major authority's status as major authority shall be continued before such body or court;

(c) for every matter in respect of which the major authority referred to in clause (a) or the administrative body or court referred to in clause (b) has proposed or made a decision, order, direction or approval to which the pension legislation or other legislation applying on the day preceding the replacement of the major authority provides a right of recourse:

(i) such right shall be maintained so long as the period provided for exercising that right has not expired; and

(ii) such recourse may be brought before the administrative body or court provided for by the legislation giving entitlement thereto;

(d) for any matter related to the plan not described in clauses (a) to (c) that occurred while the major authority was the major authority for the plan and that related to the provisions of the pension legislation of the major authority's jurisdiction in respect of a matter referred to in Schedule B:

(i) the major authority may, even after it loses its status in that regard for the plan, conduct an examination, investigation or inquiry into the matter in accordance with the pension legislation of the major authority's jurisdiction to determine whether compliance with that legislation was met, and in such case, the matter shall remain subject to that major authority; and

(ii) where the matter constitutes an offence under the pension legislation of the major authority's jurisdiction, the offence may be prosecuted by the competent authority in that jurisdiction, and in such case, the matter shall remain subject to that major authority; and

(e) all matters referred to in clauses (a) to (d) shall remain subject to the pension legislation or other legislation that, under this Agreement, applied to such matters on the day preceding the loss of the major authority's status as major authority.

Notice by major authority

(6) Where the major authority for a pension plan receives from the administrator of the plan the information described in clauses (a), (b) or (c) of subsection (1), it shall:

(a) as soon as possible after receipt of the information, notify the pension plan administrator and each minor authority for the plan of the date on which, pursuant to subsection (2), it will lose its status as major authority for the plan and, if applicable, the pension supervisory authority that shall become the new major authority for the plan; and

(b) as soon as possible after the plan's new major authority assumes its functions, provide to such new major authority all relevant records, documents or other information that it has concerning the plan.

Notice by new major authority

(7) The pension supervisory authority that replaces another authority as major authority for a pension plan shall, as soon as possible after assuming its functions, inform the pension plan administrator and each of the plan's minor authorities of the date on which it assumed the functions of major authority.

Notice by plan administrator

(8) The administrator of a pension plan that receives from the plan's major authority notice of the information provided for in clause (a) of subsection (6) or in subsection (7) shall:

(a) in respect of the information provided for in clause (a) of subsection (6), transmit such information to each employer that is party to the plan and any collective bargaining agent that represents any person who has rights or benefits under the plan within 90 days after such notice; and

(b) in respect of the information provided for in subsection (7), transmit such information to each employer that is party to the plan and any person who has rights or benefits under the plan who is entitled to receive an annual statement of the person's benefits, no later than the expiry of the period for providing such persons with their next annual statements of benefits.

PART III
APPLICABLE LAW

SECTION 6.
APPLICABLE LEGISLATION
Applicable pension legislation

6. (1) While a pension supervisory authority is the major authority for a pension plan in accordance with this Agreement:

(a) the provisions of the pension legislation of the major authority's jurisdiction in respect of matters referred to in Schedule B apply to the plan instead of those of the corresponding provisions of the pension legislation of any minor authority's jurisdiction that would apply to the plan if this Agreement did not exist; and

(b) subject to the provisions of this Agreement, the provisions of the pension legislation of each jurisdiction that are applicable to the plan under the terms of such legislation apply to the plan in respect of matters not referred to in Schedule B.

Funding rule exceptions

(2) Despite clause (a) of subsection (1):

(a) where the pension legislation of a minor authority's jurisdiction would, if this Agreement did not exist, require the funding of a benefit provided in relation to a pension plan with respect to persons having rights under the plan who are subject to that legislation:

(i) subject to subclause (ii), funding shall be required in respect of that benefit with respect to those persons, even if funding for that benefit would not be required under the pension legislation of the major authority's jurisdiction; and

(ii) funding of the benefit described in subclause (i) shall be required in a manner consistent with, and to the extent determined by, the requirements under the pension legislation of the major authority's jurisdiction applicable to the funding of other benefits that are provided in relation to the plan and that are required to be funded in relation to the plan under that legislation;

(b) where the pension legislation of a minor authority's jurisdiction would require, for the purposes of this clause, that an additional liability be established and funded in relation to a pension plan with respect to persons having rights under the plan who are subject to that legislation:

(i) subject to subclause (ii), such liability shall be required to be established and funded, even if such liability would not be required to be established, and such funding would not be required, under the pension legislation of the major authority's jurisdiction; and

(ii) funding of the liability described in subclause (i) shall be required in a manner consistent with, and to the extent determined by, the requirements under the pension legislation of the major authority's jurisdiction applicable to the funding of benefits that are provided in relation to the plan and that are required to be funded in relation to the plan under that legislation; and

(c) subject to subsection (4), when a pension supervisory authority becomes the major authority for a pension plan in accordance with this Agreement, if the funding of any benefit provided under the plan has been based on actuarial valuation reports filed in respect of the plan with a pension supervisory authority, the funding of those benefits shall continue to be subject to the pension legislation that applied immediately before the major authority assumed its functions in respect of the plan until such time as a new actuarial valuation report is due to be filed in respect of the plan with the major authority in accordance with the pension legislation of the major authority's jurisdiction.

Definitions

(3) For the purposes of subsection (4):

"alternative funding arrangement" means a fund or financial instrument that is described in the pension legislation of a jurisdiction and is permitted under that legislation to supplement, support or otherwise satisfy the funding requirements for a pension plan under that legislation, where in the absence of such fund or financial instrument additional contributions would be required to be made to the pension fund of the plan in order to satisfy the funding requirements for the plan under that legislation; (« instrument financier »)

"new major authority" means a pension supervisory authority that becomes the major authority for a pension plan in accordance with this Agreement; and

"prior authority" means a pension supervisory authority with which a pension plan is registered immediately before a pension supervisory authority becomes the major authority for the plan in accordance with this Agreement.

Alternative funding arrangement exceptions

(4) Despite clause (a) of subsection (1), when a pension supervisory authority becomes the new major authority for a pension plan, if the pension legislation of the prior authority's jurisdiction permitted the use of an alternate funding arrangement, but the pension legislation of the new major authority's jurisdiction does not permit the use of that alternate funding arrangement, then:

(a) if, no later than thirty-five days before the new major authority becomes the major authority for the plan, the administrator of the plan provides notice to both the new major authority and the prior authority that it intends to file an actuarial valuation report with the new major authority with a valuation date that coincides with the fiscal year end of the plan that immediately follows the new major authority becoming the major authority for the plan, then the following rules shall apply with respect to the funding of the plan:

(i) the alternative funding arrangement may continue to be used until thirty days after the valuation report is due to be filed with the new major authority;

(ii) no later than thirty days after the valuation report is due to be filed with the new major authority, an amount equal to the lesser of the value of the alternative funding arrangement or the amount required to make the plan fully funded on a solvency basis shall be deposited into the pension fund of the plan by an employer that is party to the plan; and

(iii) if the amount described in subclause (ii) has not been deposited by an employer into the pension fund of the plan within the thirty day timeframe described in that subclause, an amount equal to the full value of the alternative funding arrangement shall be immediately deposited into the pension fund of the plan by an employer that is party to the plan; and

(b) if the administrator of the plan does not provide the notice described in clause (a), then the following rules shall apply with respect to the funding of the plan:

(i) no later than thirty days before the new major authority becomes the major authority for the plan, an amount equal to the lesser of the value of the alternative funding arrangement or the amount required to make the plan fully funded on a solvency basis shall be deposited into the pension fund of the plan by an employer that is party to the plan; and

(ii) until the time a new actuarial valuation report described in clause (c) of subsection (2) is filed with the new major authority respecting the plan, an amount equal to the lesser of the value of any subsequent alternative funding arrangement that would have been required to have been obtained in relation to the plan under the pension legislation of the prior authority's jurisdiction, or the amount that would be required to make the plan fully funded on a solvency basis, shall be deposited into the pension fund of the plan by an employer that is party to the plan instead of obtaining the subsequent alternative funding arrangement, at or before the time the alternative funding arrangement would have been required to have been obtained in relation to the plan under the pension legislation of the prior authority's jurisdiction and in accordance with the last actuarial valuation report that had been filed with the prior authority in respect of the plan.

SECTION 7.
DETERMINATION OF BENEFITS BY FINAL LOCATION
Deemed applicability of pension legislation

7. For the purposes of determining the benefits accrued by a person under a pension plan, the person's entire benefit accrual shall be deemed to have been subject to the pension legislation that applied to the person:

(a) at the time the person's benefits were determined, if the person was still accruing benefits under the plan at that time; or

(b) at the time the person ceased accruing benefits under the plan, if the person was no longer accruing benefits under the plan at the time the person's benefits were determined.

SECTION 8.
PENSION PLAN INVESTMENTS
Deadline for compliance

8. Despite any other provision of this Agreement, any investment by a pension plan that is held on the date a pension supervisory authority becomes the major authority for the plan and that, although it complies with the pension legislation that applied to the plan on the day preceding that date, does not comply with the pension legislation that applies to the plan's investments from that date, shall be brought into compliance with the latter legislation within five years from that date.

SECTION 9.
PENSION BENEFITS GUARANTEE FUND
Pension benefits guarantee fund

9. Subject to sections 10 to 17, this Agreement shall not affect the application or administration of the Pension Benefits Guarantee Fund set out under the pension legislation of Ontario or any similar fund established under any other pension legislation.

PART IV
PENSION PLAN ASSET ALLOCATION INTO JURISDICTIONAL PORTIONS

SECTION 10.
APPLICABLE SITUATIONS
Applicable situations

10. The assets of a pension plan shall be allocated into portions in accordance with this Part when:

(a) the plan is amended so that part of the liability of the plan to pay benefits or other amounts to persons so entitled under the plan is transferred to a different pension plan, and where, as part and in consideration of that transfer of liability, part of the assets of the plan are transferred to the different plan;

(b) a pension supervisory authority orders or otherwise requires the splitting of the assets and liabilities of the plan, as described in clause (c) of subsection (3) of section 4;

(c) the plan has more than one participating employer and an employer withdraws from the plan, and pension legislation requires that the rights and benefits accrued under the plan be divided into groups, one of which consists of the rights and benefits of persons affected by the withdrawal, and that those persons may elect to have their rights and benefits under the plan be paid forthwith;

(d) the plan is being wound up in part;

(e) the plan is being fully wound up; or

(f) a situation not described in clauses (a) to (e) occurs and assets of the plan related to a jurisdiction are to be paid to an employer that participates in the plan in accordance with the pension legislation of that jurisdiction.

SECTION 11.
ALLOCATION OF ASSETS
Allocation into portions

11. (1) For the purposes of this Part, the assets of a pension plan shall be allocated into portions as of the date of allocation, each portion being related to the liability for benefits and other amounts accrued under the plan, and any additional liability referred to in clause (b) of subsection (2) of section 6 respecting the plan, that is subject to a jurisdiction's pension legislation, as determined in accordance with this section.

Standard allocation methodology

(2) Subject to section 12, the portion of a pension plan's assets that is subject to a jurisdiction's pension legislation as of the date of allocation shall be equal to the sum of the amounts referred to in section 13 as of the date of allocation, determined with respect to the benefits and other amounts described in section 13 that are subject to that jurisdiction's pension legislation and applying the requirements of sections 14 to 16.

Other allocation methodology

(3) The major authority for a pension plan may permit the assets of the plan to be allocated into the portions described in subsection (1) in a manner other than that required by subsection (2) or section 12 if:

(a) the allocation of the plan's assets is made in relation to any situation described in section 10 other than the full wind up of the plan and a Fellow of the Canadian Institute of Actuaries certifies that:

(i) the liabilities of the plan that are related to the plan assets to be allocated into the portions described in subsection (2) do not exceed those assets on either a solvency basis or a going concern basis; and

(ii) the allocation of the assets of the plan described in subclause (i) will not differ materially from an allocation of those assets conducted in accordance with subsection (2); or

(b) the allocation of the plan's assets is made in relation to a situation described in clause (d) of section 10, no pension legislation that applies to the plan assets to be allocated into the portions described in subsection (2) requires the distribution of any plan assets related to the wound up part of the plan that remain after all liabilities related to the wound up part of the plan have been settled and a Fellow of the Canadian Institute of Actuaries certifies that the liabilities of the plan related to the wound up part of the plan do not exceed the plan assets related to the wound up part of the plan on either a solvency basis or a going concern basis immediately before the partial wind up of the plan.

SECTION 12.
PLAN WITH MORE THAN ONE PARTICIPATING EMPLOYER
Plan with more than one participating employer

12. (1) This section applies to a pension plan that has more than one participating employer and, in accordance with the pension legislation of the major authority's jurisdiction:

(a) the following are determined and accounted for separately in respect of an employer that participates in the plan, as if a separate pension plan was established within the plan in respect of that employer:

(i) the assets and liabilities of the plan;

(ii) the contributions payable in relation to the plan;

(iii) the benefits and other amounts owing under the plan; and

(iv) the expenses payable in relation to the plan;

(b) the liabilities of the plan related to the employer described in clause (a) are determined with reference to only the benefits and other amounts owing to a person in relation to that person's employment with that employer; and

(c) among the contributions payable in relation to the plan by the employer described in clause (a), those that are required to be paid under the applicable pension legislation in relation to benefits and other amounts currently accruing by active members of the plan are determined only with reference to active members employed by that employer.

Allocation of assets into employer shares

(2) For the purposes of an asset allocation under this Part involving a pension plan described in subsection (1), the assets of the plan that have been determined and accounted for separately in relation to an employer as of the date of allocation shall be allocated to that employer as an employer share if the plan characteristics described in clause (a) of subsection (1) respecting the employer:

(a) have been determined and accounted for separately since the start of the employer's participation in the plan; or

(b) began to be determined and accounted for separately at a date subsequent to the start of the employer's participation in the plan, and the initial determination and accounting of the assets of the plan respecting that employer was consistent with, and conducted on the basis of, an allocation of the assets of the plan in accordance with the requirements of this Part and in relation to a situation other than that described in clause (c), (d) or (e) of section 10.

Allocation of employer shares into portions

(3) Any employer share allocated in accordance with subsection (2) shall be further allocated into portions in the manner provided for in section 11, and used in the manner provided for in section 17, as if the employer share consisted of the assets of a separate pension plan for that employer.

Allocation of remaining assets into portions

(4) For the purposes of an asset allocation under this Part involving a pension plan described in subsection (1), any assets of the plan not allocated to an employer share in accordance with subsection (2) shall be allocated into portions in the manner provided for in section 11, and used in the manner provided for in section 17, without considering the liabilities described in clause (b) of subsection (1) related to an employer for which an employer share has been allocated under this section.

