Court File No. CV-10-8647-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.

B E T W E E N:

THOMAS COOK CANADA INC.

Applicant

- and –

SKYSERVICE AIRLINES INC.

Respondent

BRIEF OF AUTHORITIES OF THE RECEIVER FTI CONSULTING CANADA INC. (Sunwing Trust Motion, returnable February 13, 2012)

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INDEX

TAB

TAB 1

WATERS' LAW OF TRUSTS IN CANADA

Third Edition

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I. INTRODUCTION

For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*,[1] in words adopted by Barker J. in *Renehan v. Malone*[2] and considered fundamental in common law Canada,[3] (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained.[4] Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

The principle of the three certainties has been fundamental at least since the days of Lord Eldon, and no one today could seek to challenge the principle; the problems that exist concern the issue of what constitutes certainty.

II. CERTAINTY OF INTENTION

There is no need for any technical words or expressions for the creation of a trust.[5] Equity is concerned with discovering the intention to create a trust; provided

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[1] (1840), 3 Beav. 148, 49 E.R. 58 (Eng. Ch.).

[2] (1897), 1 N.B. Eq. 506 (N.B. S.C. [In Equity]).

[3] Numerous Canadian cases have referred to the three certainties as essential to the existence of an express trust. A few relatively recent examples include *Goodman Estate v. Geffen* (1987), (sub nom. *Goodman v. Geffen*) 52 Alta. L.R. (2d) 210 (Alta. Q.B.), reversed (1989), 68 Alta. L.R. (2d) 289 (Alta. C.A.), additional reasons at (1990), 80 Alta. L.R. (2d) 289 (Alta. C.A.), reversed (1991), 80 Alta. L.R. (2d) 293 (S.C.C.), leave to appeal allowed (1989), 101 A.R. 160 (note) (S.C.C.); *Quesnel & District Credit Union v. Smith* (1987), 19 B.C.L.R. (2d) 105 (B.C. C.A.); *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 58 Alta. L.R. (2d) 193 (Alta. C.A.); *Faucher v. Tucker Estate* (1993), [1994] 2 W.W.R. 1 (Man. C.A.); *Howitt v. Howden Group Canada Ltd.* (1999), 170 D.L.R. (4th) 423, 26 E.T.R. (2d) 1 (Ont. C.A.); *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)* (1998), 227 A.R. 280, (sub nom. *Arkay Casino Ltd. v. Alberta (Attorney General)*) 64 Alta. L.R. (3d) 368, [1999] 4 W.W.R. 334 (Alta. Q.B.); *Re Chemainus Team Development Training Trust* (2004), 2004 CarswellBC 2853, [2004] B.C.J. No. 2519 (B.C. S.C.); *Parsons v. Cook* (2004), 238 Nfld. & P.E.I.R. 16, 7 E.T.R. (3d) 92 (N.L. T.D.); and *McMillan v. Hughes* (2004), 11 E.T.R. (3d) 290 (B.C. S.C.).

[4] The property interest which each beneficiary is to take must also be clearly defined. See *infra*, Part III C.

[5] See, e.g., *Royal Bank v. Eastern Trust Co.*, 32 C.B.R. 111, [1951] 3 D.L.R. 828 (P.E.I. T.D.) where

it can be established that the transferor had such an intention,[6] a trust is set up. There are indeed certain evidentiary requirements which the law regards as mandatory for the transfer of certain kinds of property. For example, the *Statute of Frauds* in 1677, reproduced in common law Canada, required all trusts of land to be evidenced in writing, and under the wills legislation of the common law provinces and the territories a person's last will and testament must be in writing, which means, of course, that a testamentary trust must be in writing, and form part of the will.[7] But these are requirements of the law of evidence, not of the law of trusts, though, as we shall see, the effect of these statutory evidentiary rules has created a variety of problems for trust lawyers.[8]

A trust may be construed from conduct alone,[9] but it is unlikely that such evidence will conclusively reveal the necessary intention. Words do show that

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it was noted that language need not be technical so long as the intention to create a trust can be inferred with certainty.

[6] For an unusual case, see *No. 382 v. Minister of National Revenue* (1957), 16 Tax A.B.C. 274, 57 D.T.C. 48 (Can. Tax App. Bd.) at 282-3 [Tax A.B.C.]. If tax avoidance is the object of a transaction, the courts are likely to be particularly concerned with whether there was indeed an intention to create a trust, or merely a desire to give that appearance. See *Minister of National Revenue v. Ablan Leon (1964) Ltd.*, [1976] C.T.C. 506, 76 D.T.C. 6280 (Fed. C.A.). The fact that the alleged settlor of a number of trusts, purportedly created at the same time, did not know all the details of the scheme in which he was taking part, and that the amount of property initially assigned to the trustees for each trust was minimal, were found to be evidence of a desire only to create appearances. See further, *infra*, chapter 6, note 2.

The question of certainty of intention to create a trust can arise in a wide variety of contexts. One such context that has been considered on several occasions occurs where an employer seeks access to surplus pension funds. If the pension plan is construed such that the employer's contributions are to be held in trust *for the employees* then the employer will not be able to take back surplus contributions. Cases dealing with this issue include *Mifsud v. Owens Corning Canada Inc.* (2004), 41 C.C.P.B. 81 (Ont. S.C.J.); *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 3 E.T.R. (2d) 1, 115 D.L.R. (4th) 631 (S.C.C.); *LaHave Equipment Ltd. v. Nova Scotia (Superintendent of Pensions)* (1994), 121 D.L.R. (4th) 67 (N.S. C.A.); *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Gen. Div.), additional reasons at (1992), 98 D.L.R. (4th) 326 at 411 (Ont. Gen. Div.), affirmed (1994), 16 O.R. (3d) 761 (Ont. C.A.), leave to appeal refused (1994), 4 E.T.R. (2d) 36 (S.C.C.); *Howitt v. Howden Group Canada Ltd.* (1997), 152 D.L.R. (4th) 185 (Ont. Div. Ct.), leave to appeal allowed (1997), 1997 CarswellOnt 4662 (Ont. C.A.), affirmed (1999), 26 E.T.R. (2d) 1 (Ont. C.A.); *Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan (5) (Administrator of)* (1997), (sub nom. *Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan (5)*) 149 D.L.R. (4th) 200 (N.S. C.A.); *Crownx Inc. v. Edwards* (1994), 20 O.R. (3d) 710, 120 D.L.R. (4th) 270 (Ont. C.A.).

[7] On the requirement of writing, see chapter 7.

[8] But for the formal requirements in cases such as those involving wills or trusts of land, no formal document is required. A trust may arise simply from the words used (see, e.g., *Lev v. Lev* (1992), 40 R.F.L. (3d) 404 (Man. C.A.); and *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Gen. Div.), additional reasons at (1992), 98 D.L.R. (4th) 326 at 411 (Ont. Gen. Div.), affirmed (1994), 16 O.R. (3d) 761 (Ont. C.A.), leave to appeal refused (1994), 4 E.T.R. (2d) 36 (S.C.C.)) or from conduct or circumstances (see note 9 below and the accompanying text).

[9] Conduct in the form of a sequence of transactions or circumstances may be enough: *Northguard Financial Group v. Wah*, [1977] 3 W.W.R. 3 (B.C. S.C.). See also *Kattler v. Kattler* (1995), 132 Sask. R. 92 (Sask. Q.B.), additional reasons at (June 22, 1995), Doc. Regina Q.B. 015726/94 (Sask. Q.B.) (which mentions *Northguard* with respect to a trust potentially arising from conduct alone but then holds that a trust arose on the facts partly on conduct and partly on other evidence); *Eu v. Rosedale*

intention, and they must either appear in a document which the maker regarded as final or be orally communicated to another.[10] A recording or communication of a future intention to set up a trust is not enough, unless the statement of future intention was "bought" by another for valuable consideration. If the maker of the statement thus bound himself to set up a trust at a later date, that agreement or covenant is enforceable by the parties to it. But the statement of a would-be donor as to his

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Realty Corp. (Trustee of) (1997), 33 O.R. (3d) 666, 18 E.T.R. (2d) 288 (Ont. Bktcy.); *Randall v. Nicklin* (1984), 58 N.B.R. (2d) 414 (N.B. C.A.), reversing (1984), 54 N.B.R. (2d) 95 (N.B. Q.B.); and *Thomas v. Whitwell* (1991), 45 E.T.R. 75 (Alta. Q.B.). A court may also consider the circumstances surrounding a transaction alleged to give rise to an express trust. See, e.g., *Winisky v. Krivuzoff* (2003), 237 Sask. R. 213, 3 E.T.R. (3d) 147 (Sask. Q.B.). In *Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre* (2002), 44 E.T.R. (2d) 155, 22 B.L.R. (3d) 182 (Ont. S.C.J.), additional reasons at (2002), 44 E.T.R. (2d) 175 (Ont. S.C.J.), affirmed (2002), 2002 CarswellOnt 4537 (Ont. C.A.), the court considered whether the incorporation of a foundation (to which the hospital transferred funds) with clauses limiting its objects could itself amount to the creation of a trust. Although there were other circumstances which led the court to conclude that there was no trust, the court also suggested that, particularly without the application of the doctrine of ultra vires to the foundation objects, the incorporation of the foundation alone could not amount to the creation of trust. In *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)*, *supra*, note 3, poker players at a casino made deposits towards a jackpot with set rules for payments out of the jackpot to specified winning poker hands. Brooker J. found that "even though there is no trust document or oral communication establishing the trust, the intention can be inferred from the players' conduct in the circumstances of this game. It seems clear from the nature of the game itself that the players, upon depositing their dollar, expected that the jackpot would go to whomever had the necessary hand. The players did not expect that the jackpot would go into the general coffers of either the casino operator or the charity. The players gave the money for a particular purpose and expected the casino operator to use it for that purpose. . . Under these circumstances, therefore, I am satisfied that I can infer that it was the players' intention to create an express trust with respect to the funds which they wagered and lost on the jackpot." See also *McMillan v. Hughes*, *supra*, note 3, where the circumstances and the defendant's own statements, corroborated by other witnesses, established the intention to create a trust.