SECTION 13.
DETERMINATION OF PORTIONS FOR ASSET ALLOCATION

Determination of portions

13. (1) The assets of a pension plan that are to be allocated into portions in accordance with subsection (2) of section 11 shall be allocated into portions as of the date of allocation in accordance with the levels of priority of allocation set out in this section.

Contributions and similar amounts

(2) First, allocate assets of the pension plan equal to the sum of the following contributions and amounts, to the extent that such contributions and amounts are still credited to the account of a person having benefits under the plan on the date of allocation:

(a) any contributions paid into the pension fund of the plan and any amounts that the person had elected to transfer into the pension fund of the plan, other than contributions and amounts used to fund benefits that are not determined solely as a function of amounts credited to the account of the person; and

(b) any interest attributable to contributions or amounts described in clause (a).

Core liabilities

(3) Second, allocate assets of the pension plan equal to the sum of the following liability amounts, provided that the pension legislation that would govern those liabilities if this Agreement did not exist would require them to be funded on a solvency basis:

(a) the value of benefits under the plan that are being paid on a regular and periodic basis to any person on the date of allocation, whether or not the benefit is payable for the lifetime of the person, and determined taking into account:

(i) any periodic increase in the benefits, based on any index, rate or formula provided for in the plan; and

(ii) any related benefits that are payable due to the death of the person;

(b) the value of lifetime benefits accrued under the plan by any person who, on the date of allocation, is entitled to receive payment of the benefits on that date or a later date, but who is not in receipt of payment of the benefits as of the date of allocation, determined:

(i) using the earliest age at which all such persons are entitled to payment of unreduced lifetime benefits, without reference to any other requirements or conditions under the terms of the plan or any applicable pension legislation;

(ii) taking into account any post-retirement periodic increase in the lifetime benefits, based on any index, rate or formula provided for in the plan; and

(iii) taking into account any related benefits that are payable due to the death of the person, whether such death occurs before or after the person starts receiving payment of lifetime benefits under the plan and determined at the age described in subclause (i);

(c) in respect of any person who has been required to make contributions under the plan, the amount by which the contributions made by the person plus any interest attributable to those contributions exceeds the amount representing 50% of the value of the benefits payable to the person under the plan, subject to the following requirements:

(i) the contributions, interest and value of the benefits shall be calculated as of the date of allocation and consistent with either the pension legislation that governs the benefits or the terms of the plan, whichever produces a larger excess amount; and

(ii) any such excess amount already determined in relation to a person before the date of allocation shall not be included, whether or not such previously determined excess amount has been refunded to the person; and

(d) any unpaid part of the value of the benefits payable under the plan to a person who had elected before the date of allocation to be paid the value of the person's benefit entitlements under the plan, as well as any interest attributable to that unpaid part.

Other liabilities whose funding is required

(4) Third, allocate assets of the pension plan equal to the sum of the following liability amounts:

(a) the value of benefits accrued under the plan, other than those referred to in subsection (3), by any person who, on the date of allocation, is entitled to receive payment of the benefit on that date or a later date, but who is not in receipt of payment of the benefit as of the date of allocation, provided that the pension legislation that would govern the benefits if this Agreement did not exist would require that such benefits be funded on a solvency basis; and

(b) subject to subsection (5), the value of the additional liability referred to in clause (b) of subsection (2) of section 6.

Assets related to additional liability

(5) Where the assets of the pension plan that are allocated to a portion under subsections (2), (3) and (4) in the absence of the requirements of this subsection exceed the value of benefits and other amounts accrued under the plan that are related to that portion:

(a) the value calculated for clause (b) of subsection (4) shall be reduced by the excess amount referred to in this subsection; and

(b) the assets of the plan not allocated to a portion due to the application of clause (a) may be allocated to other portions in accordance with subsection (4).

Balance of assets

(6) Fourth, for the purposes of an asset allocation in any situation other than that described in clause (c), (d) or (e) of section 10:

(a) any assets of the pension plan remaining after the allocations made in accordance with subsections (2) to (4) shall be sequentially allocated to the portion or portions with the lowest going concern ratio, until the going concern ratio of that portion equals the going concern ratio of the portion with the next highest going concern ratio;

(b) the sequential allocation of the plan's assets described in clause (a) shall be made until all portions have the same going concern ratio or no assets remain to be allocated, whichever occurs first;

(c) if, after applying the sequential allocation of assets described in clauses (a) and (b), the going concern ratio of each portion is lower than 1.0, any assets of the pension plan yet to be allocated shall be allocated to the portions so that the going concern ratios of all portions remain the same, until the going concern ratio of each portion reaches 1.0 or no assets remain to be allocated, whichever occurs first;

(d) for the purposes of clauses (a), (b) and (c), the going concern ratio of a portion shall be calculated by using the assets of the pension plan allocated to the portion in accordance with this section and the going concern liabilities of the plan that are subject to the jurisdiction's pension legislation applicable to that portion, other than assets and liabilities related to contributions and amounts described in subsection (2); and

(e) any assets of the pension plan remaining after the allocations made in accordance with clauses (a), (b) and (c) shall be allocated pro rata to the total of the going concern liabilities determined for each portion.

Balance of assets for certain asset allocations

(7) Fourth, for the purposes of an asset allocation in a situation described in clause (c), (d) or (e) of section 10:

(a) allocate assets of the pension plan equal to the value of benefits accrued under the plan, other than those referred to in subsections (2), (3) or (4), to which persons are entitled under the plan as of the date of allocation; and

(b) any assets of the pension plan remaining after the allocations made in accordance with subsections (2) to (5) and clause (a) shall be allocated pro rata to the total of the values determined for each portion in applying subsections (2) and (3) and clause (a) of subsection (4).

SECTION 14.
RULES OF APPLICATION
Alternative funding arrangements

14. (1) For the purposes of this Part, the assets of a pension plan include any alternative funding arrangement described in section 6 that exists in relation to the plan at the time the assets of the plan are allocated into portions in accordance with this Part.

Determining value of benefits and assets

(2) For the purposes of sections 11 to 13, except subsection (6) of section 13, the value of the benefits and other amounts payable under a pension plan and the assets of the plan shall be determined as if the pension plan were wound up on the date of allocation.

Deemed solvency funding requirement

(3) If, at the time the assets of a pension plan are allocated into portions in accordance with this Part, a liability amount related to the plan or a benefit under the plan that is subject to a jurisdiction's pension legislation would not, if this Agreement did not exist, be required to be funded on a solvency basis due to a temporary suspension under that legislation of a requirement under that legislation that would otherwise require the funding of such liability amount or benefit on a solvency basis, the liability amount or benefit shall be deemed to be one that is required by that legislation to be funded on a solvency basis for the purposes of subsection (3) of section 13 and clause (a) of subsection (4) of section 13.

SECTION 15.
REDUCTION METHOD
Reduction method

15. (1) Subject to subsection (2), to the extent that a value or amount referred to in subsection (3) or (4) of section 13 relates to benefits arising from the application of a provision of a pension plan or of pension legislation that came into effect less than five years before the date of allocation, such value or amount shall, for the purposes of subsection (3) or (4) of section 13, be reduced:

(a) by 100%, if the period from the date that the provision of the pension plan or pension legislation came into effect to the date of allocation is less than one year;

(b) by 80%, if the period is one year or more, but less than two years;

(c) by 60%, if the period is two years or more, but less than three years;

(d) by 40%, if the period is three years or more, but less than four years; and

(e) by 20%, if the period is four years or more, but less than five years.

Exception to reduction method

(2) The major authority for a pension plan may permit the assets of the plan to be allocated into the portions described in subsection (2) of section 11 without applying the requirements of subsection (1) if a Fellow of the Canadian Institute of Actuaries certifies that the liabilities of the plan that are related to the plan assets to be allocated into the portions described in subsection (2) of section 11 do not exceed those assets on a solvency basis.

SECTION 16.
INSUFFICIENCY OF ASSETS

Insufficiency of assets

16. If, at one of the levels of priority of allocation established by section 13, the assets of a pension plan that have yet to be allocated to a portion described in subsection (2) of section 11 are less than the total value of the benefits and other amounts that rank equally in that level of priority of allocation, the available plan assets shall be allocated to the portions pro rata to the total value of the benefits and other amounts that rank equally in that level of priority of allocation.

SECTION 17.
USE OF ASSETS FOLLOWING ALLOCATION

Use of allocated assets

17. (1) Where an asset allocation for a pension plan is made under this Part in any situation other than that described in clause (c), (d) or (e) of section 10, each portion of the assets of the plan allocated in accordance with sections 11 to 16 shall be utilized in conformity with the pension legislation applicable to the benefits and other amounts related to that portion.

Use of allocated assets for certain asset allocations

(2) Where an asset allocation for a pension plan is made under this Part in a situation described in clause (c), (d) or (e) of section 10, each portion of the assets of the plan allocated in accordance with sections 11 to 16 shall be utilized, in conformity with the pension legislation applicable to the benefits and other amounts related to that portion, to satisfy payment of those benefits and other amounts arising from the wind up of the plan or the withdrawal of the employer, as the case may be. In addition, any remaining assets related to that portion shall be distributed in accordance with that pension legislation, if so required under that legislation. No assets of the plan allocated to one portion shall be utilized to satisfy payment of the benefits and other amounts related to another portion on the wind up of the plan or the withdrawal of the employer, as the case may be.

Use of remaining allocated assets

(3) Where a situation described in clause (c) or (d) of section 10 occurs and the assets of a pension plan that have been allocated to a portion in accordance with sections 11 to 16 have been utilized to fully satisfy payment of the benefits and other amounts related to that portion that arise from the partial wind up of the plan or the withdrawal of the employer, as the case may be, and any other assets related to that portion have been distributed as required by the pension legislation applicable to the benefits and other amounts related to that portion, any remaining assets related to that portion shall remain in the pension fund of the plan and be commingled with the other assets therein.

PART V
RELATIONS BETWEEN AUTHORITIES

SECTION 18.
COOPERATION

Reciprocal obligations

18. The pension supervisory authorities that are subject to this Agreement shall:

(a) provide to each other any information required for the application of this Agreement or pension legislation, and if requested, may provide other information which is reasonable in the circumstances;

(b) assist each other in any matter concerning the application of this Agreement or pension legislation as is reasonable in the circumstances, particularly with respect to subsection (7) of section 4, and may act as agent for each other;

(c) upon the request of such an authority, transmit to that authority any information on steps taken for the application of this Agreement and amendments to pension legislation, to the extent that such amendments affect the application of this Agreement;

(d) notify each other of any difficulty encountered in the interpretation or in the application of this Agreement or pension legislation; and

(e) seek an amicable resolution to any dispute that arises between them with respect to the interpretation of this Agreement.

PART VI
EXECUTION AND COMING INTO FORCE OF AGREEMENT

SECTION 19.
EXECUTION AND COMING INTO FORCE
Effective date

19. This Agreement shall come into force:

(a) on July 1, 2011, in respect of each government on behalf of which this Agreement has been signed on or before that date; and

(b) on the date unanimously agreed to by all governments that are party to this Agreement in respect of a government on behalf of which this Agreement is signed after July 1, 2011.

SECTION 20.
ADDITIONAL PARTIES
Unanimous consent

20. (1) A government may become party to this Agreement with the unanimous consent of the governments that are party to it.

Effects

(2) This Agreement shall enure to the benefit of and be binding upon a government that becomes a party to this Agreement, the government's jurisdiction and the jurisdiction's pension supervisory authority as of the date referred to, as the case may be, in clause (a) or (b) of section 19.

SECTION 21.
WITHDRAWAL
Written notice

21. (1) A government that is party to this Agreement may withdraw from this Agreement by giving written notice to all other governments that are party to this Agreement. Such notice shall be signed by a person authorized by the laws of the withdrawing government's jurisdiction to sign this Agreement.

Waiting period

(2) The withdrawal shall take effect on the first day of the month following expiry of a period of three years following the date on which the notice was transmitted. The withdrawal shall affect only the withdrawing government, and the Agreement shall remain in force for all other governments.

Minor authority

(3) Where, upon expiry of the three-year period referred to in subsection (2), the pension supervisory authority for the withdrawing government's jurisdiction acts as a minor authority with respect to a pension plan, the major authority for the plan shall provide, upon request, that minor authority with copies of all relevant records, documents and other information concerning the plan in the major authority's possession.

Major authority

(4) Where, upon expiry of the three-year period referred to in subsection (2), the pension supervisory authority for the withdrawing government's jurisdiction acts as the major authority for a pension plan, such authority shall:

(a) determine which pension supervisory authority, if any, shall become the new major authority for the plan in accordance with section 3 as of the effective date of the withdrawal; and

(b) provide the new major authority for the plan referred to in clause (a), as soon as possible after such authority assumes its functions, with all relevant records, documents and other information in its possession concerning the plan.

Notice by major authority

(5) The pension supervisory authority that becomes a pension plan's new major authority in accordance with subsection (4) shall, as soon as possible after assuming its functions, inform the plan administrator and each of the plan's minor authorities of the date on which it assumed the functions of major authority.

Notice by plan administrator

(6) The administrator of a pension plan that receives from the plan's new major authority notice of the information provided for in subsection (5) shall transmit such information:

(a) to each employer that is party to the plan and any collective bargaining agent that represents any person who has rights or benefits under the plan within 90 days after such notice; and

(b) to any person who has rights or benefits under the plan who is entitled to receive an annual statement of the person's benefits under the plan, no later than the expiry of the period for providing such persons with their next annual statements of benefits.

Decisions and recourse

(7) Despite sections 4 and 6, where a pension supervisory authority becomes a pension plan's new major authority in accordance with subsection (4):

(a) all matters related to the plan that are pending before a prior major authority on the day preceding the new major authority's assumption of its functions under this Agreement shall be continued before that prior major authority;

(b) all matters related to the plan that concern a decision, order, direction or approval proposed or made by a prior major authority and pending before any administrative body or court on the day preceding the new major authority's assumption of its functions under this Agreement shall be continued before such body or court;

(c) for every matter in respect of which the prior major authority referred to in clause (a) or the administrative body or court referred to in clause (b) has proposed or made a decision, order, direction or approval to which the pension legislation or other legislation applying on the day preceding the new major authority's assumption of its functions under this Agreement provides a right of recourse:

(i) such right shall be maintained so long as the period provided for exercising that right has not expired; and

(ii) such recourse may be brought before the administrative body or court provided for by the legislation giving entitlement thereto;

(d) for any matter related to the plan not described in clauses (a) to (c) that occurred before the new major authority's assumption of its functions under this Agreement and that related to the provisions of the pension legislation of a prior major authority's jurisdiction in respect of a matter referred to in Schedule B:

(i) the prior major authority may, even after it loses its status as major authority for the plan, conduct an examination, investigation or inquiry into the matter in accordance with the pension legislation of the prior major authority's jurisdiction to determine whether compliance with that legislation was met, and in such case, the matter shall remain subject to that prior major authority; and

(ii) where the matter constitutes an offence under the pension legislation of the prior major authority's jurisdiction, the offence may be prosecuted by the competent authority in that jurisdiction, and in such case, the matter shall remain subject to that prior major authority; and

(e) all matters referred to in clauses (a) to (d) shall remain subject to the pension legislation or other legislation that applied to such matters on the day preceding the new major authority's assumption of its functions under this Agreement.

SECTION 22.
AMENDMENT
Unanimous consent

22. This Agreement may be amended with the unanimous written consent of the governments that are party to this Agreement.

SECTION 23.
COUNTERPARTS
Execution in counterparts

23. This Agreement or any amendment to this Agreement may be executed in counterparts.

SECTION 24.
EXECUTION IN ENGLISH AND IN FRENCH
Authentic texts

24. This Agreement and any amendment to this Agreement shall be executed in the English and French languages, each text being equally authoritative.

PART VII
IMPLEMENTATION AND TRANSITIONAL PROVISIONS

SECTION 25.
REPLACEMENT
Prior agreements

25. On the date referred to in clause (a) or (b) of section 19, as the case may be, this Agreement replaces the agreement entitled "Memorandum of Reciprocal Agreement" and any similar agreement respecting the application of pension legislation to pension plans made between the governments that are party to this Agreement or between the departments or agencies of such governments, to the extent that such plans are subject to this Agreement.

SECTION 26.
TRANSITION
Preliminary measure

26. (1) Where this Agreement comes into force on a date set out under section 19 and on that date a pension plan to which this Agreement would apply is registered with a pension supervisory authority that was not already the major authority for the plan immediately before that date:

(a) if the plan is registered with only one pension supervisory authority and that authority is subject to this Agreement on that date, that authority shall become the major authority for the plan as of that date;

(b) if the plan is registered with more than one pension supervisory authority and each of those authorities is subject to this Agreement on that date, the major authority for the plan shall be, of those authorities, the authority of the jurisdiction with the plurality of active members of the plan, as determined in accordance with subsection (3) of section 3 and considering only those jurisdictions whose pension legislation would, if this Agreement and any other agreement respecting the supervision of pension plans did not exist, require the plan to be registered with the pension supervisory authority of that jurisdiction; and

(c) if the plan is registered with more than one pension supervisory authority and not all of those authorities are subject to this Agreement on that date, this Agreement shall not apply to the plan until such time as all of the authorities with which the plan is registered are subject to this Agreement, at which time the requirements of clause (b) shall apply to the plan.

Equal number of active members

(2) Where the major authority for a pension plan cannot be determined by applying clause (b) of subsection (1) because two or more jurisdictions have authority over an equal number, greater than zero, of active members of the plan, the major authority for the plan shall be, of those jurisdictions, the authority whose main office is in closest proximity to the main office of the administrator of the plan. For the purposes of this subsection:

(a) the main office of a pension supervisory authority is the office from which the authority conducts most of its supervisory activities; and

(b) the main office of the pension plan administrator is the office from which the plan administrator described in the text of the pension plan conducts most of the plan's administration.

Notice by major authority

(3) The pension supervisory authority that becomes a pension plan's major authority in accordance with this section shall, as soon as possible after assuming its functions, inform the plan administrator and each of the plan's minor authorities of the date on which it assumed the functions of major authority.

Notice by plan administrator

(4) The administrator of a pension plan that receives from the plan's major authority notice of the information provided for in subsection (3) shall transmit such information:

(a) to each employer that is party to the plan and any collective bargaining agent that represents any person who has rights or benefits under the plan within 90 days after such notice; and

(b) to any person who has rights or benefits under the plan who is entitled to receive an annual statement of the person's benefits under the plan, no later than the expiry of the period for providing such persons with their next annual statements of benefits.

Decisions and recourse

(5) Despite sections 4 and 6, where a pension supervisory authority becomes a pension plan's major authority in accordance with this section:

(a) all matters related to the plan that are pending before a pension supervisory authority on the day preceding the major authority's assumption of its functions under this Agreement shall be continued before that pension supervisory authority;

(b) all matters related to the plan that concern a decision, order, direction or approval proposed or made by a pension supervisory authority and pending before any administrative body or court on the day preceding the major authority's assumption of its functions under this Agreement shall be continued before such body or court;

(c) for every matter in respect of which the pension supervisory authority referred to in clause (a) or the administrative body or court referred to in clause (b) has proposed or made a decision, order, direction or approval to which the pension legislation or other legislation applying on the day preceding the major authority's assumption of its functions under this Agreement provides a right of recourse:

(i) such right shall be maintained so long as the period provided for exercising that right has not expired; and

(ii) such recourse may be brought before the administrative body or court provided for by the legislation giving entitlement thereto;

(d) for any matter related to the plan not described in clauses (a) to (c) that occurred before the major authority's assumption of its functions under this Agreement and that related to the provisions of the pension legislation of a pension supervisory authority's jurisdiction in respect of a matter referred to in Schedule B:

(i) the pension supervisory authority may, even after the major authority assumes its functions under this Agreement for the plan, conduct an examination, investigation or inquiry into the matter in accordance with the pension legislation of that authority's jurisdiction to determine whether compliance with that legislation was met, and in such case, the matter shall remain subject to that pension supervisory authority; and

(ii) where the matter constitutes an offence under the pension legislation of the pension supervisory authority's jurisdiction, the offence may be prosecuted by the competent authority in that jurisdiction, and in such case, the matter shall remain subject to that pension supervisory authority; and

(e) all matters referred to in clauses (a) to (d) shall remain subject to the pension legislation or other legislation that applied to such matters on the day preceding the major authority's assumption of its functions under this Agreement.

SCHEDULE A
PENSION LEGISLATION

Alberta

1. *Employment Pension Plans Act*, R.S.A. 2000, c. E-8.

British Columbia

2. *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352.

Manitoba

3. *Pension Benefits Act*, R.S.M. 1987, c. P32.

New Brunswick

4. *Pension Benefits Act*, S.N.B. 1987, c. P-5.1.

Newfoundland and Labrador

5. *Pension Benefits Act, 1997*, S.N.L. 1996, c. P-4.01.

Nova Scotia

6. *Pension Benefits Act*, R.S.N.S. 1989, c. 340.

Ontario

7. *Pension Benefits Act*, R.S.O. 1990, c. P.8.

Quebec

8. *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1.

Saskatchewan

9. *Pension Benefits Act, 1992*, S.S. 1992, c. P-6.001.

Federal jurisdiction

10. *Pension Benefits Standards Act, 1985*, R.S.C. 1985 (2nd supp.), c. 32.

SCHEDULE B
MATTERS COVERED BY INCORPORATED LEGISLATIVE PROVISIONS

SECTION 1.
MAJOR AUTHORITY'S PENSION LEGISLATION
Major authority's pension legislation

1. The pension legislation applicable to a pension plan shall be the pension legislation of the jurisdiction of the major authority for the plan in the following areas of pension legislation:

Registration of pension plans

1. Legislative provisions respecting:

(a) the duty of the pension plan administrator to ensure that the plan complies with the applicable pension legislation;

(b) requirements that a pension plan be registered with the authority;

(c) prohibitions against administering a pension plan not registered with the authority;

(d) the pension plan registration process (including the filing of required forms and documents, the form in which such documents must be filed, the contents of documents and filing deadlines);

(e) whether registration of a plan is proof of compliance with the applicable pension legislation; and

(f) the authority's power to refuse or revoke the registration of a plan due to non-compliance with the applicable pension legislation.

Registration of pension plan amendments

2. Legislative provisions respecting:

(a) requirements that pension plan amendments, or amendments to prescribed pension plan documents, be registered with the authority;

(b) the amendment registration process (including the filing of required forms and documents, the form in which such documents must be filed, the contents of documents and filing deadlines);

(c) whether registration of an amendment is proof of compliance with the applicable pension legislation;

(d) the authority's power to refuse or revoke the registration of a plan amendment due to non-compliance with the pension legislation applicable to the plan under clause (a) of subsection (1) of section 6 of the Agreement;

(e) the ability of the administrator to administer the amended plan if it does not comply with the applicable pension legislation; and

(f) requirements for notice of registration of the amendment to be provided to active members or other persons, the form and content of the notice and deadlines for providing such notice.

Pension plan administrators

3. Legislative provisions respecting:

(a) requirements that a pension plan be administered by an administrator;

(b) who may be an administrator; and

(c) the right of active members or other persons to establish an advisory committee to advise the administrator, and requirements respecting such an advisory committee.

Pension plan administrators' duties

4. Legislative provisions respecting:

(a) requirements that the pension plan administrator or the trustee, custodian or holder of the pension fund:

(i) administer the pension plan or pension fund in accordance with the applicable pension legislation and the plan terms;

(ii) stand in a fiduciary relationship to active members or other persons;

(iii) hold the pension fund in trust for the active members or other persons;

(iv) act honestly, in good faith and in the best interests of the active members or other persons;

(v) exercise the care, diligence and skill of a prudent person;

(vi) invest the pension fund in accordance with the applicable pension legislation, the pension plan's written investment policies, in the best interests of the active members or other persons or in a reasonable and prudent manner; and

(vii) hold an annual or periodic meeting with the active members or other persons;

(b) requirements that persons involved in the administration of a pension plan or pension fund:

(i) employ all knowledge and skill they possess by reason of their business or profession;

(ii) familiarize themselves with their fiduciary duties and obligations; and

(iii) possess the skills, capability and dedication required to fulfill their responsibilities and seek advice from qualified advisors where appropriate;

(c) conflict of interest requirements for persons involved in the administration of a pension plan or pension fund;

(d) requirements for the selection, use and supervision of the administrator's agents or advisors, and requirements for such agents or advisors;

(e) requirements that the employer or trustee provide information to the administrator; and

(f) requirements respecting to the payment of expenses related to the pension plan.

Pension plan records

5. Legislative provisions respecting:

(a) how long any person must retain information related to the pension plan; and

(b) requests by the plan administrator for information necessary for the administration of the pension plan.

Funding of ongoing pension plans (not in the case of full or partial plan wind up)

6. Legislative provisions respecting:

   (a) requirements for contributions made to the pension fund (including the type or form of contributions, the manner in which they must be made and deadlines for making them);

   (b) minimum plan funding and solvency levels (including plan funding and solvency levels related to pension plan amendments and the use of plan assets for the funding of plan amendments);

   (c) the ability to take contribution holidays;

   (d) requirements for actuarial valuation reports to be filed with the authority in respect of pension plans (including the form and content of such reports, filing deadlines and actuarial standards to be applied in preparing such reports);

   (e) requirements for refunds of contributions to employers, active members or other persons;

   (f) restrictions on the amount of the commuted value of a person's benefit entitlements under a pension plan that can be transferred out of the pension fund of the plan where the plan is not fully funded on a solvency or going concern basis;

   (g) who may be the trustee, custodian or holder of the pension fund; and

   (h) requirements for the provision of information between administrators and the trustees, custodians or holders of pension funds with respect to contributions, and for notice to the authority of contributions not remitted when due.

Pension fund investments

7. Legislative provisions respecting:

   (a) requirements for the investment of the pension fund (including limitations on investments and requirements that pension fund assets to be held in the name of the pension plan);

   (b) requirements that the administrator prepare a written investment policy, requirements for such a policy (including the form and content of the policy, whether it must be filed with the authority and the deadline for filing) and requirements regarding to whom such a policy must be provided; and

(c) requirements in situations where active members or other persons direct the investment of their contributions (including the minimum number and type of investment options offered, the education and advice available to active members or who may provide the advice).

Pension fund assets

8. Legislative provisions respecting:

(a) requirements for pension fund assets to be held by specified fund holders under a specified type of agreement;

(b) requirements for contributions to be remitted to the pension fund;

(c) requirements that the pension fund be held separate and apart from the employer's assets and deeming the pension fund to be held in trust for the active members or other persons;

(d) an administrator's lien and charge on the employer's assets equal to the amounts deemed held in trust; and

(e) the administrator's duty to take immediate action (including court proceedings) to obtain outstanding contributions.

Provision of information

9. Legislative provisions respecting:

(a) requirements for documents and information to be filed by the administrator or any other person with the authority, including:

(i) periodic information returns;

(ii) actuarial information for defined benefit plans;

(iii) financial statements (including audited financial statements); and

(iv) the form and content of the documents and information, who must prepare them and filing deadlines;

(b) requirements for the following documents and information to be provided by the administrator, including the form and content of the documents and information, who must prepare them and deadlines for providing them:

(i) pension plan summaries for active members or employees entitled to join the plan; and

(ii) annual or periodic statements for active members or other persons; and

(c) requirements for the inspection of pension plan documents in the possession of the administrator, authority or other persons (including who is entitled to inspect the documents and information, how often, where and at what cost).

Plan membership

10. Legislative provisions respecting:

(a) pension plans being for one or more classes of employees; and

(b) the ability of the employer to establish separate plans for full-time and part-time employees.

Appointment of pension plan administrator

11. Legislative provisions respecting:

(a) the ability of the authority to appoint itself or another person as administrator of a pension plan and rescind the appointment; and

(b) the powers of an appointed administrator.

SECTION 2.

MAJOR AUTHORITY'S POWERS

Major authority's powers

2. Where the pension legislation of the major authority's jurisdiction applies to a pension plan in accordance with section 1 of this Schedule, the following areas of the pension legislation of the major authority's jurisdiction shall, for the purposes of the plan and all jurisdictions that are subject to this Agreement in respect of the plan, also apply in respect of the application of the pension legislation described in section 1 of this Schedule:

Powers of examination, investigation or inquiry

1. All powers of examination, investigation or inquiry given to the major authority.

Orders, directions, approvals or decisions

2. The issuance of, or proposal to issue, orders, directions, approvals or decisions by the major authority, and any modification as may be made to such an order, direction, approval or decision by the authority, an administrative body or a court.

Reconsideration or review

3. The rights of the plan or a person affected by an order, direction, approval or decision of the major authority, an administrative body or a court to have the order, direction, approval or decision reconsidered or reviewed by the authority, an administrative body or a court.