[10] Trust documentation which reveals the intention to create a trust by those documents will exclude the argument that they were mere evidence of an earlier oral trust in the same terms: *Minister of National Revenue v. Ablan Leon (1964) Ltd.*, *supra*, note 6. And an agreement to create a trust will only create a trust there and then if the agreement (a contract) is specifically enforceable: *ibid.*; *North Vancouver (Municipality) v. Macdonald* (1977), 5 B.C.L.R. 89 (B.C. S.C.). The document as a whole must be considered in addition to the specific words of bequest: *LeBlanc Estate v. Belliveau* (1986), 68 N.B.R. (2d) 145, 175 A.P.R. 145 (N.B. Q.B.); *Luscar Ltd. v. Pembina Resources Ltd.* (1995), 165 A.R. 104 (Alta. C.A.); *Canada Permanent Trust Co. v. Lasby*, 42 Sask. R. 73, [1985] 6 W.W.R. 665 (Sask. Q.B.). As to what may constitute evidence of the intent, see *Re Kayford Ltd.* (1974), [1975] 1 W.L.R. 279, [1975] 1 All E.R. 604 (Eng. Ch. Div.); *Re Japan Leasing (Europe) plc v. Shoa Leasing (Singapore) Pte Ltd.* (July 30, 1999), (Eng. Ch. Div.); and *Re Lewis's of Leicester Ltd. v. Kordengate Ltd.* (1995), [1995] E.W.J. No. 206 (Eng. & Wales H.C.J., 13 January 1995). See also *Kattler v. Kattler* (1995), 132 Sask. R. 92 (Sask. Q.B.), additional reasons at (June 22, 1995), Doc. Regina Q.B. 015726/94 (Sask. Q.B.). Where there is a written document the courts have, on occasion, considered extrinsic evidence in assessing whether there was an intention to create a trust – see, e.g., *Canada (Attorney General) v. Ristimaki* (2000), 46 O.R. (3d) 721, 4 R.F.L. (5th) 167 (Ont. S.C.J.); and *Byers v. Foley* (1993), 16 O.R. (3d) 641 (Ont. Gen. Div.). Other documents relating to the same transaction were considered in *Re Chemainus Team Development Training Trust*, *supra*, note 3.

intention for the future is not enough.[11] Nor is it enough to intend to transfer for another's benefit; the transferor must be shown to have had in mind a transfer *on trust*. This means that the intention to make a gift by way of a handing over is not the intention to make a gift by way of a trust.[12]

The words employed to set up a trust, therefore, must show that the transferee is to take the property not beneficially, but for objects which the transferor describes. The words which nearly always reveal the intention are "in trust", or "as trustee for", but it is well established in common law courts, including those of Canada, that these words are neither conclusive nor indispensable.[13] On the other hand, in a series of Canadian cases, courts have made the point that there is no magic in the word "trust" and that other words may convey the same intention.[14]

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[11] E.g., a father says to his son, "I intend next Monday to convey this house on trust for you, your wife, and your children." On Monday next the father has changed his mind. There is no trust. *Quaere* whether the result would be different if the son had in the interim relied on this statement of intention to his detriment.

A trust, the terms of which are only to come into effect at a future date, is perfectly valid. In such a case there is a present intention to set up a trust, the terms of the trust being that the interests under it shall take effect in the future, e.g., "$50,000 on trust for my daughter for her life to take effect on her marriage, remainder to her children equally."

[12] Executory trusts created by the delivery of trust property to trustees can only exist if there is an intention at the moment of transfer to create a trust: *Minister of National Revenue v. Ablan Leon (1964) Ltd., supra*, note 6.

[13] See, e.g., *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Bullock v. Key Property Management Ltd.* (1992), 46 E.T.R. 275 (Ont. Gen. Div.), varied (1997), 33 O.R. (3d) 1 (Ont. C.A.); *McEachren v. Royal Bank* (1990), 78 Alta. L.R. (2d) 158, [1991] 2 W.W.R. 702 (Alta. Q.B.); *Mohr v. C.J.A.* (1991), 40 E.T.R. 12 (B.C. C.A.); affirming (1989), 36 E.T.R. 246 (B.C. S.C.); and *Luscar Ltd. v. Pembina Resources Ltd.* (1995), 165 A.R. 104 (Alta. C.A.), leave to appeal to S.C.C. refused (1995), 31 Alta. L.R. (3d) xli (S.C.C.). In the context of all the language of a bequest, Garrow J.A. came to the conclusion in *Canada Trust Co. v. Davis* (1912), 25 O.L.R. 633, 2 D.L.R. 644 (Ont. C.A.), affirmed (1912), 46 S.C.R. 649, 8 D.L.R. 756 (S.C.C.) that the words "in trust", though used, did not have controlling importance, and that no trust had been created. See also *Re Dickin* (1975), 7 O.R. (2d) 472, 55 D.L.R. (3d) 504. "In trust" are words commonly found written after the name of the payee of guaranteed investment certificates, and term deposit instruments. Such an act creates an inherent ambiguity as to the intent of the investor or depositor, when no trust objects are mentioned. Did he intend the payee to be the trust beneficiary for his personal benefit, to hold on trust for implied third parties or purposes, or to hold on resulting trust for the investor or depositor (i.e., himself)?

[14] *Mulholland v. Merriam* (1873), 20 Gr. 152 (U.C. C.A.); *Cameron v. Campbell* (1882), 7 O.A.R. 361; *Kendrick v. Barkey* (1907), 9 O.W.R. 356 (Ont. H.C.); *Elgin Loan & Savings Co. v. National Trust Co.* (1903), 7 O.L.R. 1 (Ont. H.C.), affirmed (1905), 10 O.L.R. 41 (Ont. C.A.); *Re Garden*, [1931] 2 W.W.R. 849, [1931] 4 D.L.R. 791 (Alta. C.A.); *Royal Bank v. Eastern Trust Co.*, 32 C.B.R. 111, [1951] 3 D.L.R. 828 (P.E.I. T.D.).

B. The Evidentiary Difficulties

The difficulty of ascertaining on available evidence that a declaration of trust took place is often considerable. The burden of proof that the donor intended to make himself a trustee is on those who allege such a trust and many factors may reveal the true intent. The cases often arise in circumstances where the alleged donor is deceased and is thus no longer available to corroborate the evidence.[115]

1. Examples of Sufficient Evidence

The surrounding circumstances may nonetheless be considered sufficient for a court to find a declaration of trust. For instance, in *Re Mellen*[116] the deceased donor had deposited bonds, contained in envelopes, in a safety deposit box at the office of the Toronto General Trusts Corporation. On the envelopes was written in her handwriting, "The contents of this envelope are to be used solely for the benefit of my dearly beloved son, [E.M.], by the Toronto General Trusts Corporation, [address given]." The trial judge, Kingstone J., noted that "a simple letter or memorandum or any writing of a similar untechnical or informal character will be sufficient," and went on to decide that the donor had declared herself a trustee for her son by these words. The words were "sufficient to warrant a conclusion that she intended the son to have the full use and benefit of this money."[117]

Similarly in *Watt v. Watt Estate*[118] the deceased had a half interest in a boat and had given the plaintiff the keys to the boat for her use and the use of her family for

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S.C.J.), additional reasons at (2001), 2001 CarswellOnt 131 (Ont. S.C.J. [In Chambers]). See also *Paul v. Constance*, [1977] 1 W.L.R. 527, [1977] 1 All E.R. 195 (Eng. C.A.), noted in [1978] *Scots Law Times* 145. There can be considerable difficulty in ascertaining whether on the available evidence there has been a declaration of trust. See, e.g., *Harrison v. Lucas* (1957), 7 D.L.R. (2d) 157 (B.C. S.C.) at 163-64; and *Barnett v. Wise* (1960), [1961] O.R. 97, 26 D.L.R. (2d) 321 (Ont. C.A.) at 327 [D.L.R.] *et seq.*

[115] In cases dealing with *inter vivos* gifts in circumstances where the alleged donor has since died, courts have required that evidence of the intended gift be "clear and unmistaken" and that it "leave no room for doubt" (see *Johnstone v. Johnstone* (1913), 28 O.L.R. 334, 12 D.L.R. 537 (Ont. C.A.)). See also *Kibsey Estate v. Stutsky*, 63 Man. R. (2d) 34, [1990] 2 W.W.R. 632 (Man. C.A.) ("beyond a reasonable doubt"); *Hardy v. Atkinson* (1908), 18 Man. R. 351, 9 W.L.R. 564 (Man. C.A.) (the evidence of the intention of the donor to divest himself or herself of his or her interest in the property "should be inconsistent with any other purpose"); *Wettstein v. Wettstein* (1992), [1992] B.C.J. No. 1026, 1992 CarswellBC 1421 (B.C. S.C.); *Armstrong v. Armstrong* (1998), 130 Man. R. (2d) 58, [1999] 2 W.W.R. 163 (Man. Q.B.); and *Doiron v. Kerr (Committee of)* (1998), (sub nom. *Doiron v. Kerr Estate*) 195 N.B.R. (2d) 323, 22 E.T.R. (2d) 18 (N.B. C.A.).

[116] [1933] O.W.N. 118 (Ont. H.C.), varied [1933] O.W.N. 246 (Ont. C.A.); settled before appeal, *ibid.*, at 246.

[117] *Ibid.*, at 120.

[118] (1987), 49 Man. R. (2d) 317, 28 E.T.R. 9, [1988] 1 W.W.R. 534 (Man. C.A.). Also in *Paul v. Constance*, *supra*, note 114, Mr. Constance and Mrs. Paul were not married but had lived together for several years. A bank account was opened in Mr. Constance's name who had apparently repeatedly said that the account was for the joint benefit of himself and Mrs. Paul. Mr. Constance had separated from Mrs. Constance a few years before he began living with Mrs. Paul. He died intestate in 1974.

free. The plaintiff had done typing, bookkeeping, and gardening at the deceased's marina for no remuneration. The deceased wrote a note declaring that he and the plaintiff jointly owned the boat. The court found the delivery of keys was not sufficient evidence of delivery of an interest in the boat and thus the gift was incomplete. The court, however, concluded that what the deceased "wrote, said, and did constituted an executed trust which made him and, subsequently, his estate a trustee of the one-half interest in [the boat] on behalf of the plaintiff." Here the delivery of the keys together with the written note and perhaps also evidence of the motive for the gift (compensation for free work provided by the plaintiff) provided sufficient support for what might otherwise have been simply the plaintiff's self-serving assertion that the deceased had made a declaration of trust in a private conversation with the plaintiff.

2. Examples of Insufficient Evidence

In other cases the circumstances may not support a declaration of trust.[119] In *Sing v. Bryant*,[120] for example, the donor during his lifetime and while on his sickbed had his housekeeper write on slips of paper the names of intended donees and the number of shares each was to have. Later, however, he altered the number of shares to be given to one donee, and from a note he had had attached to the envelope containing the share certificates, it appeared that he was contemplating making a will. He also dealt with some of the property belonging to the company, the shares in which, as shown, he had earlier parcelled among the beneficiaries. The court came to the conclusion that what the donor was doing was making preparations for the drafting of a will, a will that was never made because of his intervening death. Moreover, the would-be donees appeared to have understood that he was dividing up the property which should pass on his death. "The surrounding circumstances and the conduct of the parties"[121] therefore led Harper J. to conclude that the donor never intended to make himself a trustee of the shares; he was merely revealing his intentions as to what form his testamentary bounty would take. Again, in *Barnett v.*

Mrs. Constance became the administrator of his estate and she closed the account. Mrs. Paul brought an action to recover the money. The court noted that no technical words are necessary to declare oneself a trustee. It was also noted that on the basis of *Milroy v. Lord* (*infra*, note 123) that one cannot substitute one mode of transfer for another, but here it was said that there was no attempt to make a gift but only an alleged attempt by Mr. Constance to declare himself a trustee. The court accepted that Mr. Constance had declared himself a trustee on the basis of corroborating evidence from the bank manager, the deposit of joint bingo winnings and a withdrawal for the benefit of both Mr. Constance and Mrs. Paul.

[119] For other cases finding insufficient evidence to support a declaration of trust see *Boulos v. Boulos*, *supra*, note 114; *Doiron v. Kerr (Committee of)*, *supra*, note 115; and *Edell v. Sitzer* (2001), 55 O.R. (3d) 198, 40 E.T.R. (2d) 10 (Ont. S.C.J.) at 33 [E.T.R.], leave to appeal refused (2004), 9 E.T.R. (3d) 1 (Ont. C.A.), leave to appeal denied (2005), [2004] S.C.C.A. No. 372, 2005 CarswellOnt 96, 2005 CarswellOnt 97 (S.C.C.).