Offences and penalties

4. The offences and penalties that may be applied where the plan or a person is found to have contravened the terms of the applicable pension legislation.

AGREEMENT RESPECTING
MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by
the Government of Quebec, have signed
the Agreement Respecting Multi-jurisdictional
Pension Plans.

Signed at Québec ,

the 21st day of April , 2011.

(original signed by)
Julie Boulet
Minister of Employment and Social Solidarity

Signed at Québec ,

the 28th day of April , 2011.

(original signed by)
Pierre Moreau
Minister responsible for Canadian Intergovernmental
Affairs and the Canadian Francophonie

AGREEMENT RESPECTING
MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by
the Government of Ontario, has signed
the Agreement Respecting Multi-jurisdictional
Pension Plans.

Signed at Toronto ,

the 9th day of May , 2011.

(original signed by)
Dwight Duncan
Minister of Finance

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

The signatories of this Agreement are as follows:

The governments of

BRITISH COLUMBIA, herein acting and represented by the Minister of Finance;

NOVA SCOTIA, herein acting and represented by the Minister of Finance and Treasury Board;

ONTARIO, herein acting and represented by the Minister of Finance;

QUEBEC, herein acting and represented by the Minister of Finance and the Minister responsible for Canadian Relations and the Canadian Francophonie; and

SASKATCHEWAN, herein acting and represented by the Minister of Justice and Attorney General.

RECITALS

I. Each signatory to this Agreement represents a legislative jurisdiction in Canada and is authorized by the laws of the signatory's jurisdiction to sign this Agreement.

II. A pension plan may be subject to the pension legislation of more than one jurisdiction and may be subject to the supervision of more than one jurisdiction's pension supervisory authority, by reason of the nature or place of the plan members' residence or employment or the nature of the business, work or undertaking of the members' employer.

III. Pension plans that are subject to the pension legislation of more than one jurisdiction play a significant role in providing retirement income to many Canadians. To establish an efficient and transparent regulatory environment for such plans, the parties to this Agreement deem it desirable to specify the rules that apply to such plans and allow, to the extent provided for in this Agreement, a single pension supervisory authority to exercise with respect to any such pension plan all of the supervisory and regulatory powers to which such plan is subject.

IV. The laws of the jurisdictions whose governments are party to this Agreement allow for the incorporation of rules for pension plans enacted by Canadian legislative jurisdictions or as otherwise set out in this Agreement, as well as the reciprocal application of legislative provisions and administrative powers by the pension supervisory authorities concerned.

V. Therefore, the parties to this Agreement agree as follows:

PART I
GENERAL PROVISIONS

SECTION 1.
DEFINITIONS & SCHEDULES

Definitions

1. (1) For the purposes of this Agreement, unless the context indicates a different meaning:

"active member" means, in relation to a pension plan, a person who:

(a) is accruing benefits under the plan; or

(b) is no longer accruing benefits under the plan, but who is deemed by the terms of the plan or the pension legislation that would apply to the person if this Agreement did not exist to have the same status as an active member of the plan as a person determined under clause (a); ("participant actif")

"pension legislation" means, in relation to a jurisdiction, the legislation identified in Schedule A in respect of that jurisdiction and any subordinate legislation made under that legislation, all as amended or substituted from time to time; ("loi sur les régimes de retraite")

"pension plan" means, in respect of a jurisdiction, any plan that is subject to the jurisdiction's pension legislation; and ("régime de retraite")

"pension supervisory authority" means the government ministry, department or agency of a jurisdiction that has supervisory or regulatory powers with respect to pension plans under the pension legislation of the jurisdiction. ("organisme de surveillance")

Schedules

(2) The following attached Schedules form part of this Agreement:

(a) Schedule A – Pension Legislation; and

(b) Schedule B – Matters Covered by Incorporated Legislative Provisions.

SECTION 2.
APPLICATION

General application

2. (1) Subject to subsection (2) and section 26, this Agreement applies to any pension plan that would, if this Agreement and any other agreement respecting the supervision of pension plans did not exist, be subject to registration with a pension supervisory authority under the pension legislation of more than one jurisdiction that is subject to this Agreement.

Restriction

(2) This Agreement does not apply to a pension plan if the pension supervisory authority that would be designated as the major authority for the plan under this Agreement is not subject to this Agreement.

Plan provision not effective

(3) This Agreement applies in respect of a pension plan despite any conflicting provision in any document that creates or supports the pension plan.

PART II
MAJOR AUTHORITY

SECTION 3.
DETERMINATION OF THE MAJOR AUTHORITY

One major authority

3. (1) One pension supervisory authority having jurisdiction over a pension plan shall be the major authority for the plan.

Plurality of active members

(2) Except as provided in sections 5 and 26, the major authority for a pension plan shall be the pension supervisory authority of the jurisdiction with the plurality of active members of the plan, as determined in accordance with subsection (3) and considering only those jurisdictions whose pension legislation would, if this Agreement and any other agreement respecting the supervision of pension plans did not exist, require the plan to be registered with the pension supervisory authority of that jurisdiction.

Determination of plurality

(3) The jurisdiction that, among those referred to in subsection (2), has the plurality of active members of a pension plan shall be determined using the most recent periodic information return that has been filed with a pension supervisory authority in relation to the plan's fiscal year end, or if an application to register a new pension plan is received by a pension supervisory authority, determined using the information set out in the application, and on the following basis:

(a) in respect of a provincial jurisdiction, the number of active members of the plan who are employed in that provincial jurisdiction and who would be subject to that jurisdiction's pension legislation if this Agreement and any other agreement respecting the supervision of pension plans did not exist; and

(b) in respect of the federal jurisdiction, the number of active members of the plan who are employed in "included employment" within the meaning of that jurisdiction's pension legislation, where the plan is subject to that jurisdiction's pension legislation.

Equal number of active members

(4) Where the major authority for a pension plan cannot be determined by applying subsections (2) and (3) because two or more jurisdictions have authority over an equal number, greater than zero, of active members of the plan, the major authority for the plan shall be, of those jurisdictions, the authority whose main office is in closest proximity to the main office of the administrator of the plan. For the purposes of this subsection:

(a) the main office of a pension supervisory authority is the office from which the authority conducts most of its supervisory activities; and

(b) the main office of the pension plan administrator is the office from which the plan administrator described in the text of the pension plan conducts most of the plan's administration.

Status as major authority

(5) A pension supervisory authority that becomes the major authority for a pension plan in accordance with this Agreement shall remain the major authority for the plan until the authority loses its status as major authority in accordance with this Agreement.

Minor authorities

(6) Once a pension supervisory authority becomes the major authority for a pension plan, any other pension supervisory authority to which this Agreement extends and that has supervisory or regulatory powers with respect to the plan becomes a minor authority for the plan.

New pension plan registration

(7) Where a pension supervisory authority receives an application to register a pension plan, that authority shall determine whether it is the major authority for the plan within the meaning of this Agreement, and if necessary and as soon as possible thereafter, that authority shall notify the plan administrator as to the relevant authority with which the plan should or may be registered and shall notify the relevant authority about the plan to be registered.

SECTION 4.
ROLE OF THE MAJOR AUTHORITY

Interpretation

4. (1) For the purposes of this section:

(a) a decision includes an order, direction, approval or, if specific recourse is provided, a proposal to make such a decision; and

(b) recourse includes the right to request a hearing, review, reconsideration or appeal.

Role of major authority

(2) The major authority for a pension plan shall:

(a) supervise and regulate the plan in accordance with this Agreement, and on behalf of each of the minor authorities for the plan as required by this Agreement;

(b) subject to subsection (3) and section 9, exercise, with respect to the plan and as required by this Agreement, the functions and powers necessary to carry out this Agreement conferred on the minor authority by the pension legislation of the minor authority's jurisdiction;

(c) apply and enforce any rules specified in this Agreement that are not part of the pension legislation of a jurisdiction; and

(d) determine any matter or question related to the application of this Agreement to the plan in accordance with this Agreement and the procedural provisions of the pension legislation of the major authority's jurisdiction.

Exceptions

(3) Despite clause (b) of subsection (2):

(a) where the major authority for a pension plan and a minor authority for the plan agree that a particular function or power conferred by the pension legislation of the minor authority's jurisdiction shall be exercised in respect of the plan by the minor authority, only such minor authority may exercise such function or power in respect of the plan;

(b) where the major authority for a pension plan and a minor authority for the plan agree that a particular decision concerning the application of provisions of the pension legislation of the minor authority's jurisdiction shall be made in respect of the plan by the minor authority, only such minor authority may make such decision in respect of the plan; and

(c) where pension legislation confers on a pension supervisory authority the power to order or otherwise require the splitting of the assets and liabilities of a pension plan, only such authority may make a decision concerning the exercise of that power with respect to the liabilities of a plan that are subject to such pension legislation and the assets of the plan related to the funding of those liabilities.

Decisions and recourse

(4) Any decision that may be made by the major authority for a pension plan that applies the provisions of the pension legislation of a minor authority's jurisdiction as described in clause (b) of subsection (1) of section 6 is subject to the following rules:

(a) the decision shall be made under the procedural provisions of the pension legislation of the major authority's jurisdiction that would have applied if the matter had arisen under that legislation;

(b) the decision shall be deemed to have been made by the minor authority under the procedural provisions of the pension legislation of the minor authority's jurisdiction that would have applied if the minor authority had made the decision;

(c) when the decision is issued by the major authority, it shall include notice to any person receiving the decision as to:

(i) the provisions of the pension legislation of the minor authority's jurisdiction that were applied in formulating the decision that is made;

(ii) the recourse provided, if any, from the decision under the pension legislation of the minor authority's jurisdiction, including the body before whom such recourse may be exercised;

(iii) the time limit under the pension legislation of the minor authority's jurisdiction for exercising such recourse; and

(iv) where the pension legislation of the minor authority's jurisdiction does not provide for recourse from the decision, any recourse from the decision provided under any other legislation of that jurisdiction, including the body before whom such recourse may be exercised and the time limit for exercising such recourse; and

(d) the right to recourse from the decision shall be determined under the pension legislation or other legislation of the minor authority's jurisdiction as though the decision had been made under the procedural provisions of that legislation.

Continued role of major authority

(5) Exercise of a recourse from a decision referred to in this section does not have the effect of preventing or releasing the major authority from continuing to fulfill its responsibilities with respect to the pension plan as set out in subsection (2).

Enforcement of decisions

(6) The major authority shall enforce any decision referred to in this section once that decision is no longer open to any further recourse, as well as any decision resulting from such recourse that is no longer open to any further recourse.

Communication with major authority

(7) A person shall be entitled to communicate with the major authority for a pension plan in the same manner that the person would be entitled to communicate with a pension supervisory authority under the legislation that would apply to the person if this Agreement did not exist.

Representative

(8) Where a person having any rights or benefits under a pension plan has designated another person or an association that represents people with rights or benefits under the plan to act on his or her behalf with respect to the major authority for the plan, such authority shall, to the extent permitted by law, communicate with that other person or association and, upon request, provide that other person or association with the information and documents to which the person is entitled.

SECTION 5.
LOSS OF MAJOR AUTHORITY STATUS

Loss of major authority status

5. (1) The major authority for a pension plan shall lose its status in that regard on the date described in subsection (2) where, according to the most recent periodic information return that has been filed with the major authority in relation to the plan's fiscal year end, the number of active members of the plan employed in relation to the major authority's jurisdiction, as determined under subsection (3) of section 3 as of the plan's fiscal year end, is:

(a) for the third consecutive fiscal year, less than the number of active members who were employed in relation to any other jurisdiction or jurisdictions;

(b) less than 75% of the number of active members who were employed in relation to any other jurisdiction; or

(c) equal to zero and there are active members of the plan employed in relation to any other jurisdiction.

Date of loss of major authority status

(2) The major authority for a pension plan loses its status in that regard:

(a) in the case provided for in clause (a) or (b) of subsection (1), five days prior to the end of the first plan fiscal year that begins after the date on which the major authority received the information referred to in the relevant clause; and

(b) in the case provided for in clause (c) of subsection (1), upon the later of the fifth day before the end of the current plan fiscal year during which the major authority received the information referred to in that clause or of the expiry of the period of six months beginning on the date the major authority received the information.

New major authority

(3) When the major authority for a pension plan loses its status in that regard in accordance with subsection (2), the pension supervisory authority for the jurisdiction having, as determined in accordance with subsection (1), the plurality of active members of the plan becomes the plan's new major authority if that new major authority is subject to this Agreement.

Equal number of active members

(4) Where the new major authority for a pension plan cannot be determined in accordance with subsection (3) because two or more jurisdictions have authority over an equal number, greater than zero, of active members of the plan, the major authority for the plan shall be, of those jurisdictions, the authority whose main office is in closest proximity to the main office of the administrator of the plan. For the purposes of this subsection:

(a) the main office of a pension supervisory authority is the office from which the authority conducts most of its supervisory activities; and

(b) the main office of the pension plan administrator is the office from which the plan administrator described in the text of the pension plan conducts most of the plan's administration.

Transitional rules

(5) Where the major authority for a pension plan loses its status in that regard in accordance with this section:

(a) all matters related to the plan that are pending before the major authority on the day preceding its loss of status as major authority shall be continued before that authority;

(b) all matters related to the plan that concern a decision, order, direction or approval proposed or made by the major authority and pending before any administrative body or court on the day preceding the loss of the major authority's status as major authority shall be continued before such body or court;

(c) for every matter in respect of which the major authority referred to in clause (a) or the administrative body or court referred to in clause (b) has proposed or made a decision, order, direction or approval to which the pension legislation or other legislation applying on the day preceding the replacement of the major authority provides a right of recourse:

(i) such right shall be maintained so long as the period provided for exercising that right has not expired; and

(ii) such recourse may be brought before the administrative body or court provided for by the legislation giving entitlement thereto;

(d) for any matter related to the plan not described in clauses (a) to (c) that occurred while the major authority was the major authority for the plan and that related to the provisions of the pension legislation of the major authority's jurisdiction in respect of a matter referred to in Schedule B:

(i) the major authority may, even after it loses its status in that regard for the plan, conduct an examination, investigation or inquiry into the matter in accordance with the pension legislation of the major authority's jurisdiction to determine whether compliance with that legislation was met, and in such case, the matter shall remain subject to that major authority; and

(ii) where the matter constitutes an offence under the pension legislation of the major authority's jurisdiction, the offence may be prosecuted by the competent authority in that jurisdiction, and in such case, the matter shall remain subject to that major authority; and

(e) all matters referred to in clauses (a) to (d) shall remain subject to the pension legislation or other legislation that, under this Agreement, applied to such matters on the day preceding the loss of the major authority's status as major authority.

Notice by major authority

(6) Where the major authority for a pension plan receives from the administrator of the plan the information described in clauses (a), (b) or (c) of subsection (1), it shall:

(a) as soon as possible after receipt of the information, notify the pension plan administrator and each minor authority for the plan of the date on which, pursuant to subsection (2), it will lose its status as major authority for the plan and, if applicable, the pension supervisory authority that shall become the new major authority for the plan; and

(b) as soon as possible after the plan's new major authority assumes its functions, provide to such new major authority all relevant records, documents or other information that it has concerning the plan.

Notice by new major authority

(7) The pension supervisory authority that replaces another authority as major authority for a pension plan shall, as soon as possible after assuming its functions, inform the pension plan administrator and each of the plan's minor authorities of the date on which it assumed the functions of major authority.

Notice by plan administrator

(8) The administrator of a pension plan that receives from the plan's major authority notice of the information provided for in clause (a) of subsection (6) or in subsection (7) shall:

(a) in respect of the information provided for in clause (a) of subsection (6), transmit such information to each employer that is party to the plan and any collective bargaining agent that represents any person who has rights or benefits under the plan within 90 days after such notice; and

(b) in respect of the information provided for in subsection (7), transmit such information to each employer that is party to the plan and any person who has rights or benefits under the plan who is entitled to receive an annual statement of the person's benefits, no later than the expiry of the period for providing such persons with their next annual statements of benefits.

PART III
APPLICABLE LAW

SECTION 6.
APPLICABLE LEGISLATION
Applicable pension legislation

6. (1) While a pension supervisory authority is the major authority for a pension plan in accordance with this Agreement:

(a) the provisions of the pension legislation of the major authority's jurisdiction in respect of matters referred to in Schedule B apply to the plan instead of those of the corresponding provisions of the pension legislation of any minor authority's jurisdiction that would apply to the plan if this Agreement did not exist; and

(b) subject to the provisions of this Agreement, the provisions of the pension legislation of each jurisdiction that are applicable to the plan under the terms of such legislation apply to the plan in respect of matters not referred to in Schedule B.

Funding rule exceptions

(2) Despite clause (a) of subsection (1):

(a) where the pension legislation of a minor authority's jurisdiction would, if this Agreement did not exist, require the funding of a benefit provided in relation to a pension plan with respect to persons having rights under the plan who are subject to that legislation:

(i) subject to subclause (ii), funding shall be required in respect of that benefit with respect to those persons, even if funding for that benefit would not be required under the pension legislation of the major authority's jurisdiction; and

(ii) funding of the benefit described in subclause (i) shall be required in a manner consistent with, and to the extent determined by, the requirements under the pension legislation of the major authority's jurisdiction applicable to the funding of other benefits that are provided in relation to the plan and that are required to be funded in relation to the plan under that legislation;

(b) where the pension legislation of a minor authority's jurisdiction would require, for the purposes of this clause, that an additional liability be established and funded in relation to a pension plan with respect to persons having rights under the plan who are subject to that legislation:

(i) subject to subclause (ii), such liability shall be required to be established and funded, even if such liability would not be required to be established, and such funding would not be required, under the pension legislation of the major authority's jurisdiction; and

(ii) funding of the liability described in subclause (i) shall be required in a manner consistent with, and to the extent determined by, the requirements under the pension legislation of the major authority's jurisdiction applicable to the funding of benefits that are provided in relation to the plan and that are required to be funded in relation to the plan under that legislation; and

(c) subject to subsection (4), when a pension supervisory authority becomes the major authority for a pension plan in accordance with this Agreement, if the funding of any benefit provided under the plan has been based on actuarial valuation reports filed in respect of the plan with a pension supervisory authority, the funding of those benefits shall continue to be subject to the pension legislation that applied immediately before the major authority assumed its functions in respect of the plan until such time as a new actuarial valuation report is due to be filed in respect of the plan with the major authority in accordance with the pension legislation of the major authority's jurisdiction.

Definitions

(3) For the purposes of subsection (4):

"alternative funding arrangement" means a fund or financial instrument that is described in the pension legislation of a jurisdiction and is permitted under that legislation to supplement, support or otherwise satisfy the funding requirements for a pension plan under that legislation, where in the absence of such fund or financial instrument additional contributions would be required to be made to the pension fund of the plan in order to satisfy the funding requirements for the plan under that legislation; ("instrument financier")

"new major authority" means a pension supervisory authority that becomes the major authority for a pension plan in accordance with this Agreement; and

"prior authority" means a pension supervisory authority with which a pension plan is registered immediately before a pension supervisory authority becomes the major authority for the plan in accordance with this Agreement.

Alternative funding arrangement exceptions

(4) Despite clause (a) of subsection (1), when a pension supervisory authority becomes the new major authority for a pension plan, if the pension legislation of the prior authority's jurisdiction permitted the use of an alternate funding arrangement, but the pension legislation of the new major authority's jurisdiction does not permit the use of that alternate funding arrangement, then:

(a) if, no later than thirty-five days before the new major authority becomes the major authority for the plan, the administrator of the plan provides notice to both the new major authority and the prior authority that it intends to file an actuarial valuation report with the new major authority with a valuation date that coincides with the fiscal year end of the plan that immediately follows the new major authority becoming the major authority for the plan, then the following rules shall apply with respect to the funding of the plan:

(i) the alternative funding arrangement may continue to be used until thirty days after the valuation report is due to be filed with the new major authority;

(ii) no later than thirty days after the valuation report is due to be filed with the new major authority, an amount equal to the lesser of the value of the alternative funding arrangement or the amount required to make the plan fully funded on a solvency basis shall be deposited into the pension fund of the plan by an employer that is party to the plan; and

(iii) if the amount described in subclause (ii) has not been deposited by an employer into the pension fund of the plan within the thirty day timeframe described in that subclause, an amount equal to the full value of the alternative funding arrangement shall be immediately deposited into the pension fund of the plan by an employer that is party to the plan; and

(b) if the administrator of the plan does not provide the notice described in clause (a), then the following rules shall apply with respect to the funding of the plan:

(i) no later than thirty days before the new major authority becomes the major authority for the plan, an amount equal to the lesser of the value of the alternative funding arrangement or the amount required to make the plan fully funded on a solvency basis shall be deposited into the pension fund of the plan by an employer that is party to the plan; and

(ii) until the time a new actuarial valuation report described in clause (c) of subsection (2) is filed with the new major authority respecting the plan, an amount equal to the lesser of the value of any subsequent alternative funding arrangement that would have been required to have been obtained in relation to the plan under the pension legislation of the prior authority's jurisdiction, or the amount that would be required to make the plan fully funded on a solvency basis, shall be deposited into the pension fund of the plan by an employer that is party to the plan instead of obtaining the subsequent alternative funding arrangement, at or before the time the alternative funding arrangement would have been required to have been obtained in relation to the plan under the pension legislation of the prior authority's jurisdiction and in accordance with the last actuarial valuation report that had been filed with the prior authority in respect of the plan.

SECTION 7.
DETERMINATION OF BENEFITS BY FINAL LOCATION
Deemed applicability of pension legislation

7. For the purposes of determining the benefits accrued by a person under a pension plan, the person's entire benefit accrual shall be deemed to have been subject to the pension legislation that applied to the person:

(a) at the time the person's benefits were determined, if the person was still accruing benefits under the plan at that time; or

(b) at the time the person ceased accruing benefits under the plan, if the person was no longer accruing benefits under the plan at the time the person's benefits were determined.

SECTION 8.
PENSION PLAN INVESTMENTS
Deadline for compliance

8. Despite any other provision of this Agreement, any investment by a pension plan that is held on the date a pension supervisory authority becomes the major authority for the plan and that, although it complies with the pension legislation that applied to the plan on the day preceding that date, does not comply with the pension legislation that applies to the plan's investments from that date, shall be brought into compliance with the latter legislation within five years from that date.

SECTION 9.
PENSION BENEFITS GUARANTEE FUND
Pension benefits guarantee fund

9. Subject to sections 10 to 17, this Agreement shall not affect the application or administration of the Pension Benefits Guarantee Fund set out under the pension legislation of Ontario or any similar fund established under any other pension legislation.

PART IV
PENSION PLAN ASSET ALLOCATION INTO JURISDICTIONAL PORTIONS

SECTION 10.
APPLICABLE SITUATIONS
Applicable situations

10. The assets of a pension plan shall be allocated into portions in accordance with this Part when:

(a) the plan is amended so that part of the liability of the plan to pay benefits or other amounts to persons so entitled under the plan is transferred to a different pension plan, and where, as part and in consideration of that transfer of liability, part of the assets of the plan are transferred to the different plan;

(b) a pension supervisory authority orders or otherwise requires the splitting of the assets and liabilities of the plan, as described in clause (c) of subsection (3) of section 4;

(c) the plan has more than one participating employer and an employer withdraws from the plan, and pension legislation requires that the rights and benefits accrued under the plan be divided into groups, one of which consists of the rights and benefits of persons affected by the withdrawal, and that those persons may elect to have their rights and benefits under the plan be paid forthwith;

(d) the plan is being wound up in part;

(e) the plan is being fully wound up; or

(f) a situation not described in clauses (a) to (e) occurs and assets of the plan related to a jurisdiction are to be paid to an employer that participates in the plan in accordance with the pension legislation of that jurisdiction.

SECTION 11.
ALLOCATION OF ASSETS

Allocation into portions

11. (1) For the purposes of this Part, the assets of a pension plan shall be allocated into portions as of the date of allocation, each portion being related to the liability for benefits and other amounts accrued under the plan, and any additional liability referred to in clause (b) of subsection (2) of section 6 respecting the plan, that is subject to a jurisdiction's pension legislation, as determined in accordance with this section.

Standard allocation methodology

(2) Subject to section 12, the portion of a pension plan's assets that is subject to a jurisdiction's pension legislation as of the date of allocation shall be equal to the sum of the amounts referred to in section 13 as of the date of allocation, determined with respect to the benefits and other amounts described in section 13 that are subject to that jurisdiction's pension legislation and applying the requirements of sections 14 to 16.

Other allocation methodology

(3) The major authority for a pension plan may permit the assets of the plan to be allocated into the portions described in subsection (1) in a manner other than that required by subsection (2) or section 12 if:

(a) the allocation of the plan's assets is made in relation to any situation described in section 10 other than the full wind up of the plan and a Fellow of the Canadian Institute of Actuaries certifies that:

(i) the liabilities of the plan that are related to the plan assets to be allocated into the portions described in subsection (2) do not exceed those assets on either a solvency basis or a going concern basis; and

(ii) the allocation of the assets of the plan described in subclause (i) will not differ materially from an allocation of those assets conducted in accordance with subsection (2); or

(b) the allocation of the plan's assets is made in relation to a situation described in clause (d) of section 10, no pension legislation that applies to the plan assets to be allocated into the portions described in subsection (2) requires the distribution of any plan assets related to the wound up part of the plan that remain after all liabilities related to the wound up part of the plan have been settled and a Fellow of the Canadian Institute of Actuaries certifies that the liabilities of the plan related to the wound up part of the plan do not exceed the plan assets related to the wound up part of the plan on either a solvency basis or a going concern basis immediately before the partial wind up of the plan.

SECTION 12.
PLAN WITH MORE THAN ONE PARTICIPATING EMPLOYER
Plan with more than one participating employer

12. (1) This section applies to a pension plan that has more than one participating employer and, in accordance with the pension legislation of the major authority's jurisdiction:

(a) the following are determined and accounted for separately in respect of an employer that participates in the plan, as if a separate pension plan was established within the plan in respect of that employer:

(i) the assets and liabilities of the plan;

(ii) the contributions payable in relation to the plan;

(iii) the benefits and other amounts owing under the plan; and

(iv) the expenses payable in relation to the plan;

(b) the liabilities of the plan related to the employer described in clause (a) are determined with reference to only the benefits and other amounts owing to a person in relation to that person's employment with that employer; and

(c) among the contributions payable in relation to the plan by the employer described in clause (a), those that are required to be paid under the applicable pension legislation in relation to benefits and other amounts currently accruing by active members of the plan are determined only with reference to active members employed by that employer.

Allocation of assets into employer shares

(2) For the purposes of an asset allocation under this Part involving a pension plan described in subsection (1), the assets of the plan that have been determined and accounted for separately in relation to an employer as of the date of allocation shall be allocated to that employer as an employer share if the plan characteristics described in clause (a) of subsection (1) respecting the employer:

(a) have been determined and accounted for separately since the start of the employer's participation in the plan; or

(b) began to be determined and accounted for separately at a date subsequent to the start of the employer's participation in the plan, and the initial determination and accounting of the assets of the plan respecting that employer was consistent with, and conducted on the basis of, an allocation of the assets of the plan in accordance with the requirements of this Part and in relation to a situation other than that described in clause (c), (d) or (e) of section 10.

Allocation of employer shares into portions

(3) Any employer share allocated in accordance with subsection (2) shall be further allocated into portions in the manner provided for in section 11, and used in the manner provided for in section 17, as if the employer share consisted of the assets of a separate pension plan for that employer.

Allocation of remaining assets into portions

(4) For the purposes of an asset allocation under this Part involving a pension plan described in subsection (1), any assets of the plan not allocated to an employer share in accordance with subsection (2) shall be allocated into portions in the manner provided for in section 11, and used in the manner provided for in section 17, without considering the liabilities described in clause (b) of subsection (1) related to an employer for which an employer share has been allocated under this section.

SECTION 13.
DETERMINATION OF PORTIONS FOR ASSET ALLOCATION
Determination of portions

13. (1) The assets of a pension plan that are to be allocated into portions in accordance with subsection (2) of section 11 shall be allocated into portions as of the date of allocation in accordance with the levels of priority of allocation set out in this section.

Contributions and similar amounts

(2) First, allocate assets of the pension plan equal to the sum of the following contributions and amounts, to the extent that such contributions and amounts are still credited to the account of a person having benefits under the plan on the date of allocation:

(a) any contributions paid into the pension fund of the plan and any amounts that the person had elected to transfer into the pension fund of the plan, other than contributions and amounts used to fund benefits that are not determined solely as a function of amounts credited to the account of the person; and

(b) any interest attributable to contributions or amounts described in clause (a).