[120] [1946] 3 W.W.R. 106 (B.C. S.C.).

[121] *Ibid.*, at 111.

Wise[122] a husband actually signed a "personal request", prepared by him at the instructions of his dying wife, in which he promised "to sell, assign or transfer . . . at cost price" while his wife yet lived both realty and shares which he personally owned. The document even laid down that these assets were to be held by named trustees for the three children of the marriage until they should attain majority. Had the husband intended a trust of those assets, constituting himself a trustee for the named trustees? The Ontario Court of Appeal thought not; the husband's signature was motivated by his desire arising out of devotion to please a wife who was dying and in great emotional stress over the matter. He had not seen the document before it was presented to him for signature at the hospital bedside, and he had therefore had no earlier opportunity to consider its contents.

VIII. THE SETTLEMENT MUST BE BINDING

It was in the leading case of *Milroy v. Lord*[123] that Turner L.J. used these oft-quoted words in relation to the gift by transfer: "in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him." We have discussed what it means to say that the settlor must have done all he could do to transfer the property, but what did Turner L.J. mean by saying he must have done all so as to render the settlement binding upon him? If the settlor has done everything he can to transfer the property to the settlement trustees, what more must he do to render the settlement binding upon himself? This question has arisen in Canadian courts.

A. Must a Trust Involving a Voluntary Transfer or Declaration of Trust be Irrevocable

As far as the declaration of trust is concerned, Jessel M.R. said in *Richards v. Delbridge*[124] that the donor/settlor must constitute himself a trustee, and "so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person." According to Bacon V.C. in *Heartley v. Nicholson,*[125] "the donor should have evinced by acts which admit of no other interpretation, that he himself has ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer, and that such legal right to it, if any, as he retained was held by him in trust for the donee." Does this mean that the trust must be irrevocable?

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[122] *Supra,* note 114.
[123] (1862), 4 De G.F. & J. 264, 45 E.R. 1185 (Eng. Ch.) at 274 [De G.F. & J.].
[124] *Supra,* note 113, at 14.
[125] (1875), L.R. 19 Eq. 233 (Eng. Ch.) at 242.

TAB 2

1995 CarswellOnt 318, 33 C.B.R. (3d) 161, 8 C.C.P.B. 1, C.E.B. & P.G.R. 8227, 8 E.T.R. (2d) 72, 31 C.C.L.I. (2d) 77, 24 O.R. (3d) 717

1995 CarswellOnt 318, 33 C.B.R. (3d) 161, 8 C.C.P.B. 1, C.E.B. & P.G.R. 8227, 8 E.T.R. (2d) 72, 31 C.C.L.I. (2d) 77, 24 O.R. (3d) 717

Canada (Attorney General) v. Confederation Life Insurance Co.

Re CONFEDERATION LIFE INSURANCE COMPANY; AND Re Insurance Companies Act, S.C. 1991, as amended; AND Re Winding-up Act, R.S.C. 1985, c. W-11, as amended

ATTORNEY GENERAL OF CANADA v. CONFEDERATION LIFE INSURANCE COMPANY

Ontario Court of Justice (General Division)

R.A. Blair J.

Heard: March 3, 7, 8, 20, 21, 27, 28 and 31 and April 5, 6 and 13, 1995
Judgment: July 4, 1995
Docket: Doc. RE 4315/94

Counsel: *Benjamin Zarnett, Andrea W. Rowe* and *Michele Altaras*, for Peat Marwick Thorne Inc., agent of Superintendent of Financial Institutions, provisional liquidator of Confederation Life Insurance Company.

Mark Zigler, Susan Rowland and *Cynthia Weekes*, appointed as representative counsel to represent interests of retirees of Confederation Life Insurance Company.

Donald C. Matheson, Q.C., Martha Milczynski and *Clifton Prophet*, appointed as representative counsel to represent interests of Supplementary Pensioners "In Pay"; and appointed as representative counsel to represent interests of Messrs. Rhind and Burns in respect of their claims for payment from Confederation Life Insurance Companies Deferred Compensation Plan.

Ronald Robertson, Q.C., Michael MacNaughton and *Edmond Lamek*, appointed as representative counsel to represent interests of Supplementary Pensioners "Not In Pay".

J.H. Grout and *Aida Van Wees*, appointed as representative counsel to represent interests of all policyholders and claimants of Confederation Life Insurance Company other than those persons described above.

Charles Scott and *David Roney*, for Canadian Life and Health Insurance Compensation Corporation.

Shaun Devlin and *Peggy McCallum*, for Superintendent of Pensions.

John Varley and *M. Jasmine Sweatman*, for Deloitte & Touche which was appointed administrator of Confederation Life Insurance Company Pension Plan for Canadian Salaried Employees by Superintendent of Pensions.

Hart Schwartz, for intervenor, Attorney General of Ontario.

R. Stephen Paddon, Q.C. and *Russell Laishley*, for Prost Investments Limited, Grant Forest Industries Corporation, Domco Food Services Ltd., Sullivan Entertainment, The Miller McAsphalt Corp. and CCL Industries Inc., policyholders.

Robb Heintzman, for Price Waterhouse Limited, liquidator for Confederation Trust Company.

Lawrence Ritchie, for Avenor Inc., Coopérative fédérée du Québec, Avenor Maritimes Inc., Bombardier Inc., ITT Industries of Canada Limited and AlliedSignal Canada Inc., policyholders.

Jeff Carhart, for Association of Confederation Life Contractholders, Inc.

Dana Fuller and *Derrick Tay*, for Fidelity Management Trust Company, policyholder.

Ian Morris, for Daniel Wiseblott, former employee of Confederation Life Insurance Company.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Insurance

Corporations --- Winding-up — Under Dominion Act — Claims of creditors.

Corporations — Winding-up — Priorities — Employees of life insurance company ranking behind policyholders as ordinary unsecured creditors — Employees not qualifying as "policyholders" under s. 161(1)(c) of Winding-up Act and failing to establish facts that would support claim of trust — Winding-up Act, R.S.C. 1985, c. W-11, s. 161(1)(c).

A life insurance company was ordered to be wound up. The company had a contractual arrangement with its employees as part of their remuneration package. Under the arrangement, they would be entitled to long-term medical, dental and life insurance coverage after their retirement. The company had also set up a supplementary retirement income arrangement with its senior officers, the purpose of which was to "top up" the benefits provided under the company's registered pension plan for officers and employees.

One of the issues in the winding up process was the priority to the company's remaining assets between the employees and insurance policyholders. Since only "policyholders" are entitled to priority under the distribution provisions of the *Winding-up Act*, the employee claimants could only receive effective protection in the winding-up proceedings if they could show that their claims were in the nature of trust claims or if they could show themselves to be in the category of policyholders who had priority.

Held:

The policyholders had priority.

Under s. 161(1)(*c*) of the *Winding-up Act*, the claims of "policyholders" of the company rank in priority after the costs of the liquidation and preferred claim given to employees for three months' wages, but ahead of the priority provided in s. 161(2) for ordinary or general creditors. The only reason the claimants could argue that they were "policyholders" under the Act was because the liquidation of the company was a liquidation of an insur-

ance company. Parliament could not have intended to treat employees differently with respect to priority on liquidation simply because of the nature of their employer's business. Therefore, the claimants were not "policyholders" as that term is used in s. 161(1)(*c*).

None of the claimants was successful in showing the existence of an express trust with respect to their benefits. The trust claims failed because certainty of intention to create a trust and certainty of subject-matter were not shown. No funds or assets were set aside or designated to fund any of the claimants retirement benefits arrangements.

Insufficient evidence was adduced to support the claimants' suggestion that constructive trusts should be declared. There was no indication that there was fiduciary relationship between the company and the claimants with respect to the retirement benefits arrangements. The evidence did not show a mutual understanding that the benefits would be pre-funded or secured, and there was nothing upon which to base a finding that the claimants had any reasonable expectation that the company had undertaken to subordinate its own interests, and those of its policyholders, to those of the claimants with respect to the benefits. Therefore, since there was no fiduciary relationship in this regard, no constructive trust could be imposed as a remedy for breach of the obligations arising out of such a relationship.

No constructive trust could be imposed on the basis of a finding of unjust enrichment. While the company benefitted from the services of its former employees, and they were going to suffer from the collapse of the company, the deprivation of the claimants was not related to the company's enrichment. The deprivation of the claimants related to the company's collapse. Therefore, there was not an enrichment and corresponding deprivation in these circumstances sufficient to found a claim of unjust enrichment.

Even if this was not true, there were several juristic reasons for the benefit or enrichment received by the company. First, given the contractual/employment relationship between the parties, the contract constituted a juristic reason for deprivation. A second reason for the enrichment was the existence of the winding-up proceedings. The scheme under the Act that provides for priority to policyholders over other creditors is a juristic reason for the enrichment. Finally, the fact of the insolvency nature of the proceedings represented a juristic reason for the enrichment. In such situations, it is not unjust for certain groups to be held to the contractual/employment arrangements that have governed their relationship prior to the insolvency/winding-up proceedings.

Even if unjust enrichment were found to exist, the imposition of a constructive trust would not be an appropriate remedy in the circumstances.

Cases considered:

Allan Realty of Guelph Ltd., Re (1979), 29 C.B.R. (N.S.) 229, 24 O.R. (2d) 21, 6 E.T.R. 50, 97 D.L.R. (3d) 95 (S.C.) — *referred to*

Barnabe v. Touhey (1994), 18 O.R. (3d) 370, 4 E.T.R. (2d) 22 (Gen. Div.) — *considered*

Becker v. Pettkus, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384 — *referred to*

Bendix Automotive Canada Ltd. v. U.A.W., Local 195, [1971] 3 O.R. 263, 20 D.L.R. (3d) 151, 71 C.L.L.C. 14,089 (H.C.) — *considered*

California Physicians' Service v. Garrison (1946), 172 P.2d 4 — *referred to*

Coopérants, Société mutuelle d'assurance-vie/Coopérants, Mutual Life Insurance Society c. Raymond, Chabot, Fafard, Gagnon Inc. (sub nom. *Re Coopérants, Société mutuelle d'assurance-vie/Coopérants, Mutual Life Insurance Society)* (1993), 58 Q.A.C. 211, [1994] R.L. 268, leave to appeal to S.C.C. refused (sub nom. *Raymond, Chabot, Fafard, Gagnon Inc. c. Bouchard*) (1994), 170 N.R. 79 (note), 63 Q.A.C. 150 (note) — *considered*

Crownx Inc. v. Edwards (1994), 7 C.C.P.B. 312, 20 O.R. (3d) 710, 5 E.T.R. (2d) 197, 75 O.A.C. 143, 120 D.L.R. (4th) 270 (C.A.), affirming (1991), 45 E.T.R. 57, 7 O.R. (3d) 27, C.E.B. & P.G.R. 8115 (Gen. Div.) — *referred to*

Daniels v. Canadian Tire Corp. (1991), 39 C.C.E.L. 107, 5 O.R. (3d) 773 (Gen. Div.) — *referred to*

Dayco (Canada) Ltd. v. C.A.W., (sub nom. *Dayco (Canada) Ltd. v. CAW-Canada))* [1993] 2 S.C.R. 230, 14 Admin. L.R. (2d) 1, 152 N.R. 1, 63 O.A.C. 1, (sub nom. *Dayco v. N.A.W.)* C.E.B. & P.G.R. 8141, (sub nom. *Dayco v. C.A.W.)* 93 C.L.L.C. 14,032, 102 D.L.R. (4th) 609 — *considered*