Core liabilities

(3) Second, allocate assets of the pension plan equal to the sum of the following liability amounts, provided that the pension legislation that would govern those liabilities if this Agreement did not exist would require them to be funded on a solvency basis:

(a) the value of benefits under the plan that are being paid on a regular and periodic basis to any person on the date of allocation, whether or not the benefit is payable for the lifetime of the person, and determined taking into account:

(i) any periodic increase in the benefits, based on any index, rate or formula provided for in the plan; and

(ii) any related benefits that are payable due to the death of the person;

(b) the value of lifetime benefits accrued under the plan by any person who, on the date of allocation, is entitled to receive payment of the benefits on that date or a later date, but who is not in receipt of payment of the benefits as of the date of allocation, determined:

(i) using the earliest age at which all such persons are entitled to payment of unreduced lifetime benefits, without reference to any other requirements or conditions under the terms of the plan or any applicable pension legislation;

(ii) taking into account any post-retirement periodic increase in the lifetime benefits, based on any index, rate or formula provided for in the plan; and

(iii) taking into account any related benefits that are payable due to the death of the person, whether such death occurs before or after the person starts receiving payment of lifetime benefits under the plan and determined at the age described in subclause (i);

(c) in respect of any person who has been required to make contributions under the plan, the amount by which the contributions made by the person plus any interest attributable to those contributions exceeds the amount representing 50% of the value of the benefits payable to the person under the plan, subject to the following requirements:

(i) the contributions, interest and value of the benefits shall be calculated as of the date of allocation and consistent with either the pension legislation that governs the benefits or the terms of the plan, whichever produces a larger excess amount; and

(ii) any such excess amount already determined in relation to a person before the date of allocation shall not be included, whether or not such previously determined excess amount has been refunded to the person; and

(d) any unpaid part of the value of the benefits payable under the plan to a person who had elected before the date of allocation to be paid the value of the person's benefit entitlements under the plan, as well as any interest attributable to that unpaid part.

Other liabilities whose funding is required

(4) Third, allocate assets of the pension plan equal to the sum of the following liability amounts:

(a) the value of benefits accrued under the plan, other than those referred to in subsection (3), by any person who, on the date of allocation, is entitled to receive payment of the benefit on that date or a later date, but who is not in receipt of payment of the benefit as of the date of allocation, provided that the pension legislation that would govern the benefits if this Agreement did not exist would require that such benefits be funded on a solvency basis; and

(b) subject to subsection (5), the value of the additional liability referred to in clause (b) of subsection (2) of section 6.

Assets related to additional liability

(5) Where the assets of the pension plan that are allocated to a portion under subsections (2), (3) and (4) in the absence of the requirements of this subsection exceed the value of benefits and other amounts accrued under the plan that are related to that portion:

(a) the value calculated for clause (b) of subsection (4) shall be reduced by the excess amount referred to in this subsection; and

(b) the assets of the plan not allocated to a portion due to the application of clause (a) may be allocated to other portions in accordance with subsection (4).

Balance of assets

(6) Fourth, for the purposes of an asset allocation in any situation other than that described in clause (c), (d) or (e) of section 10:

(a) any assets of the pension plan remaining after the allocations made in accordance with subsections (2) to (4) shall be sequentially allocated to the portion or portions with the lowest going concern ratio, until the going concern ratio of that portion equals the going concern ratio of the portion with the next highest going concern ratio;

(b) the sequential allocation of the plan's assets described in clause (a) shall be made until all portions have the same going concern ratio or no assets remain to be allocated, whichever occurs first;

(c) if, after applying the sequential allocation of assets described in clauses (a) and (b), the going concern ratio of each portion is lower than 1.0, any assets of the pension plan yet to be allocated shall be allocated to the portions so that the going concern ratios of all portions remain the same, until the going concern ratio of each portion reaches 1.0 or no assets remain to be allocated, whichever occurs first;

(d) for the purposes of clauses (a), (b) and (c), the going concern ratio of a portion shall be calculated by using the assets of the pension plan allocated to the portion in accordance with this section and the going concern liabilities of the plan that are subject to the jurisdiction's pension legislation applicable to that portion, other than assets and liabilities related to contributions and amounts described in subsection (2); and

(e) any assets of the pension plan remaining after the allocations made in accordance with clauses (a), (b) and (c) shall be allocated pro rata to the total of the going concern liabilities determined for each portion.

Balance of assets for certain asset allocations

(7) Fourth, for the purposes of an asset allocation in a situation described in clause (c), (d) or (e) of section 10:

(a) allocate assets of the pension plan equal to the value of benefits accrued under the plan, other than those referred to in subsections (2), (3) or (4), to which persons are entitled under the plan as of the date of allocation; and

(b) any assets of the pension plan remaining after the allocations made in accordance with subsections (2) to (5) and clause (a) shall be allocated pro rata to the total of the values determined for each portion in applying subsections (2) and (3) and clause (a) of subsection (4).

SECTION 14.
RULES OF APPLICATION

Alternative funding arrangements

14. (1) For the purposes of this Part, the assets of a pension plan include any alternative funding arrangement described in section 6 that exists in relation to the plan at the time the assets of the plan are allocated into portions in accordance with this Part.

Determining value of benefits and assets

(2) For the purposes of sections 11 to 13, except subsection (6) of section 13, the value of the benefits and other amounts payable under a pension plan and the assets of the plan shall be determined as if the pension plan were wound up on the date of allocation.

Deemed solvency funding requirement

(3) If, at the time the assets of a pension plan are allocated into portions in accordance with this Part, a liability amount related to the plan or a benefit under the plan that is subject to a jurisdiction's pension legislation would not, if this Agreement did not exist, be required to be funded on a solvency basis due to a temporary suspension under that legislation of a requirement under that legislation that would otherwise require the funding of such liability amount or benefit on a solvency basis, the liability amount or benefit shall be deemed to be one that is required by that legislation to be funded on a solvency basis for the purposes of subsection (3) of section 13 and clause (a) of subsection (4) of section 13.

Additional deemed solvency funding requirement

(4) If, on the date as of which the assets of a pension plan are allocated into portions in accordance with this Part, the pension legislation of a government that is party to this Agreement has been amended after January 1, 2014, to permanently remove a requirement that some or all of the benefits and liability amounts under a pension plan be funded on a solvency basis, then that pension legislation shall be deemed, for the purposes of subsection (3) of section 13 and clause (a) of subsection (4) of section 13, to require that those benefits and liability amounts that are the subject of the amendment to the pension legislation and that have been accrued under the plan before the date that the amendment to the pension legislation has come into effect must be funded on a solvency basis.

SECTION 15.
REDUCTION METHOD

Reduction method

15. (1) Subject to subsection (2), to the extent that a value or amount referred to in subsection (3) or (4) of section 13 relates to benefits arising from the application of a provision of a pension plan or of pension legislation that came into effect less than five years before the date of allocation, such value or amount shall, for the purposes of subsection (3) or (4) of section 13, be reduced:

(a) by 100%, if the period from the date that the provision of the pension plan or pension legislation came into effect to the date of allocation is less than one year;

(b) by 80%, if the period is one year or more, but less than two years;

(c) by 60%, if the period is two years or more, but less than three years;

(d) by 40%, if the period is three years or more, but less than four years; and

(e) by 20%, if the period is four years or more, but less than five years.

Exception to reduction method

(2) The major authority for a pension plan may permit the assets of the plan to be allocated into the portions described in subsection (2) of section 11 without applying the requirements of subsection (1) if a Fellow of the Canadian Institute of Actuaries certifies that the liabilities of the plan that are related to the plan assets to be allocated into the portions described in subsection (2) of section 11 do not exceed those assets on a solvency basis.

SECTION 16.
INSUFFICIENCY OF ASSETS
Insufficiency of assets

16. If, at one of the levels of priority of allocation established by section 13, the assets of a pension plan that have yet to be allocated to a portion described in subsection (2) of section 11 are less than the total value of the benefits and other amounts that rank equally in that level of priority of allocation, the available plan assets shall be allocated to the portions pro rata to the total value of the benefits and other amounts that rank equally in that level of priority of allocation.

SECTION 17.
USE OF ASSETS FOLLOWING ALLOCATION
Use of allocated assets

17. (1) Where an asset allocation for a pension plan is made under this Part in any situation other than that described in clause (c), (d) or (e) of section 10, each portion of the assets of the plan allocated in accordance with sections 11 to 16 shall be utilized in conformity with the pension legislation applicable to the benefits and other amounts related to that portion.

Use of allocated assets for certain asset allocations

(2) Where an asset allocation for a pension plan is made under this Part in a situation described in clause (c), (d) or (e) of section 10, each portion of the assets of the plan allocated in accordance with sections 11 to 16 shall be utilized, in conformity with the pension legislation applicable to the benefits and other amounts related to that portion, to satisfy payment of those benefits and other amounts arising from the wind up of the plan or the withdrawal of the employer, as the case may be. In addition, any remaining assets related to that portion shall be distributed in accordance with that pension legislation, if so required under that legislation. No assets of the plan allocated to one portion shall be utilized to satisfy payment of the benefits and other amounts related to another portion on the wind up of the plan or the withdrawal of the employer, as the case may be.

Use of remaining allocated assets

(3) Where a situation described in clause (c) or (d) of section 10 occurs and the assets of a pension plan that have been allocated to a portion in accordance with sections 11 to 16 have been utilized to fully satisfy payment of the benefits and other amounts related to that portion that arise from the partial wind up of the plan or the withdrawal of the employer, as the case may be, and any other assets related to that portion have been distributed as required by the pension legislation applicable to the benefits and other amounts related to that portion, any remaining assets related to that portion shall remain in the pension fund of the plan and be commingled with the other assets therein.

PART V
RELATIONS BETWEEN AUTHORITIES

SECTION 18.
COOPERATION
Reciprocal obligations

18. The pension supervisory authorities that are subject to this Agreement shall:

(a) provide to each other any information required for the application of this Agreement or pension legislation, and if requested, may provide other information which is reasonable in the circumstances;

(b) assist each other in any matter concerning the application of this Agreement or pension legislation as is reasonable in the circumstances, particularly with respect to subsection (7) of section 4, and may act as agent for each other;

(c) upon the request of such an authority, transmit to that authority any information on steps taken for the application of this Agreement and amendments to pension legislation, to the extent that such amendments affect the application of this Agreement;

(d) notify each other of any difficulty encountered in the interpretation or in the application of this Agreement or pension legislation; and

(e) seek an amicable resolution to any dispute that arises between them with respect to the interpretation of this Agreement.

PART VI
EXECUTION AND COMING INTO FORCE OF AGREEMENT

SECTION 19.
EXECUTION AND COMING INTO FORCE
Effective date

19. This Agreement shall come into force:

(a) on July 1, 2016, in respect of the governments of British Columbia, Nova Scotia, Ontario, Quebec and Saskatchewan; and

(b) on the date unanimously agreed to by all parties to this Agreement in respect of a government on behalf of which this Agreement is signed after July 1, 2016.

SECTION 20.
ADDITIONAL PARTIES
Unanimous consent

20. (1) A government may become party to this Agreement with the unanimous consent of the parties to this Agreement.

Effects

(2) This Agreement shall enure to the benefit of and be binding upon a government that becomes party to this Agreement, the government's jurisdiction and the jurisdiction's pension supervisory authority as of the date referred to in section 19.

SECTION 21.
WITHDRAWAL
Written notice

21. (1) A party to this Agreement may withdraw from this Agreement by giving written notice to all other parties to this Agreement. Such notice shall be signed by a person authorized by the laws of the withdrawing party's jurisdiction to sign this Agreement.

Waiting period

(2) The withdrawal shall take effect on the first day of the month following expiry of a period of three years following the date on which the notice was transmitted. The withdrawal shall affect only the withdrawing party, and this Agreement shall remain in force for all other parties to this Agreement.

Minor authority

(3) Where, upon expiry of the three year period referred to in subsection (2), the pension supervisory authority for the withdrawing party's jurisdiction acts as a minor authority with respect to a pension plan, the major authority for the plan shall provide, upon request, that minor authority with copies of all relevant records, documents and other information concerning the plan in the major authority's possession.

Major authority

(4) Where, upon expiry of the three year period referred to in subsection (2), the pension supervisory authority for the withdrawing party's jurisdiction acts as the major authority for a pension plan, such authority shall:

(a) determine which pension supervisory authority, if any, shall become the new major authority for the plan in accordance with section 3 as of the effective date of the withdrawal; and

(b) provide the new major authority for the plan referred to in clause (a), as soon as possible after such authority assumes its functions, with all relevant records, documents and other information in its possession concerning the plan.

Notice by major authority

(5) The pension supervisory authority that becomes a pension plan's new major authority in accordance with subsection (4) shall, as soon as possible after assuming its functions, inform the plan administrator and each of the plan's minor authorities of the date on which it assumed the functions of major authority.

Notice by plan administrator

(6) The administrator of a pension plan that receives from the plan's new major authority notice of the information provided for in subsection (5) shall transmit such information:

(a) to each employer that is party to the plan and any collective bargaining agent that represents any person who has rights or benefits under the plan within 90 days after such notice; and

(b) to any person who has rights or benefits under the plan who is entitled to receive an annual statement of the person's benefits under the plan, no later than the expiry of the period for providing such persons with their next annual statements of benefits.

Decisions and recourse

(7) Despite sections 4 and 6, where a pension supervisory authority becomes a pension plan's new major authority in accordance with subsection (4):

(a) all matters related to the plan that are pending before a prior major authority on the day preceding the new major authority's assumption of its functions under this Agreement shall be continued before that prior major authority;

(b) all matters related to the plan that concern a decision, order, direction or approval proposed or made by a prior major authority and pending before any administrative body or court on the day preceding the new major authority's assumption of its functions under this Agreement shall be continued before such body or court;

(c) for every matter in respect of which the prior major authority referred to in clause (a) or the administrative body or court referred to in clause (b) has proposed or made a decision, order, direction or approval to which the pension legislation or other legislation applying on the day preceding the new major authority's assumption of its functions under this Agreement provides a right of recourse:

(i) such right shall be maintained so long as the period provided for exercising that right has not expired; and

(ii) such recourse may be brought before the administrative body or court provided for by the legislation giving entitlement thereto;

(d) for any matter related to the plan not described in clauses (a) to (c) that occurred before the new major authority's assumption of its functions under this Agreement and that related to the provisions of the pension legislation of a prior major authority's jurisdiction in respect of a matter referred to in Schedule B:

(i) the prior major authority may, even after it loses its status as major authority for the plan, conduct an examination, investigation or inquiry into the matter in accordance with the pension legislation of the prior major authority's jurisdiction to determine whether compliance with that legislation was met, and in such case, the matter shall remain subject to that prior major authority; and

(ii) where the matter constitutes an offence under the pension legislation of the prior major authority's jurisdiction, the offence may be prosecuted by the competent authority in that jurisdiction, and in such case, the matter shall remain subject to that prior major authority; and

(e) all matters referred to in clauses (a) to (d) shall remain subject to the pension legislation or other legislation that applied to such matters on the day preceding the new major authority's assumption of its functions under this Agreement.