Frame v. Smith, [1987] 2 S.C.R. 99, 78 N.R. 40, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 23 O.A.C. 84, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152 — *considered*

Garden Estate, Re, [1931] 2 W.W.R. 849, 25 Alta. L.R. 580, [1931] 4 D.L.R. 791 (C.A.) — *referred to*

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, (sub nom. *Guerin v. Canada)* 55 N.R. 161, 13 D.L.R. (4th) 321 — *referred to*

Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, [1975] 1 S.C.R. 271, 66 D.L.R. (3d) 449 — *referred to*

Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] 9 W.W.R. 609, 97 B.C.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 57 C.P.R. (3d) 1, 49 B.C.A.C. 1, 80 W.A.C. 1, 6 C.C.L.S. 1, 16 B.L.R. (2d) 1, 5 E.T.R. (2d) 1, 95 D.T.C. 5135 — *considered*

Ince Hall Rolling Mills Co. v. Douglas Forge Co. (1882), 8 Q.B.D. 179 — *considered*

International Corona Resources Ltd. v. LAC Minerals Ltd., [1989] 2 S.C.R. 574, 26 C.P.R. (3d) 97, 69 O.R. (2d) 287, 61 D.L.R. (4th) 14, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 101 N.R. 239, 36 O.A.C. 57 — *followed*

James v. Richmond Hill (Town) (1986), 54 O.R. (2d) 555, 32 M.P.L.R. 313 (H.C.) — *referred to*

Jones v. Lock (1865), 1 Ch. App. 25 — *referred to*

Keech v. Sandford (1726), 25 E.R. 223 — *referred to*

Kerslake v. Gray, [1958] S.C.R. 3, [1957] I.L.R. 1-279, 11 D.L.R. (2d) 225 — *considered*

Knight v. Boughton (1840), (sub nom. *Knight v. Knight)* 49 E.R. 58 (Ch.) [affirmed (1844), 11 Cl. & Fin. 513, 8 Jur. 923, 8 E.R. 1195 (H.L.)] — *referred to*

Laskin v. Bache & Co. (1971), [1972] 1 O.R. 465, 23 D.L.R. (3d) 385 (C.A.) — *considered*

Madott v. Chrysler Canada Ltd. (1989), Labrosse J. (Ont. H.C.) — *referred to*

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 — *referred to*

Norberg v. Wynrib, [1992] 2 S.C.R. 226, [1992] 4 W.W.R. 577, 12 C.C.L.T. (2d) 1, 68 B.C.L.R. (2d) 29, 138 N.R. 81, 9 B.C.A.C. 1, 19 W.A.C. 1, 92 D.L.R. (4th) 449 [additional reasons at [1992] 2 S.C.R. 318, [1992] 6 W.W.R. 673] — *referred to*

O'Connor v. Minister of National Revenue, [1943] Ex. C.R. 168, [1943] 4 D.L.R. 160 — *considered*

Partington v. Cushing (1906), 3 N.B. Eq. 322 (S.C.) — *referred to*

Peter v. Beblow, [1993] 1 S.C.R. 980, [1993] 3 W.W.R. 337, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621 *considered*

Pikalo v. Morewood Industries Ltd. (Trustee of) (1991), 7 C.B.R. (3d) 209 (Ont. Bktcy.) — *considered*

Prudential Insurance Co. v. Inland Revenue Commissioners, [1904] 2 K.B. 658 — *referred to*

Rathwell v. Rathwell, [1978], 2 S.C.R. 436, [1978] 2 W.W.R. 101, 1 E.T.R. 307, 1 R.F.L. (2d) 1, 83 D.L.R. (3d) 289 — *referred to*

Royal Bank v. Harowitz (1994), 17 O.R. (3d) 671 (Gen. Div.) — *referred to*

Royal Bank v. Pioneer Trust Co. (Liquidator of), [1988] 4 W.W.R. 175, 68 C.B.R. (N.S.) 124, 67 Sask. R. 228 (Q.B.) — *considered*

Schmidt v. Air Products of Canada Ltd., [1994] 2 S.C.R. 611, 3 C.C.P.B. 1, 4 C.C.E.L. (2d) 1, 3 E.T.R. (2d) 1, 20 Alta. L.R. (3d) 225, C.E.B. & P.G.R. 8173, [1994] 8 W.W.R. 305, 115 D.L.R. (4th) 631, 168 N.R. 81, 155 A.R. 81, 73 W.A.C. 81 — *referred to*

Sorochan v. Sorochan, [1986] 2 S.C.R. 38, 2 R.F.L. (3d) 225, 46 Alta. L.R. (2d) 97, [1986] 5 W.W.R. 289, 29 D.L.R. (4th) 1, 69 N.R. 81, 23 E.T.R. 143, [1986] R.D.I. 448, [1986] R.D.F. 501, 74 A.R. 67 — *referred to*

St. Marys Paper Inc., Re (1994), 4 C.C.P.B. 233, 26 C.B.R. (3d) 273, 19 O.R. (3d) 163, 116 D.L.R. (4th) 448, (sub nom. *Re St. Marys Paper Inc. (Bankrupt))* 73 O.A.C. 1 — *followed*

Stanton v. Reliable Printing Ltd. (1994), 17 Alta. L.R. (3d) 214, 25 C.B.R. (3d) 48, [1994] 6 W.W.R. 333, 152 A.R. 372 (Q.B.) — *considered*

Tremblay c. Daigle, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634, 102 N.R. 81, 11 C.H.R.R. D/165, 27 Q.A.C. 81 — *referred to*

807933 Ontario Inc. v. Allison (Trustee of) (1995), 30 C.B.R. (3d) 144, (sub nom. *Re Allison)* 22 O.R. (3d) 102 (Gen. Div.) — *referred to*

1995 CarswellOnt 318, 33 C.B.R. (3d) 161, 8 C.C.P.B. 1, C.E.B. & P.G.R. 8227, 8 E.T.R. (2d) 72, 31 C.C.L.I. (2d) 77, 24 O.R. (3d) 717

Statutes considered:

Income Tax Act, R.S.C. 1952, c. 148, am. S.C. 1970-71-72, c. 163 [R.S.C. 1985, c. 1 (5th Supp.)] —

s. 248(1) "retiring allowance" [re-en. S.C. 1980-81-82-83, c. 140, s. 128(10)] [R.S.C. 1985, c. 1 (5th Supp.), s. 248(1) "retiring allowance"]

Insurance Act, R.S.O. 1990, c. I.8 —

s. 1 "contract"

s. 1 "insurance"

s. 1 "life insurance"

Insurance Companies Act, S.C. 1991, c. 47 —

s. 2 "policy"

Pension Benefits Act, R.S.O. 1990, c. P.8 —

s. 1 "pension"

s. 1 "pension benefit"

s. 1 "pension plan"

s. 1 "pension plan" (*b*)

s. 3

s. 6

s. 10(1)

s. 55

s. 55(1)

s. 57

s. 57(3)

s. 57(5)

Winding-up Act, R.S.C. 1985, c. W-11 —

s. 33

s. 72

s. 159 "policy"

s. 161 [am. R.S.C. 1985, c. 18 (3rd Supp.), s. 44; am. R.S.C. 1985, c. 21 (3rd Supp.), s. 55(1); am. S.C. 1991, c. 47, s. 749(1), (2)]

s. 161(1) [am. R.S.C. 1985, c. 18 (3rd Supp.), s. 44; am. R.S.C. 1985, c. 21 (3rd Supp.), s. 55(1); am. S.C. 1991, c. 47, s. 749(1), (2)]

s. 161(1)(*a*) [am. S.C. 1991, c. 47, s. 749(1)]

s. 161(1)(*b*) [am. S.C. 1991, c. 47, s. 749(2)]

s. 161(1)(*c*) [am. R.S.C. 1985, c. 18 (3rd Supp.), s. 44; am. R.S.C. 1985, c. 21 (3rd Supp.), s. 55(1); am. S.C. 1991, c. 47, s. 749(2)]

s. 161(2)

Regulations considered:

Pension Benefits Act, R.S.O. 1990, c. P.8 —

General Regulation,

R.R.O. 1990, Reg. 909,

s. 47(3) [am. O. Reg. 655/94]

Application by provisional liquidator for advice and directions regarding priorities between policyholders and former employees of insurance company.

R.A. Blair J.:

Part A: Overview

1 "Confederation Life" is a venerable Canadian company. Known fondly in the industry for years as "Confed", it is one of the country's oldest and, until recently in any event, it was one of its most solid and most respected financial institutions. Fatally afflicted by the "real estate boom" disease of the 1980's, however, it has fallen into financial difficulties. A Court Order has directed that Confederation Life Insurance Company be wound up and liquidated.

2 The failure of such a financial institution invariably causes great hardship to certain segments of society. Innocent people suffer. Their financial plans and expectations are shattered. They must compete, in priority contests, for the scarcity of corporate assets which, by the very nature of the circumstances, are insufficient to satisfy all claims.

3 Such is the case here.

4 In this matter — at least in the proceedings before me — those affected are the Confederation Life policyholders, on the one hand (the widows, widowers and other investors who depend upon the reliability of the

Company's life policies and annuities for their continued financial well-being) and the retired Confederation Life employees and supplementary retirement income beneficiaries, on the other hand (those who depend upon the benefits arising from their long-term employment relationship with the Company for their continued financial well-being). There is also an issue to be determined regarding deferred income arrangements involving the two most senior officers of the Company.

5 Confederation Life had a contractual arrangement with its employees, as part of their overall remuneration package, that they would be entitled to long-term medical, dental and life insurance coverage after their retirement. I am told that there are approximately 700 retired employees who fall into this category. Many have been retired for many years, are elderly, and depend upon the continuation of these benefits for their livelihood.

6 The Company also had a supplementary retirement income arrangement with its senior officers. The purpose of this arrangement was to "top up" the benefits provided under Confederation Life's registered pension plan for officers and employees to a level more consistent with the remuneration level of the senior officers. This was necessary because of limits imposed by Revenue Canada upon the level of pension benefits that can be provided through registered plans. There are 31 retired senior officers who claim to be entitled to such benefits; some of them were already receiving the supplementary retirement income benefit at the time of the liquidation Order, and some were not. There is no doubt that without the receipt of such payments, the affected former senior officers, too, will experience financial hardship.

7 Messrs. J.A. Rhind and P.D. Burns are the former Chairman and President of Confederation Life, respectively. In the early 1980's, when it was still permissible to do so, they had agreed to defer a portion of the income they had earned pursuant to what were known as "deferred compensation plans". Under such a plan, in exchange for deferring payment of a portion of their compensation to be earned in a given year, the employee was able to defer the tax on such amounts to a later taxation year (when, presumably, they would be taxed at a lower rate of taxation). Messrs. Rhind and Burns did so. The amounts accruing to their credit, as at December 31, 1993, totalled $1,185,780 — $707,143 to the credit of Mr. Rhind, and $478,637 to the credit of Mr. Burns. They now claim to be entitled to recover those monies from Confederation Life.

8 In these Reasons, I will refer to the retired employees, as a group, as "the Retirees"; to the senior officers claiming a supplementary retirement income benefit, whether in pay or not in pay, as the "Supplementary Pensioners"; and to Messrs. Rhind and Burns, together, as "the Deferred Compensation Claimants". They are defined with more detail, and as classes of persons with potential claims in the liquidation and winding-up, in an order of Mr. Justice Houlden dated January 13, 1995 and attached as Sched. "B" to these Reasons [at p. 243].