SECTION 22.
AMENDMENT
Unanimous consent

22. This Agreement may be amended with the unanimous written consent of each of the parties to this Agreement.

SECTION 23.
COUNTERPARTS
Execution in counterparts

23. This Agreement or any amendment to this Agreement may be executed in counterparts.

SECTION 24.
EXECUTION IN ENGLISH AND IN FRENCH
Authentic texts

24. This Agreement and any amendment to this Agreement shall be executed in the English and French languages, each text being equally authoritative.

PART VII
IMPLEMENTATION AND TRANSITIONAL PROVISIONS

SECTION 25.
REPLACEMENT
Prior agreements

25. Subject to sections 27 and 28, as of the date referred to in section 19, this Agreement replaces the agreement entitled "Memorandum of Reciprocal Agreement" and any similar agreement respecting the application of pension legislation to pension plans that has been made between the governments that are party to this Agreement or between the departments or agencies of such governments.

SECTION 26.
TRANSITION
Preliminary measure

26. (1) Where this Agreement comes into force on a date referred to in section 19, and on that date a pension plan first becomes subject to this Agreement:

(a) if the plan is registered with only one pension supervisory authority and that authority is subject to this Agreement on that date, that authority shall become the major authority for the plan as of that date;

(b) if the plan is registered with more than one pension supervisory authority and each of those authorities is subject to this Agreement on that date, the major authority for the plan shall be, of those authorities, the authority of the jurisdiction with the plurality of active members of the plan, as determined in accordance with subsection (3) of section 3 and considering only those jurisdictions whose pension legislation would, if this Agreement and any other agreement respecting the supervision of pension plans did not exist, require the plan to be registered with the pension supervisory authority of that jurisdiction; and

(c) if the plan is registered with more than one pension supervisory authority and not all of those authorities are subject to this Agreement on that date, this Agreement shall not apply to the plan until such time as all of the authorities with which the plan is registered are subject to this Agreement, at which time the requirements of clause (b) shall apply to the plan.

Equal number of active members

(2) Where the major authority for a pension plan cannot be determined by applying clause (b) of subsection (1) because two or more jurisdictions have authority over an equal number, greater than zero, of active members of the plan, the major authority for the plan shall be, of those jurisdictions, the authority whose main office is in closest proximity to the main office of the administrator of the plan. For the purposes of this subsection:

(a) the main office of a pension supervisory authority is the office from which the authority conducts most of its supervisory activities; and

(b) the main office of the pension plan administrator is the office from which the plan administrator described in the text of the pension plan conducts most of the plan's administration.

Notice by major authority

(3) The pension supervisory authority that becomes a pension plan's major authority in accordance with this section shall, as soon as possible after assuming its functions, inform the plan administrator and each of the plan's pension supervisory authorities of the date on which it assumed the functions of major authority.

Decisions and recourse

(4) Despite sections 4 and 6, where a pension supervisory authority becomes a pension plan's major authority in accordance with this section:

(a) all matters related to the plan that are pending before a pension supervisory authority on the day preceding the major authority's assumption of its functions under this Agreement shall be continued before that pension supervisory authority;

(b) all matters related to the plan that concern a decision, order, direction or approval proposed or made by a pension supervisory authority and pending before any administrative body or court on the day preceding the major authority's assumption of its functions under this Agreement shall be continued before such body or court;

(c) for every matter in respect of which the pension supervisory authority referred to in clause (a) or the administrative body or court referred to in clause (b) has proposed or made a decision, order, direction or approval to which the pension legislation or other legislation applying on the day preceding the major authority's assumption of its functions under this Agreement provides a right of recourse:

(i) such right shall be maintained so long as the period provided for exercising that right has not expired; and

(ii) such recourse may be brought before the administrative body or court provided for by the legislation giving entitlement thereto;

(d) for any matter related to the plan not described in clauses (a) to (c) that occurred before the major authority's assumption of its functions under this Agreement and that related to the provisions of the pension legislation of a pension supervisory authority's jurisdiction in respect of a matter referred to in Schedule B:

(i) the pension supervisory authority may, even after the major authority assumes its functions under this Agreement for the plan, conduct an examination, investigation or inquiry into the matter in accordance with the pension legislation of that authority's jurisdiction to determine whether compliance with that legislation was met, and in such case, the matter shall remain subject to that pension supervisory authority; and

(ii) where the matter constitutes an offence under the pension legislation of the pension supervisory authority's jurisdiction, the offence may be prosecuted by the competent authority in that jurisdiction, and in such case, the matter shall remain subject to that pension supervisory authority; and

(e) subject to sections 27 and 28, all matters referred to in clauses (a) to (d) shall remain subject to the pension legislation, other legislation and agreements referred to in section 25 that applied to such matters on the day preceding the major authority's assumption of its functions under this Agreement.

New party to this Agreement after July 1, 2016

(5) Despite sections 4 and 6, if this Agreement comes into force after July 1, 2016, in respect of a government that was not party to this Agreement before that date, and a pension plan is, on the date this Agreement comes into force in respect of that party, already subject to this Agreement:

(a) the major authority for that plan shall inform the plan administrator and each of the plan's pension supervisory authorities of the date on which this Agreement came into force in respect of that party, as soon as possible after that date;

(b) all matters related to the plan that are pending before a pension supervisory authority on the day preceding the date this Agreement comes into force in respect of that party shall be continued before that pension supervisory authority;

(c) all matters related to the plan that concern a decision, order, direction or approval proposed or made by a pension supervisory authority and pending before any administrative body or court on the day preceding the date this Agreement comes into force in respect of that party shall be continued before such body or court;

(d) for every matter in respect of which the pension supervisory authority referred to in clause (b) or the administrative body or court referred to in clause (c) has proposed or made a decision, order, direction or approval to which the pension legislation or other legislation applying on the day preceding the date this Agreement comes into force in respect of that party provides a right of recourse:

(i) such right shall be maintained so long as the period provided for exercising that right has not expired; and

(ii) such recourse may be brought before the administrative body or court provided for by the legislation giving entitlement thereto;

(e) for any matter related to the plan not described in clauses (b) to (d) that occurred before the date this Agreement came into force in respect of that party and that related to the provisions of the pension legislation of a pension supervisory authority's jurisdiction in respect of a matter referred to in Schedule B:

(i) the pension supervisory authority may, even after the date this Agreement comes into force in respect of that party, conduct an examination, investigation or inquiry into the matter in accordance with the pension legislation of that authority's jurisdiction to determine whether compliance with that legislation was met, and in such case, the matter shall remain subject to that pension supervisory authority; and

(ii) where the matter constitutes an offence under the pension legislation of the pension supervisory authority's jurisdiction, the offence may be prosecuted by the competent authority in that jurisdiction, and in such case, the matter shall remain subject to that pension supervisory authority; and

(f) all matters referred to in clauses (b) to (e) shall remain subject to the pension legislation, other legislation and agreements referred to in section 25 that applied to such matters on the day preceding the date this Agreement came into force in respect of that party.

PART VIII
FINAL AND SPECIAL PROVISIONS

SECTION 27.
REPLACEMENT OF 2011 AGREEMENT
2011 agreement

27. As of July 1, 2016, this Agreement replaces the agreement entitled "Agreement Respecting Multi-jurisdictional Pension Plans" which came into force on July 1, 2011, in respect of the governments of Ontario and Quebec. The application of that agreement is limited to matters referred to in section 28.

SECTION 28.
ADDITIONAL TRANSITIONAL RULE
Pending matters under 2011 agreement

28. Despite section 27, any matter related to a pension plan that was subject to the agreement entitled "Agreement Respecting Multi-jurisdictional Pension Plans" on June 30, 2016, and that was still pending on that date before the Financial Services Commission of Ontario, Retraite Québec, an administrative body or a court continues to be subject to the requirements of that agreement.

SECTION 29.
WITHDRAWAL FROM AGREEMENT
Written notice to other parties

29. (1) Despite section 21, a party to this Agreement may withdraw from this Agreement by giving written notice to all other parties to this Agreement on or after January 1, 2019, and before April 1, 2019. Such notice shall be signed by a person authorized by the laws of the withdrawing party's jurisdiction to sign this Agreement.

Effective date of withdrawal

(2) The withdrawal shall take effect on July 1, 2019. The withdrawal shall affect only the withdrawing party, and this Agreement shall remain in force for all other parties to this Agreement.

SCHEDULE A
PENSION LEGISLATION

Alberta

1. *Employment Pension Plans Act*, S.A. 2012, c. E-8.1.

British Columbia

2. *Pension Benefits Standards Act*, S.B.C. 2012, c. 30.

Manitoba

3. *The Pension Benefits Act*, C.C.S.M., c. P32.

New Brunswick

4. *Pension Benefits Act*, S.N.B. 1987, c. P-5.1.

Newfoundland and Labrador

5. *Pension Benefits Act, 1997*, S.N.L. 1996, c. P-4.01.

Nova Scotia

6. *Pension Benefits Act*, S.N.S. 2011, c. 41.

Ontario

7. *Pension Benefits Act*, R.S.O. 1990, c. P.8.

Quebec

8. *Supplemental Pension Plans Act*, C.Q.L.R., c. R-15.1.

Saskatchewan

9. *The Pension Benefits Act, 1992*, S.S. 1992, c. P-6.001.

Federal jurisdiction

10. *Pension Benefits Standards Act, 1985*, R.S.C. 1985 (2nd supp.), c. 32.

SCHEDULE B
MATTERS COVERED BY INCORPORATED LEGISLATIVE PROVISIONS

SECTION 1.
MAJOR AUTHORITY'S PENSION LEGISLATION

Major authority's pension legislation

1. The pension legislation applicable to a pension plan shall be the pension legislation of the jurisdiction of the major authority for the plan in the following areas of pension legislation:

Registration of pension plans

1. Legislative provisions respecting:

   (a) the duty of the pension plan administrator to ensure that the plan complies with the applicable pension legislation;

   (b) requirements that a pension plan be registered with the authority;

   (c) prohibitions against administering a pension plan not registered with the authority;

   (d) the pension plan registration process (including the filing of required forms and documents, the form in which such documents must be filed, the contents of documents and filing deadlines);

   (e) whether registration of a plan is proof of compliance with the applicable pension legislation; and

   (f) the authority's power to refuse or revoke the registration of a plan due to non-compliance with the applicable pension legislation.

Registration of pension plan amendments

2. Legislative provisions respecting:

   (a) requirements that pension plan amendments, or amendments to prescribed pension plan documents, be registered with the authority;

   (b) the amendment registration process (including the filing of required forms and documents, the form in which such documents must be filed, the contents of documents and filing deadlines);

   (c) whether registration of an amendment is proof of compliance with the applicable pension legislation;

(d) the authority's power to refuse or revoke the registration of a plan amendment due to non-compliance with the pension legislation applicable to the plan under clause (a) of subsection (1) of section 6 of the Agreement;

(e) the ability of the administrator to administer the amended plan if it does not comply with the applicable pension legislation; and

(f) requirements for notice of registration of the amendment to be provided to active members or other persons, the form and content of the notice and deadlines for providing such notice.

Pension plan administrators

3. Legislative provisions respecting:

(a) requirements that a pension plan be administered by an administrator;

(b) who may be an administrator; and

(c) the right of active members or other persons to establish an advisory committee to advise the administrator, and requirements respecting such an advisory committee.

Pension plan administrators' duties

4. Legislative provisions respecting:

(a) requirements that the pension plan administrator or the trustee, custodian or holder of the pension fund:

(i) administer the pension plan or pension fund in accordance with the applicable pension legislation and the plan terms;

(ii) stand in a fiduciary relationship to active members or other persons;

(iii) hold the pension fund in trust for the active members or other persons;

(iv) act honestly, in good faith and in the best interests of the active members or other persons;

(v) exercise the care, diligence and skill of a prudent person;

(vi) invest the pension fund in accordance with the applicable pension legislation, the pension plan's written investment policies, in the best interests of the active members or other persons or in a reasonable and prudent manner; and

(vii) hold an annual or periodic meeting with the active members or other persons;

(b) requirements that persons involved in the administration of a pension plan or pension fund:

(i) employ all knowledge and skill they possess by reason of their business or profession;

(ii) familiarize themselves with their fiduciary duties and obligations; and

(iii) possess the skills, capability and dedication required to fulfill their responsibilities and seek advice from qualified advisors where appropriate;

(c) conflict of interest requirements for persons involved in the administration of a pension plan or pension fund;

(d) requirements for the selection, use and supervision of the administrator's agents or advisors, and requirements for such agents or advisors;

(e) requirements that the employer or trustee provide information to the administrator; and

(f) requirements respecting to the payment of expenses related to the pension plan.

Pension plan records

5. Legislative provisions respecting:

(a) how long any person must retain information related to the pension plan; and

(b) requests by the plan administrator for information necessary for the administration of the pension plan.

Funding of ongoing pension plans (not in the case of full or partial plan wind up)

6. Legislative provisions respecting:

   (a) requirements for contributions made to the pension fund (including the type or form of contributions, the manner in which they must be made and deadlines for making them);

   (b) minimum plan funding and solvency levels (including plan funding and solvency levels related to pension plan amendments and the use of plan assets for the funding of plan amendments);

   (c) the ability to take contribution holidays;

   (d) requirements for actuarial valuation reports to be filed with the authority in respect of pension plans (including the form and content of such reports, filing deadlines and actuarial standards to be applied in preparing such reports);

   (e) requirements for refunds of contributions to employers, active members or other persons;

   (f) restrictions on the amount of the commuted value of a person's benefit entitlements under a pension plan that can be transferred out of the pension fund of the plan where the plan is not fully funded on a solvency or going concern basis;

   (g) who may be the trustee, custodian or holder of the pension fund; and

   (h) requirements for the provision of information between administrators and the trustees, custodians or holders of pension funds with respect to contributions, and for notice to the authority of contributions not remitted when due.

Pension fund investments

7. Legislative provisions respecting:

   (a) requirements for the investment of the pension fund (including limitations on investments and requirements that pension fund assets to be held in the name of the pension plan);

   (b) requirements that the administrator prepare a written investment policy, requirements for such a policy (including the form and content of the policy, whether it must be filed with the authority and the deadline for filing) and requirements regarding to whom such a policy must be provided; and

(c) requirements in situations where active members or other persons direct the investment of their contributions (including the minimum number and type of investment options offered, the education and advice available to active members or who may provide the advice).