9 I will refer to the three groups en masse, from time to time, as "the Claimants". Similarly, the three groups of benefits mentioned in the preceeding paragraphs will be referred to as "the Employee Benefits".

10 Since there is an issue to be determined as to whether the arrangements, which provide the senior officers with supplementary retirement income, constitute a "pension plan" or something else, such as a "retiring allowance", I intend to refer to these arrangements in these Reasons as the "supplementary retirement income arrangements". I recognize that there is a creature of the *Income Tax Act* (Canada) with a similar designation, known as an "SRIA" (a "Supplementary Retirement Income Arrangement"). By using the phrase "supplementary retirement income arrangements" I do not mean to ascribe to the arrangements here in question the meaning of the capitalized technical term of art in income tax parlance. I simply use it as the most convenient generic way in which to describe the supplementary retirement income benefits in a neutral fashion, for purposes of these

proceedings.

11 There is little doubt that the Claimants have a contractual right to the recovery of the Group Benefits, the supplementary retirement income benefit, and the deferred compensation payments in question. I so hold at the outset. Such contractual entitlement, however, is not what is at issue here, in reality. As is the case in most financial collapses, Confederation Life has insufficient general assets to meet its obligations in full. It cannot provide the benefits and payments to which the Claimants are entitled and, at the same time, honour its other obligations, particularly those of the Company to its policyholders.

12 "Policyholders" are entitled to priority under the distribution provisions of the *Winding-up Act*. Consequently, notwithstanding their contractual entitlement to receive the benefits and payments claimed, the Claimants can only receive effective protection in the winding-up proceedings if their claims are in the nature of trust claims (express, statutory or constructive) — as they assert they are — or if they can place themselves amongst the category of Confederation Life "policyholders" who have priority — as they assert they can.

Part B Directions Sought And Issues

A. Directions Sought

13 Hence these proceedings.

14 The original Court Order came on August 15, 1994, and was made by the Honourable Mr. Justice Houlden pursuant to the provisions of the *Winding-up Act*, R.S.C. 1985, c. W-11, as amended. The winding-up is effective as of August 12, 1995. The Superintendent of Financial Institutions was appointed the Provisional Liquidator of the Company. It, in turn, appointed Peat Marwick Thorne Inc. as its agent to assist in the administration of the liquidation of the estate of Confederation Life.

15 In these proceedings, the Provisional Liquidator, through its agent, moves for directions in view of the dilemma arising from the foregoing circumstances. It seeks advice and direction regarding the following ques- tions:

(a) Whether all or any of the Retirees, the Supplementary Pensioners In Pay, the Supplementary Pensioners Not in Pay, and the Deferred Compensation Claimants, as classes of persons, have claims against the estate of Confederation Life; and,

(b) If all or any of those classes of persons have a claim or claims against the estate of Confederation Life, does such claim or claims constitute:

(i) a trust claim?; or

(ii) a claim under a policy in respect of which priority is accorded to a policyholder by the provisions of s.161(1)(c) of the *Winding-Up Act*?

16 By Orders of Mr. Justice Houlden dated January 13 and February 8, 1995, representative counsel were appointed to represent each of the above classes.

B. The Issues

17 While question (b) above sets out the ultimate issues to be determined — are there "trust" claims and/or claims as "policyholders"? — there are a number of individual issues which must be addressed in making those determinations. They are varied and complex. For ease of reference, I set out the issues to be considered by the class of Claimant. They are as follows:

With Respect to the Retirees:

a) Are the assets of Confederation Life subject to an express trust in respect of the amount required to satisfy all benefit liabilities under the Group Benefit Plans?

b) Alternatively, are the assets of Confederation Life subject to a constructive trust in respect of the amount required to satisfy all benefit liabilities under the Group Benefit Plans arising as a result of either,

(i) a breach of fiduciary duty; or,

(ii) an unjust enrichment?

c) Are the Retirees "policyholders", as that term is utilized in s.161(1)(c) of the *Winding-Up Act*, *supra*, and thus entitled to share *pari passu* in the priority accorded to policyholders by that section?

d) Should the Court exercise its discretion under s.33 of the *Winding-Up Act*, *supra*, to require the Provisional Liquidator to keep the Group Benefits in place or to compel the Provisional Liquidator to take legal action on behalf of the Retirees against certain alleged, but not particularly well specified wrongdoers?

With Respect to the Supplementary Pensioners:

(a) Is there a distinction to be drawn in the treatment of the Supplementary Pensioners "In Pay" and the Supplementary Pensioners "Not in Pay"?

(b) Are the assets of Confederation Life subject to an express trust in respect of the amount required to satisfy all benefit liabilities under the supplementary retirement income arrangements?

(c) Alternatively, are the assets of Confederation Life subject to a constructive trust in respect of the amount required to satisfy all benefit liabilities under the supplementary retirement income arrangements, arising as a result of either,

(i) a breach of fiduciary duty; or,

(ii) an unjust enrichment?

(d) Are the Supplementary Pensioners In Pay and Not In Pay entitled to the priority accorded to "policyholders" within the meaning of s.161(1)(c) of the *Winding-Up Act*, *supra*?

(e) Are the supplementary retirement income arrangements a "pension plan" to which the *Pension Benefits Act*, R.S.O. 1990, c. P-8 applies?

(f) If the supplementary retirement income arrangements are a "pension plan", does R.R.O. 1990, Reg.909, s.47(3)6, as amended to October 28, 1994 [by O. Reg. 665/94] apply?

(g) If the *Pension Benefits Act, supra,* applies to the supplementary retirement income arrangements, is Confederation Life deemed, pursuant to s.57(3) of the *Act,* to hold in trust an amount equal to the due but unpaid contributions required under the legislation and regulations?

(h) If the *Pension Benefits Act, supra,* applies to the supplementary retirement income arrangements, are the assets of Confederation Life subject to a lien and charge, pursuant to s. 57(5) of the *Act,* in an amount equal to the due but unpaid contributions required by the legislation and regulations?

(i) Does the lien and charge created by s.57(5) of the *Pension Benefits Act, supra,* constitute a secured claim against the estate of Confederation Life?

(j) If the supplementary retirement income arrangements are a "pension plan" subject to the *Pension Benefits Act, supra,* does the operation of the *Act* conflict with the *Winding-Up Act, supra,* thereby rendering the operation of the *Pension Benefits Act, supra,* unconstitutional as a result of the application of the doctrine of paramountcy?

(k) What is the test to be applied for determining whether federal legislation is paramount?

With Respect to the Deferred Compensation Claimants:

(a) Are the assets of Confederation Life subject to an express trust in respect of the contributions from salary made by the Deferred Compensation Claimants, together with interest, for the full amount of the balances standing to the credit of their Accounts?

(b) Are the assets of Confederation Life subject to a constructive trust in respect of the contributions from salary made by the Deferred Compensation Claimants, together with interest, for the full amount of the balances standing to the credit of their Accounts, arising as a result of either,

(i) a breach of fiduciary duty; or

(ii) an unjust enrichment?

(c) Are the Deferred Compensation Claimants entitled to the priority accorded to "policyholders" within the meaning of s.161(1)(c) of the *Winding-Up Act, supra*?

18 Thus, each of the groups of Claimants is asserting a claim based upon an express trust, upon the imposition of a constructive trust, and upon an entitlement as a "policyholder". The Retirees raise an additional argument based upon the Court's discretion to impose duties upon a liquidator under s.33 of the *Winding-up Act.* Finally, there are an additional series of "pension" or *Pension Benefits Act* issues and a constitutional issue which relates to the Supplementary Pensioners' claims.

19 Before beginning the trek through this myriad of issues, I turn to a fuller outline of the factual circumstances surrounding the Winding-Up and the Claims.

Part C: Facts

A. Confederation Life's "Benefit" Programs

20 Confederation Life has provided employee benefits as part of its employment package since 1924. The

extent and subject matter of the benefits has evolved over the years. As at the date of the winding-up, however, the benefits consisted primarily of the following:

21 (a) Group Life Insurance;

22 (b) Group Accidental Death and Dismemberment Insurance;

23 (c) Major Medical benefits;

24 (d) Dental benefits;

25 (e) Registered Pension Plan benefits;

26 (f) Supplementary Retirement Income benefits; and

27 (g) Deferred Compensation Plan benefits.

28 All except the registered pension plan benefits are at issue in these proceedings. I shall refer to that Plan in these Reasons as the "Registered Pension Plan". Similarly, the Group Life and Accidental Death and Dismemberment Insurance and the Major Medical and Dental benefits will be referred to in these Reasons, collectively, as "the Group Benefits".

B. The Retirees

29 The Group Benefits were provided by Confederation Life to its employees, both while they were actively employed and upon their retirement, as part of each employee's overall compensation package. As stated in the Confederation Life Employee Handbook (at p.2) [emphasis added]:

> Compensation, in total, consists of salary, group life, health, dental and pension benefits, vacations and many other fringe benefits provided for staff members. These items require a direct significant contribution from the Company on behalf of each employee. *Thus total compensation is a composite, of which salary is the most visible and significant item.*
>
> . . . . .
>
> Our approach to overall compensation is to be in line with general community levels in the areas where we operate, and to provide a fair return for the contribution each staff member makes to the Company's operating success.

30 While at one point in their history the Group Benefit Plans required employee contribution, at the date of the Winding-Up Order they were paid in full by Confederation Life.

31 The source of authority for the current Group Benefit Plans is to be found in a by-law enacted by the Board of Directors of Confederation Life on April 20, 1955. The By-law provided:

> (a) that a Board of Trustees be appointed to administer the group insurance plans on behalf of Confederation Life, as employer (the "Trustees");
>
> (b) that the benefits to be provided under the group contracts, and the rules and regulations pertaining

thereto, would be determined by Confederation Life from time to time; and,

(c) that the Board of Directors of Confederation Life could at any time direct the payment of premiums respecting any or all group insurance plans be discontinued and employees no longer be entitled to any related benefits.

32 That foundation for the Group Benefit Plans has not changed.

33 No formal trust agreement was ever entered into between Confederation Life, as employer, and the Trustees of the Plans. In April, 1993, however, the Board of Directors approved a document entitled "Guidelines for Canadian Group Benefit Plan Trustees". These Guidelines distinguished between the duties of the Trustees in relation to the pension plans and their duties in relation to the Group Benefit Plans. They provided that the Trustees should [emphasis added]:

(1) with respect to *the pension plans* they are responsible for:

(a) ensure that the plans are funded in a manner that will enable them to meet all their obligations; ...

(c) administer the plans in accordance with the plan documents established by Confederation Life in a manner that provides equity and consistency of treatment for all participants; and

(2) with respect to *the other group benefit plans* they are responsible for:

(a) administer the plans in accordance with the contracts established by Confederation Life in a manner that provides equity and consistency of treatment for all participants; ...

The Guidelines, I observe, place no obligation upon the Trustees to ensure that the Group Benefit Plans were funded, whereas such an obligation is expressly stated with respect to pension plans. These Guidelines were not distributed to the employees of Confederation Life.

34 What *was* distributed to the employees of Confederation Life were a series of booklets describing the employment benefits that the Company offered (the "Booklets"). The Booklets were later replaced with a handbook entitled "Your Confed Handbook" (the "Handbook"). Prior to 1983, the benefits for retired employees were described in the Booklets. Thereafter, upon retirement, retired employees were provided with a pamphlet entitled "Benefits for Retired Employees of Confederation Life in Canada" summarizing the benefits provided to retired employees (the "Retirement Pamphlets"). In each of the three documents, a statement appeared advising employees that the document merely outlined or summarized the benefits and provisions of the group plan but,

does not create or confer any contractual or other rights. All rights with respect to the benefits of a member will be governed by the Group Policy.

35 Although this statement varied slightly in each of the Booklets, Handbooks and Retirement Pamphlets, the substance of the statement in each is consistent.

36 The Benefits, and the documents reflecting them, were amended from time to time. When this occurred — at least in later years — employees and retired employees were notified and replacement pages were circulated. In October 1991 the Handbook was amended by providing that employee benefit coverage could cease on the "Termination of the Contract or coverage under the Division or Class to which [the employee] belong[ed]."

This same warning did not appear in the Retirement Pamphlets, however, until the publication of the last pamphlet in May 1993. That Pamphlet begins with a section bearing the word "Important" which states [emphasis ad- ded]:

> This booklet contains information concerning your group coverage and should be kept in a safe place. *It supersedes and replaces all previous communication material.*
>
> *Confederation Life's services with respect to Major Medical and Dental Benefits are provided on an administrative basis only. Such benefits are not insured by Confederation Life. All other benefits are underwritten and insured by Confederation Life.*
>
> This booklet summarizes the benefits and provisions of your Group Plan. *It does not constitute the Group Contracts and is not a contract of coverage, nor does it create or confer any contractual or other rights.* Every effort has been made to insure that the information is accurate. However, if there is any question as to interpretation, all rights with respect to a covered person will be governed solely by the Group Contracts issued by Confederation Life Insurance Company.

37 As the foregoing notice indicates, there is a difference in the manner in which the Group Life benefits (including Accidental Death and Dismemberment benefits) and the other benefits are provided. The Major Medical and Dental benefits are not insured. The Group Life benefits are. These are the arrangements that were in effect at the time of the winding-up. They superseded and replaced all earlier communications.

38 The Group Life benefits are provided through group insurance policies issued by Confederation Life, as insurer, to the Trustees, as policyholders ("the Life Policies"). The Life Policies are experience-rated policies with the premiums determined annually based upon the claims experience of the employees of Confederation Life covered thereby. Each of the Life Policies is renewable annually, on March 31st, upon payment of the premium due, and expires annually.

39 Major Medical and Dental benefits have been provided to employees and retirees on a self-insured basis since the 1980's, pursuant to a series of plan documents (the "Group Plans") and administrative services only ("ASO") contracts. An ASO contract is a contract by which an employer provides benefits for its employees. The employer is responsible for the cost of the benefit payments but an insurance company is retained to provide administrative services such as processing claims and sending out cheques and receives a fee for providing those services. In these arrangements, the insurance company does not agree to indemnify the employer for claims made.

40 Under the ASO contracts at issue in this action, Confederation Life, as insurer, contracted with the Trustees to provide administrative services only. Confederation Life, as employer, is responsible for the cost of the benefit payments. The ASO contracts were not distributed to the Retirees.

41 Like the Life Policies, each of the Group Plans and ASO contracts in question was for a term of one year, renewable annually, on March 31st, for a further term of one year upon payment of the first premium due for the new policy year. All of the existing coverages for the Group Benefits have, therefore, technically speaking, ceased. However, the Provisional Liquidator, through its agent, has continued to make premium payments since the date of the Winding-Up Order with respect to the Life Policies and Group Plans which were in place on August 12, 1994, pending the decision of the Court.

42 It is clear from the materials filed, and from the evidence, that none of the Group Benefit Plans were protected by any form of pre-funding mechanism or secured by any form of segregated trust fund or other assets. The cost of the Group Benefits was expensed annually as the related insurance premiums and medical/dental liabilities were incurred.

43 It is, of course, the lack of any such protection or security, which would enable the Group Benefits to be continued, notwithstanding the winding-up of Confederation Life, that lies at the heart of the Retirees' position on this Motion.

C. Supplementary Pensioners "In Pay" and Supplementary Pensioners "Not In Pay"

44 Since 1975 Confederation Life has provided supplementary retirement income arrangements for senior officers to supplement the pension benefits received under the Company's Registered Pension Plan. The necessity for such arrangements arose because of limits contained in the *Income Tax Act* (Canada) on the amount of pension income which could be paid from a registered pension plan (the "Revenue Canada limits"). The purpose of the supplementary retirement income arrangements was to ensure that senior officers received the full retirement benefit to which their income level and years of service would otherwise have entitled them but for the Revenue Canada limits.

45 While initially confined to a small group of officers, by the time of the Winding-Up Order of August 15, 1995, the supplementary pension arrangements extended to 31 senior officers of the Company. Of these, 11 were receiving payments at the time of the Order and 20 were not.

46 Confederation Life's supplementary retirement income arrangements were established in accordance with two resolutions of the Company's Board of Directors. In the first resolution, dated June 21, 1972, the Board approved in principle the concept of providing "a supplementary pension" to those officers whose pensions would otherwise be limited by the Revenue Canada limits; management was asked to investigate the method of handling the matter, possibly by way of employment agreement. In the second resolution, dated July 16, 1975, the Board authorized,

> that on retirement there be provided a retiring allowance consistent with the service and contribution by such members to the Company as authorized by the Board of Directors.

47 The supplementary retirement income arrangements were not implemented through the creation of a formal plan document. Instead, Confederation Life advised the senior officers of their entitlement to this benefit by sending them a form letter. All of these letters cannot be found, but I am told that letters in the materials which are dated in April 1983 (the "April 1983 Letters") are reasonable samples of what was sent and received — at least until June 1993. While the form of the various April 1983 Letters varies slightly, their substance remains the same. The following statement appears in some fashion in each:

> In accordance with a resolution of the Board of Directors, the Company agrees to provide you in recognition of your valuable, loyal and long devoted service, a retiring allowance payable monthly commencing on the 28th day of the month following your actual retirement. The retiring allowance will be payable during your lifetime provided you are willing, consistent with your age and health, to make yourself available to the Company in a consulting capacity at reasonable times, and provided you agree to not engage in competing business without prior approval from the Company, nor to divulge or communicate confidential information of the Company.

48 The April 1983 Letters go on to describe the formula upon which the "retiring allowance" is based. They then conclude with this comment:

> In the unlikely event that your employment with the Company is terminated for cause, the retiring allowance is not vested to you and therefore not payable.

49 To indicate their concurrence with the supplementary retirement income arrangements, the senior officers were asked to return a signed copy of the letter.

50 The terms of the supplementary retirement income arrangements were later restated by way of a form letter dated June 9, 1993 (the "June 1993 Letter") sent by Mr. J.R. Cunningham to all eligible members. Mr. Cunningham was at all material times a senior officer of Confederation Life — the Vice President, Corporate and Human Resources. He was head of the Company's Human Resources department and secretary to the Human Resources and Compensation Committee of the Board of Directors, although he was not a member of the Board. He provided evidence, by affidavit, on behalf of the Claimants.

51 Mr. Cunningham distributed copies of both the April 1983 Letters and the June 1993 Letter.

52 The June 1993 Letter states in part as follows:

> The purpose of this letter is to clarify and confirm your entitlement to the Senior Officers' Supplementary Pension Arrangement.
>
> In accordance with a resolution of the Board of Directors and in order to ensure that your post retirement income compares equitably to other employee members of the registered Pension Plan for Salaried Employees, when measured as a percentage of pre-retirement income, the Company agrees to provide you with a Supplementary Pension on your retirement. This supplement will be in addition to the pension benefit you will receive from the registered pension plan and recognizes that the amount of pension benefit which can be provided under the provisions of the registered Plan is limited by Revenue Canada regulations.
>
> . . . . .
>
> 1. (Sets out how the Supplementary Pension is to be paid)
>
> Any Supplementary Pension payable under this arrangement will be paid in the same form and in the same manner as you elect for the pension income from the registered pension plan.
>
> 3. From time to time the Company may, on an ad hoc basis, increase the amount of pension being paid to retired members (or their beneficiaries) of the registered pension plan. In this event, the amount of the Supplementary Pension will be increased in a similar and consistent manner.
>
> 4. In the event of your death after retirement, the form of the Supplementary Pension amount continuing to your spouse or other beneficiary will be of the same form as that under the registered pension plan, with the same actuarial adjustment being applied if such is required under the registered plan.
>
> 7. If you should leave the Company prior to retirement, you shall be entitled to a deferred Supplementary Pension payment determined in the same manner as outlined in point 1 above. ... You should be aware, that in the event you leave the Company prior to retirement, the Supplementary Pension will only be provided as

> a deferred payment and it is not permissible to receive or transfer the lump sum actuarial equivalent of your pension benefits. Further, in the unlikely event that your employment with the Company is terminated for cause, the Supplementary Pension is not vested to you, and therefore not payable.

53 Administration of the supplementary retirement income arrangement was the responsibility of the Corporate Human Resources Department of Confederation Life, under the supervision of Mr.Cunningham. The Trustees had no responsibility for the supplementary retirement income arrangements, notwithstanding the "Guidelines" referred to earlier in these Reasons which envisage responsibility for both the Company's "pension plans" and the Group Benefit Plans being with the Trustees. Moreover, the liability for the supplementary retirement income benefit does not form part of the pension plan obligations under the Company's Registered Pension Plan. None of the Annual Reports of the Trustees for the years 1986, 1987, 1992, 1993, and 1994 refers to a supplementary retirement income arrangement.

54 The supplementary retirement income arrangements were not funded. At no time did Confederation Life set aside any specific funds or assets to support the liability to pay those benefits. Neither the April 1983 Letters nor the June 1993 Letter make reference to the creation of a trust or the segregation of assets to secure the supplementary retirement income arrangements.

55 There was an account — Account 2332G (later 20332) — created in the records of Confederation Life pertaining to the supplementary retirement income arrangements and reflecting activity in it. These were accounting entries only, however, and the account did not represent any assets of Confederation Life; nor was it an account in which assets were deposited or held. It was an account created to record the accruing actuarial liabilities attributable to the supplementary retirement income arrangements. When payments were made to the Supplementary Pensioners, they were made from the general funds of Confederation Life, not from any funds or assets in Account 2332G.

56 From 1990 forward, Confederation Life obtained annual actuarial valuations with respect to both the Registered Pension Plan and the supplementary retirement income arrangements from Towers Perrin, a firm of actuarial and compensation consultants. These Reports revealed that the market value of the assets of what the authors called the Supplementary Pension were nil and that the liability for it was increasing. The Towers Perrin Report dated June 27, 1991, stated "that there are no assets segregated in a fund for the purposes of securing the benefit obligations of the Program."

57 In late 1993, Mr. Cunningham requested Towers Perrin to prepare a report which focused upon providing security and funding for the payment of benefits promised under the supplementary retire ment income arrangements. According to the Towers Perrin Report dated November 8, 1993, several options were available to Confederation Life in order to secure its obligation to provide these benefits in the event it were unable or unwilling to make payments. These options included: obtaining a third-party guarantee, obtaining a surety bond, obtaining a bank letter of credit, or establishing a fully funded trust. The Report concluded:

> There is no magic to any of these methods of providing security. Each of them will probably cost the company more than an unsecured promise.