Pension fund assets

8. Legislative provisions respecting:

   (a) requirements for pension fund assets to be held by specified fund holders under a specified type of agreement;

   (b) requirements for contributions to be remitted to the pension fund;

   (c) requirements that the pension fund be held separate and apart from the employer's assets and deeming the pension fund to be held in trust for the active members or other persons;

   (d) an administrator's lien and charge on the employer's assets equal to the amounts deemed held in trust; and

   (e) the administrator's duty to take immediate action (including court proceedings) to obtain outstanding contributions.

Provision of information

9. Legislative provisions respecting:

   (a) requirements for documents and information to be filed by the administrator or any other person with the authority, including:

      (i) periodic information returns;

      (ii) actuarial information for defined benefit plans;

      (iii) financial statements (including audited financial statements); and

      (iv) the form and content of the documents and information, who must prepare them and filing deadlines;

   (b) requirements for the following documents and information to be provided by the administrator, including the form and content of the documents and information, who must prepare them and deadlines for providing them:

      (i) pension plan summaries for active members or employees entitled to join the plan; and

(ii) annual or periodic statements for active members or other persons; and

(c) requirements for the inspection of pension plan documents in the possession of the administrator, authority or other persons (including who is entitled to inspect the documents and information, how often, where and at what cost).

Plan membership

10. Legislative provisions respecting:

(a) pension plans being for one or more classes of employees; and

(b) the ability of the employer to establish separate plans for full-time and part-time employees.

Appointment of pension plan administrator

11. Legislative provisions respecting:

(a) the ability of the authority to appoint itself or another person as administrator of a pension plan and rescind the appointment; and

(b) the powers of an appointed administrator.

SECTION 2.
MAJOR AUTHORITY'S POWERS

Major authority's powers

2. Where the pension legislation of the major authority's jurisdiction applies to a pension plan in accordance with section 1 of this Schedule, the following areas of the pension legislation of the major authority's jurisdiction shall, for the purposes of the plan and all jurisdictions that are subject to this Agreement in respect of the plan, also apply in respect of the application of the pension legislation described in section 1 of this Schedule:

Powers of examination, investigation or inquiry

1. All powers of examination, investigation or inquiry given to the major authority.

Orders, directions, approvals or decisions

2. The issuance of, or proposal to issue, orders, directions, approvals or decisions by the major authority, and any modification as may be made to such an order, direction, approval or decision by the authority, an administrative body or a court.

Reconsideration or review

3. The rights of the plan or a person affected by an order, direction, approval or decision of the major authority, an administrative body or a court to have the order, direction, approval or decision reconsidered or reviewed by the authority, an administrative body or a court.

Offences and penalties

4. The offences and penalties that may be applied where the plan or a person is found to have contravened the terms of the applicable pension legislation.

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by
the Lieutenant Governor in Council for British Columbia, has signed
this 2016 Agreement Respecting Multi-jurisdictional
Pension Plans.

Signed at Victoria BC,

the 16 day of May, 2016.

(original signed by)
Michael de Jong
Minister of Finance

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by the Governor in Council for Nova Scotia, has signed this 2016 Agreement Respecting Multi-jurisdictional Pension Plans.

Signed at ____Halifax____________________,

the ____19_____ day of ____May_________, 2016.

(original signed by)
Randy Delorey
____
Minister of Finance and Treasury Board

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by
the Lieutenant Governor in Council for Ontario, has signed
this 2016 Agreement Respecting Multi-jurisdictional
Pension Plans.

Signed at Toronto,

the 18 day of May, 2016.

(original signed by)
Charles Sousa
Minister of Finance

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by
the Government of Quebec, have signed
this 2016 Agreement Respecting Multi-jurisdictional
Pension Plans.

Signed at Québec,

the 17th day of May, 2016.

(original signed by)
Carlos J. Leitão
Minister of Finance

Signed at Quebec,

the 18th day of May, 2016.

(original signed by)
Jean-Marc Fournier
Minister responsible for Canadian Relations
and the Canadian Francophonie

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by
the Lieutenant Governor in Council for Saskatchewan, has signed
this 2016 Agreement Respecting Multi-jurisdictional
Pension Plans.

Signed at Regina,

the 16 day of May, 2016.

(original signed by)
Gordon Wyant
Minister of Justice and Attorney General

ACCORD MULTILATERAL DE RECIPROCITE

ATTENDU que chaque signataire de cet accord possède des fonctions et pouvoirs statutaires relatifs aux régimes de rentes couvrant des employés de la province de sa juridiction;

ATTENDU que, du fait que certains régimes couvrent des employés de plus d'une province, plus d'un signataire peut posséder des fonctions et pouvoirs statutaires relatifs à un régime de rentes;

ATTENDU que lesdits signataires ont considéré qu'il serait souhaitable qu'un seul signataire exerce tous les pouvoirs statutaires et fonctions relatifs à un même régime de rentes, agissant en son nom et au nom de tout autre signataire possédant des fonctions et pouvoirs relatifs à ce régime;

ATTENDU qu'en conséquence, chaque signataire s'est entendu avec chacun des autres signataires dans le sens énoncé ci-après;

EN FOI DE QUOI, et en vertu des ententes ci-haut mentionnées, les signataires de cet accord sont liés par les arrangements administratifs suivants:

1. Interprétation

Dans le présent accord,

a) "régime" signifie une caisse ou un régime de retraite ou de rentes;

b) "autorité" signifie une personne ou un organisme possédant des fonctions et pouvoirs statutaires relatifs à l'enregistrement, la capitalisation, la dévolution, la solvabilité, la

MEMORANDUM OF RECIPROCAL AGREEMENT

WHEREAS each signatory hereto has statutory functions and powers with respect to pension plans covering employees in the jurisdiction represented by such signatory;

AND WHEREAS, by reason of some pension plans covering employees in more than one jurisdiction, more than one signatory may have statutory functions and powers in respect of the same pension plan;

AND WHEREAS the said signatories have deemed it desirable that statutory functions and powers in respect of any one pension plan be exercised by one signatory only, acting both on its own behalf and on behalf of any other signatory having statutory functions and powers in respect of such plan;

AND WHEREAS each signatory has accordingly agreed with each other signatory to the effect hereinafter set forth;

NOW THEREFORE this Memorandum withnesseth that the signatories hereto are, by virtue of the aforementioned agreements, governed by the following administrative arrangements:

1. Interpretation

In this Memorandum,

a) "plan" means a superannuation or pension fund or plan;

b) "authority" means a person or body having statutory functions and powers with respect to registration, funding, vesting, solvency, audit, obtaining information, inspec-

vérification, l'obtention de renseignements, l'inspection, la liquidation et autres aspects des régimes;

c) "autorité participante" signifie une autorité qui est signataire du présent accord;

d) "autorité majoritaire" signifie, relativement à un régime, l'autorité participante de la province où la majorité des membres du régime sont employés (il ne sera pas tenu compte dans ce calcul des membres employés dans une province qui n'a pas d'autorité participante);

e) "autorité minoritaire" signifie, relativement à un régime, l'autorité participante de toute province où un ou plusieurs membres du régime sont employés, mais ne signifie pas l'autorité majoritaire.

2. L'autorité majoritaire de chaque régime exerce à la fois ses propres fonctions et pouvoirs statutaires et les fonctions et pouvoirs statutaires de chaque autorité minoritaire de ce régime.

3. Toute autorité peut s'exclure de l'application de l'article 2 à l'égard d'un régime déterminé en avisant par écrit l'autorité majoritaire d'un tel régime à cet effet (ou bien toutes les autorités minoritaires au cas où l'autorité majoritaire est celle qui s'exclue); et en pareil cas l'autorité qui s'exclue sera considérée comme n'étant plus une autorité participante à l'égard d'un tel régime.

4. Toute autorité participante peut s'exclure de l'application de l'article 2 à l'égard de tous régimes pour lesquels, n'était-ce cette exclusion, elle agirait comme autorité majoritaire; dans ce cas, et seulement aux fins de déterminer l'autorité majoritaire régissant chacun desdits régimes, elle ne sera pas considérée comme autorité participante.

5. Toutes les autorités participantes qui possèdent des fonctions et pouvoirs statutaires à l'égard d'un

tion, winding up, and other aspects, of plans;

c) "participating authority" means an authority which is a signatory hereto;

d) "major authority" means, with respect to a plan, the participating authority of the province where the plurality of the plan members are employed (save that members employed in a province not having a participating authority shall not be counted);

e) "minor authority" means, with respect to a plan, the participating authority of any province where one or more plan members are employed, but does not include the major authority

2. The major authority for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.

3. Any authority may except itself from the operation of section 2 in respect of a specific plan by giving written notice to that effect to the major authority (or, if the major authority is the excepting authority, then to all the minor authorities) for such plan; and in such event the excepting authority shall be deemed not to be a participating authority in respect of such plan

4. Any participating authority may except itself from the operation of section 2, in respect of all plans for which it would, but for such exception, act as the major authority; and in such event it shall, for the purpose only of determining the major authority of each such plan, be deemed not to be a participating authority.

5. All participating authorities having statutory functions and powers in respect of a specific

régime déterminé peuvent s'entendre et considérer l'une d'entre elles comme étant l'autorité majoritaire à l'endroit de ce régime.

6. Lorsque les circonstances entourant un régime déterminé changent de telle sorte qu'une autorité participante devient, ou cesse d'être, une autorité minoritaire de ce régime, l'autorité majoritaire doit en aviser cette autorité minoritaire.

7. Lorsque les circonstances entourant un régime déterminé changent de telle sorte qu'il en résulte un changement de l'autorité majoritaire, toutes les autorités minoritaires en seront avisées et l'ancienne autorité majoritaire fournira à la nouvelle autorité majoritaire tous documents et renseignements relatifs à ce régime.

8. Une autorité majoritaire agissant en vertu de l'article 2 fournira à chaque autorité minoritaire des renseignements complets concernant l'exercise de toute fonction et de tout pouvoir exercés au nom de cette autorité minoritaire.

9. Lorsqu'une autorité majoritaire est incapable d'exercer un pouvoir dont dispose l'une des autorités minoritaires, elle en avisera cette autorité minoritaire.

10. La participation de toute autorité à l'arrangement administratif qui précède commence à la date où elle signe cet accord (la signature ne doit être apposée qu'avec le consentement de tous les signataires précédents), et elle cesse le 31 décembre 1970, à moins que ladite autorité ne renonce avant cette date à cette terminaison. Cependant, toute autorité peut mettre fin à sa participation à cet arrangement administratif au moyen d'un avis écrit d'un an envoyé en même temps à toutes les autres autorités participantes.

11. Du fait qu'une autorité signe cet accord, elle conclut des accords de réciprocité avec toutes les autres autorités participantes.

plan may concur in deeming one of their number to be the major authority for such plan.

6. Where changing circumstances in respect of a specific plan result in a participating authority becoming or ceasing to be, a minor authority for such plan, such minor authority shall be advised accordingly by the major authority.

7. Where changing circumstances in respect of a specific plan result in a change in the major authority for such plan, all minor authorities for such plan shall be advised accordingly, and the former major authority shall deliver all documents and information concerning such plan to the new major authority.

8. A major authority acting pursuant to section 2 shall fully inform each minor authority as to the exercise of any functions and powers exercised on behalf of such minor authority.

9. Where a major authority is unable to exercise a particular power of enforcement available to one of the minor authorities, it shall so advise that minor authority.

10. Participation by any authority in the foregoing Administrative Arrangement commences upon the date it becomes a signatory to this Memorandum (such signature to be affixed only with the consent of all prior signatories), and terminates on the 31st day of December, 1970, unless such authority disclaims such termination prior to that date; provided that any authority may terminate its participation in this Administrative Arrangement by contemporaneous delivery of one year's written notice to the other participating authorities.

11. Execution of this Memorandum by any authority shall evidence its entry into reciprocal agreements with all the other participating authorities.

12. "The Pension Commission of Ontario" est le dépositaire de cet accord jusqu'à ce que toutes les autorités participantes s'entendent sur le choix d'un autre dépositaire; et le dépositaire informera toutes les autorités participantes de la signature de cet accord par une autorité participante subséquemment à la date des présentes.

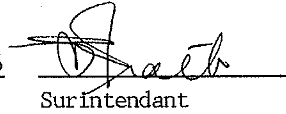
12. The Pension Commission of Ontario shall be the depositary of this Memorandum, until such time as the participating authorities agree to another depositary; and the depositary shall inform all participating authorities in connection with the execution of this Memorandum by any participating authority subsequent to the date hereof.

EN FOI DE QUOI les autorités soussignées apposent leurs signatures sur le présent accord réciproque:

IN WITNESS WHEREOF the undersigned authorities do hereby execute this Memorandum of Agreement

LA REGIE DES RENTES DU QUEBEC	QUEBEC PENSION BOARD
June 27,1968 — Membre de la Regie	June 27,1968 — Member of the Board
LA COMMISSION DES RENTES DE L'ONTARIO	THE PENSION COMMISSION OF ONTARIO
June 27,1968 — Président	June 27,1968 — Chairman
LE SURINTENDANT DES RENTES, ALBERTA	THE SUPERINTENDENT OF PENSIONS, ALBERTA
June 27,1968 — Surintendant	June 27,1968 — Superintendent
LE SURINTENDANT DES RENTES, SASKATCHEWAN	THE SUPERINTENDENT OF PENSIONS, SASKATCHEWAN
February 5,1969 — Surintendant	February 5, 1969 — Superintendent
LA COMMISSION DES RENTES DU MANITOBA	THE PENSION COMMISSION OF MANITOBA
7/x/76 — Président	7/x/76 — Chairman
LE SURINTENDANT DES RENTES, NOVA SCOTIA	THE SUPERINTENDENT OF PENSIONS, NOVA SCOTIA
May 3,1977 — Surintendant	May 3, 1977 — Superintendent

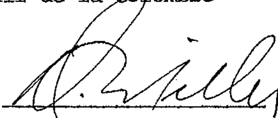
LE SURINTENDANT DES RENTES,
TERRE NEUVE

February 26, 1986 
Surintendant

Ministre Enseignement supérieur et Travail

juin 1, 1992

Ministre de la main d'oeuvre, de la formation et du travail de la Colombie britannique

FEB. 16, 1994 

THE SUPERINTENDENT OF PENSIONS,
NEW FOUNDLAND

February 26, 1986
Superintendent

Minister Advanced Education and Labour
New Brunswick

June 1, 1992

Minister of Skills, Training and Labour of British Columbia

FEB. 16, 1994