58 The Report went on to discuss what it referred to as supplementary pension benefits:

> These benefits are paid monthly to retirees through "payroll". Unlike the registered plan benefits that are well funded and secure against any calamity happening to Confederation Life, receipt of these benefits is

dependent on the future financial health of the company. This is consistent with common practice in Canada. Less than 10% of companies have funded or otherwise secured these kinds of obligations.

59 Confederation Life did not implement any of the options recommended in the Towers Perrin Report, and the supplementary retirement income arrangements remained — as they had been at all times — unfunded.

60 The Liquidator has ceased making payments to the Supplementary Pensioners In Pay and has indicated that it will not make payments to those Not in Pay.

D. Deferred Compensation Claimants

61 In December 1981, Confederation Life established a senior management Deferred Compensation Plan to provide retirement benefits to certain designated senior executives. Mr. Rhind and Mr. Burns, the Chairman and President of the Company, respectively, were the only two persons ever designated as members of the Plan.

62 Deferred compensation plans are income tax mechanisms, designed to allow senior executives to defer entitlement to all or part of their employment income until after retirement, at which time its receipt would provide a source of post-retirement income that would be taxable at (presumably) lower marginal rates applicable in the years of retirement.

63 A deferred compensation plan, being the tax-driven instrument that it is, is a complicated and carefully chiselled instrument. It is carefully chiselled because, if not, it may unwittingly be caught in the tentacles of one or another of the myriad of different tax instruments which exist, and thus attract undesired tax consequences. In the case of Confederation Life's Deferred Compensation Plan, the tax deferral aspects of it were approved in an advance ruling by Revenue Canada, dated June 18, 1982.

64 The advance ruling obtained from Revenue Canada was based upon a specific series of representations which were made by Confederation Life and Messrs. Rhind and Burns. Those representations included the terms of the Deferred Compensation Plan referred to above. Both Confederation Life and Revenue Canada treated the Plan as a "retirement allowance" and expressly agreed that it was not an "employee benefit plan" or an "employee trust" within the meaning of s. 248 of the *Income Tax Act* (Canada).

65 The operation of the Plan is described in a plan document entitled "Senior Management Deferred Compensation Plan". It is in the form of an agreement between Confederation Life and Messrs. Rhind and Burns. In essence, the members are required to elect, on an annual basis, the amount of income earned in the year in question that they will not defer. This amount of their annual income they receive. The balance is deferred, but it is not put anywhere awaiting the member's retirement. It is, in fact, not paid, although the Company accrues a liability for its payment, with interest. A ledger account is set up on the Company books, in which the deferred amounts are recorded and interest is credited on the balance.

66 Upon retirement, all deferred amounts become payable as directed by the member or the member's beneficiary in an election.

67 The Deferred Compensation Plan is quite specific about these matters. It includes, for instance, the following terms:

Crediting of Portions of Deferred Amounts to Member's Accounts

> The Deferred Amount for a Period shall not be paid into the Plan by the Employer nor shall it be construed to be so paid.
>
> In respect of each Period, the Employer shall pay to a Member ... all amounts included in such Member's Aggregate Cash Remuneration for such Period until the aggregate of such payments is equal to the member's Non-Deferred Amount for such Period. The Employer shall not pay to the Member any other amounts included in such Member's Aggregate Cash Remuneration for the Period but will credit each of such other amounts, as at the date that but for the provisions of the Plan it would otherwise have become due, to such Member's Account.
>
> For greater certainty, such crediting is entirely a matter of internal bookkeeping of the Employer and the Employer shall be under no obligation to make any actual payments to the Plan.

68 As in the case of the Group Benefits and the supplementary retirement income arrangements, Confederation Life's Deferred Compensation Plan was not pre-funded or secured by any form of segregated assets. Indeed, the terms of the Plan do not refer to the establishment of a trust, or to the segregation of funds or assets. Similarly, as noted, they do not oblige Confederation Life to make actual payments to the Plan.

69 Mr. Rhind retired from employment with Confederation Life in April, 1985. He continued to act as a director of Confederation Life until November 14, 1994, however, and because of that he had not yet begun to receive payments under the Deferred Compensation Plan prior to the Liquidator's decision to withhold further payments. At the date of the Winding-Up Order, Mr. Burns had retired and was receiving equal monthly instalments as per his election. At the time of his retirement, he elected not to purchase an annuity.

70 As of December 31, 1993 the Account for Mr. Rhind showed a balance of $707,142.76 and the Account for Mr. Burns showed a balance of $478,637.

71 The Provisional Liquidator has stopped making payments to Mr. Burns under the Plan and has refused to make such payments to Mr. Rhind.

Part D: The Positions of the Parties

A. The Retirees

72 The Retirees submit that they are entitled, either by virtue of an express trust or by virtue of the imposition of a constructive trust to have a sufficient portion of the assets of Confederation Life segregated from the Company's general assets and set aside to fund the continued provision of the Group Benefits. They approach the constructive trust objective from two different directions: first, they submit that a fiduciary relationship exists between Confederation Life and its employees and retired employees in relation to the Group Benefits and that the imposition of a constructive trust is the appropriate remedy for the Company's breach of that fiduciary duty by failing to pre-fund and secure the Benefits; and secondly, they submit that the imposition of a constructive trust is the appropriate remedy to redress an unjust enrichment which Confederation Life has enjoyed at the expense of its employees in this regard.

73 The Retirees argue further, and in any event, that they are "policyholders" within the meaning of para. 161(1)(*c*) of the *Winding-up Act*, supra, and, accordingly, that they are entitled to share pari passu with other policyholders in the distribution of the assets of the Company upon the winding-up.

B. The Supplementary Pensioners

74 The Supplementary Pensioners also argue that the assets of Confederation Life are subject to an express trust in the amount required to fund all benefit liabilities under the supplementary retirement income arrangements. Alternatively, they assert the constructive trust argument, based upon the breach of a fiduciary duty and upon the notion of unjust enrichment. They submit, as well, that they are "policyholders" within the meaning of para. 161(1)(*c*) of the *Winding-up Act*, supra.

75 These Claimants then raise a series of "pension plan" issues arising under the *Pension Benefits Act*, supra. They submit that Confederation Life's supplementary retirement income arrangements constitute a "pension plan" as defined in the Act, and that therefore there is a deemed statutory trust in the amount necessary to fund the arrangements and, in addition, a statutory lien and charge against the Company's assets for that amount: *Pension Benefits Act*, supra, subss. 57(3) and 57(5).

76 If the latter issues regarding a statutory trust, lien and charge are determined in favour of the Supplementary Pensioners, an issue arises as to whether the operation of the *Pension Benefits Act*, supra, is unconstitutional in these circumstances because of the doctrine of paramountcy.

C. The Deferred Compensation Claimants

77 The Deferred Compensation Claimants submit that the full amount of the balances outstanding in their accounts are protected by reason of an express trust, or, alternatively, by reason of a constructive trust based upon a breach of fiduciary obligation and upon the doctrine of unjust enrichment. They also argue that they are "policyholders", as contemplated by para. 161(1)(*c*) of the *Winding-up Act*, supra.

78 I will deal with each of these submissions separately.

Part E: Law and Analysis

79

I. The Claimants as "Policyholders" of Confederation Life

80 The Claimant groups each argue that they are "policyholders" within the meaning of para. 161(1)(*c*) of the *Winding-up Act*, supra, and therefore that they are entitled to share pari passu with other policyholders in the liquidation proceeds in accordance with the priority scheme of distribution set out in that provision. For the Retirees, this claim is premised upon the existence of an *indemnity-like* contract; for the Supplementary Pensioners and the Deferred Compensation Claimants, it is premised upon the existence of an *annuity-like* contract.

81 As these submissions raise issues that go to the heart of the purpose of winding-up proceedings, in general, and the scheme of priority distribution of assets, in particular — all in the context of a life insurance company insolvency — I will address them first even though they are not articulated first either in the questions as put forward by the Provisional Liquidator for directions or in the issues as I have earlier summarized them.

82 Under para. 161(1)(*c*) of the *Winding-up Act*, supra, claims of "policyholders" of the Company rank in priority after the costs of liquidation and a preferred claim given to employees for 3 months wages but ahead of the priority provided for in subs. 161(2) for the ordinary or general creditors. The priority scheme, as set out in s. 161, is as follows [emphasis added]:

161.(1) Subject to this Act, claims shall be paid in the following order of priority:

(*a*) costs of liquidation and the mortgage insurance and special insurance portions of the expenses described in paragraph 686(1)(*a*) of the *Insurance Companies Act* that were incurred by the Superintendent in respect of the Company after March 31, 1986;

(*b*) claims of preferred creditors, specified in section 72;

(*c*) *claims of policyholders of the company ranking as follows*:

(i) if reinsurance is not effected as provided in section 162,

(A) *firstly*, any of the following claims:

(I) *in the case of policies of life insurance and policies of accident and sickness insurance, claims that have arisen under those policies of the company*, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent of Financial Institutions as provided in subsection 168(1), less any amount previously advanced by the company on the security of those policies, and claims of holders of policies of life insurance and policies of accident and sickness insurance to the value of those policies computed as provided in section 163, and

(II) in the case of policies of insurance other than policies of life insurance and policies of accident and sickness insurance, claims that have arisen under those policies of the company by reason of the occurrence of the event insured against, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent of Financial Institutions as provided in subsection 168(1), less any amount previously advanced by the company on the security of those policies, and

(B) secondly, in the case of policies of insurance other than policies of life insurance and policies of accident and sickness insurance, the claims of such policyholders to the value of those policies computed as provided in section 163 or, as the case may be, claims that have arisen under those policies of the company by reason of the cancellation of such policies, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent of Financial Institutions as provided in subsection 168(1), less any amount previously advanced by the company on the security of the policies, or

(ii) if reinsurance is effected ... (this part is not relevant to these proceedings)

. . . . .

(2) *Other creditors and policyholders of the company*, including policyholders claiming any minimum amount that a life company has agreed to pay under a policy ... are entitled to receive a dividend on their claims only if the assets are more than sufficient to pay the claims specified in subsection (1).

(i) The Retirees

83 In the case of the Retirees, the "policyholder" argument is based on the premise that the Group Benefits are provided by way of contracts of indemnity — and, thus, are policies of insurance — under which they are entitled to benefit and, accordingly, that they are entitled to rank as "policyholders" under subs.161(1) of the

Winding-up Act, supra.

84 I accept, after some initial hesitation, that the Retirees' rights to Group Benefits flow from "policies of insurance" to that effect. Although it may appear implausible, at first appearance, that an employer who promises to provide such benefits becomes an "insurer" in this respect, an examination of the relevant legislative defining provisions seems to lead inexorably to that conclusion.

85 "Policy" of insurance is given a very broad meaning in insurance legislation, and "policy" is defined in s.159 of the *Winding-up Act*, supra, as including "policy" as defined in the *Insurance Companies Act*, S.C. 1991, c.47, as amended, s.2. There, the term "policy" is stipulated to mean:

> any written contract of insurance ... whether contained in one or more documents ... and includes any annuity contract.

86 There is no definition of "contract of insurance" in the federal *Insurance Companies Act*, supra, but in Ontario, "insurance" is defined in s.1 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, as follows:

> "insurance" means the undertaking by one person to indemnify another person against loss or liability from loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance;

87 Since a "contract" under the *Insurance Act*, supra, simply means "a contract of insurance" and includes "a writing evidencing the contract", Confederation Life's promise to provide the Group Benefits, as evidenced by the Booklets, Handbook and Retirement Pamphlets, and by the Group Benefit Plan documents, would seem to amount to a "policy of insurance". It is evidenced in writing, albeit in one or more documents; and it constitutes "the undertaking by one person (Confederation Life) to indemnify another person (the Retiree) against loss or liability from loss in respect of a certain risk or peril to which the object of the insurance may be exposed (i.e., to the risk or peril of illness and the costs of dealing with it). Why, then, is it not a "written contract of insurance", as contemplated by the *Insurance Companies Act*, supra, and therefore a "policy", as contemplated by the *Winding-up Act*, supra? In my opinion, it is.

88 What is missing from the foregoing analysis, and from the specific definition of "insurance" in the *Insurance Act*, supra, is the concept of "premium", an essential characteristic of a contract of insurance — the consideration in exchange for which the benefit is provided. While consideration is necessary, it is well established, however, that it need not take the form of a cash payment: see *Prudential Insurance Co. v. Inland Revenue Commissioners*, [1904] 2 K.B. 658 at p. 663; *California Physicians' Service v. Garrison* (1946), 172 P. 2d 4 at pp. 17-18, adopted by Pennell J. in *Bendix Automotive Canada Ltd. v. U.A.W., Local 195*, [1971] 3 O.R. 263 (H.C.) at pp. 270-271. In the latter case, the Court held that an employer's obligation under a collective agreement to reimburse employees for what today would be called "extra billing" payments constituted "a contract of insurance" and that the consideration was to be found in the employees' own covenants in the collective agreement. Here, the consideration is found in the Retirees' former contributions of labour, skill and knowledge in exchange for which Confederation Life's compensation package as a whole had been offered.

89 Consequently, I am satisfied that the Retirees are the holders of "policies of insurance", for these pur- poses.

90 It is argued that there can be no insurance with respect to the Major Medical and Dental benefits because

they are provided through the mechanism of "administrative services only" contracts. In this sort of arrangement the Company, as employer, "self-insures" and accepts the risk associated with providing the benefits; it is directly responsible for payment of all claims. The Company's role as insurer *in this respect* is purely administrative; it processes and deals with claims in exchange for an administrative fee. Such arrangements do not constitute insurance: see Norwood & Weir, *Norwood on Life Insurance in Canada*, 2nd ed. (Toronto: Carswell, 1993) at p. 142.

91 The Retirees Handbook itself seems to recognize the same distinction. On the first page, under a heading entitled "Important", the following is to be found [emphasis added]:

> Confederation Life's services with respect to Major Medical and Dental Benefits are provided on an administrative basis only. *Such benefits are not insured by Confederation Life.* All other benefits are underwritten and insured by Confederation Life.

92 To my mind, however, the distinction which needs to be made on these facts is the following. There is a difference between the nature of the relationship between Confederation Life, *as employer*, and its employees, and the nature of the relationship between Confederation Life, *as insurer*, and itself (i.e., the Trustees) as the holder of the ASO contracts. With regard to the latter, there is no contract of insurance. In relation to the former, however, in these circumstances, a contract of insurance exists.

93 Unfortunately for the Retirees, however, this result — while it takes them along the road they seek to travel — does not get them to the destination they seek to reach.

94 Even given a policy of insurance as I have described it, the policy is terminable at any time by the Company, and in the circumstances of a winding-up proceeding, the Provisional Liquidator is obliged in my view to terminate such policies — or, at least, not to renew them. In my opinion, the Retirees are entitled to no more than the benefits of the coverage in effect and paid for at the time of the Winding-Up Order.

95 Each of the Life Policies and the Group Medical/Dental Plans provide that coverage will terminate when the earliest of the following events occurs:

> a) the employer terminates the employee's coverage; or
>
> b) the policy or the ASO contract terminates or coverage on the group, division or class to which the employee belongs terminates.

96 A winding-up is effective as of the date of the Notice of presentation of the petition for winding-up, and it is the duty of the liquidator to effect "a speedy, inexpensive and effectual distribution of the assets among the shareholders and creditors": see J.A. Carfagnini, *Proceedings Under the Winding-up Act (Canada)* (1988), 66 C.B.R. (N.S.) 77 at pp. 79-80; *Partington v. Cushing* (1906), 3 N.B. Eq. 322 (S.C.). The general principles governing a winding-up proceeding are described in *Ince Hall Rolling Mills Co. v. Douglas Forge Co.* (1882), 8 Q.B.D. 179 at p. 184 as follows [emphasis added]:

> In determining this question it is necessary to consider the effect upon the company and its operations of a petition for liquidation followed by a subsequent order to wind-up. In the first place, *the purpose of the winding-up is to make an equitable and rateable distribution of all the assets of the company, from the moment of the commencement of the winding-up*, that is the presentation of the petition, amongst all the credit-

> ors of the company without favour or preference to any one according to the legal rights of the creditors and the company at the moment of the commencement of the winding-up. All the assets of the company are to be got in and collected in the most beneficial way and distributed. *In fact, from the moment of the winding-up, the company is stopped as an independent going concern.*
>
> *Every transaction entered into by the company from that moment is void unless sanctioned by the Court; no contracts can be executed nor can the business of the company be carried on in a single particular except for the purposes of winding-up and for the benefit of the creditors*, and, although the company continues in existence and under the same name, and may, if allowed by the Court, continue to carry on its business and enter into or complete transactions, it does so in a new interest and a new capacity, and solely for the purpose of winding-up its affairs in the interest of its creditors and shareholders except in one class of cases which have no application to the present, viz., where transactions bonâ fide executed and carried out between the petition and the winding-up order may in the discretion of the court be ratified and confirmed.

97 Canadian courts have adopted a similar approach: see Carfagnini, supra, at p. 80.

98 Here, the ASO contracts in question were one year contracts. They expired on March 31, 1994. The Provisional Liquidator has indicated its intention to cease payments under the ASO contracts unless the Court orders otherwise, but has agreed to continue funding the Group Benefits until the issue has been determined. Leaving aside arguments having to do with the existence of trusts or other remedies, there is nothing in the "policyholder" submission itself, or in the relationship between the Company and the Retirees qua participants in the Group Benefits contracts which compels the Provisional Liquidator to continue to renew the contracts and to fund the Group Benefits. In my view, unless the Court orders otherwise, the Provisional Liquidator is obliged to discontinue the ASO contracts, in order to advance the liquidation of Confederation Life's assets as of the date of the winding-up and the distribution of those assets amongst the creditors according to law. In the circumstances of this case, there is no basis for the Court to order otherwise.

99 Although the Group Life benefits attract the same "policy of insurance" analysis as do the Major Medical and Dental benefits, and in addition have the advantage of being provided through contracts of insurance, they give rise to a similar problem for the Retirees. Confederation Life, as employer, implemented its contractual obligation to provide group life benefits through a series of contracts of insurance between the Trustees, as policyholder, and Confederation Life, as insurer. Although there is an insurance policy in existence with respect to these benefits, it, too, is an annual term policy. Confederation Life pays the yearly premium out of the Company's general assets. The Life Policies also expired on March 31. Confederation Life is insolvent and can no longer pay the premiums. For the same reasons as it is not entitled to do so with respect to the Major Medical and Dental benefits, the Provisional Liquidator is obliged not to continue to pay the premiums for the Group Life benefits, in my view.

(ii) The Supplementary Pensioners and the Deferred Compensation Claimants

100 The "policyholder" arguments respecting the Supplementary Pensioners and the Deferred Compensation Claimants are founded on similar grounds. They proceed on a different basis than those of the Retirees, which were premised upon a contract of indemnity. Rather, the Supplementary Pensioners and the Deferred Compensation Claimants assert that *their* benefits constitute them policyholders because they are the owners or holders of an annuity which by definition, they assert, is a contract of life insurance.

101 Both the supplementary retirement income arrangements and the Deferred Compensation Plan call for

payments to be made on retirement in a stream of periodic payments. In addition — in the case of the supplementary retirement income arrangements — the Claimant may elect to take a life annuity as provided under the Company's Registered Pension Plan.

102 Such arrangements, it is argued, constitute an undertaking to provide an annuity, i.e., a series of periodic payments, and annuities are life insurance policies for purposes of insurance legislation. Consequently, the submission concludes, the Supplementary Pensioners and the Deferred Compensation Claimants are the holders of policies of life insurance and entitled to rank as "policyholders" under para.161(1)(*c*) of the *Winding-up Act*, supra.

103 This argument has a certain plausibility about it, at first glance. However, it cannot withstand analysis in this context of employee benefits granted by a company which happens to be a life insurance company and which is being wound up. There are two reasons for this:

1) The supplementary retirement income benefits and the deferred compensation payments do not constitute true annuities, in my opinion, but are more in the nature of a pure debt; and,

2) Even if they do constitute an "annuity", as contemplated in the definition of "life insurance" in the *Insurance Act*, supra, they are not annuities provided by way of "an undertaking entered into by an insurer", as contemplated in that legislation.

Not a True Annuity

104 I accept that the benefits in question, if not placed in context, may be characterized as an "annuity" in the very broad sense in which that term is often employed. An annuity has been defined as broadly as simply "a contract ... for the payment of periodic amounts during the lifetime of a particular person, or for a fixed or guaranteed period": see D. Norwood, *The Uniform Life Insurance Law of Canada* (Toronto: Life Insurance Institute of Canada, 1974) at p. 18. See, to the same effect, *Black's Law Dictionary*, 6th ed.

105 An annuity, then, can be quite a sweeping concept. Indeed, it is one of those concepts which can be made to appear more sweeping than it is, in a given context, if one too slavishly adheres to broad dictionary definitions. As Thorson J. said, in *O'Connor v. Minister of National Revenue*, [1943] 4 D.L.R. 160 (Ex. Ct.) at p. 167, the term "annuity" "is a word that is often loosely and, therefore, ambiguously used".

106 Central to the concept of an annuity is the alienation of capital — the payment of a sum of money or other asset *of a capital nature* — which is then turned into a flow of income, so that the capital is used up and replaced by the flow of income. In *O'Connor v. Minister of National Revenue*, supra, Thorson J. said, at p. 167 [emphasis added]:

> Ordinarily an annuity is thought of as *a series of annual payments* which a person has *purchased or arranged for with a sum of money or other asset of a capital nature*. As Best J. said in *Winter v. Mouseley*, 2 B. & Ald. 802 at p. 806, 106 E.R. 558: "I have, however, always understood the meaning of an annuity to be where the principal is gone for ever, and it is satisfied by periodical payments."
>
> In 17 Hals. (2nd ed.), p. 181, this definition of an annuity is given: "An annuity is an income purchased with a sum of money or an asset, which then ceases to exist, the principal having been converted into an annu- ity."

> This accords with the ordinary acceptance of the term. The capital that went into the purchase of the annuity has been turned into a flow of income, so that the capital has disappeared altogether and only the flow of income continues.

107 See also *Coopérants, Société mutuelle d'assurance-vie/Coopérants, Mutual Life Insurance Society c. Raymond, Chabot, Fafard, Gaynon Inc.*, [1993] Q.J. No.1203 (C.A. Qué.) unofficial translation, paras. 92-96 (referred to hereafter as "*Coopérants*") [reported at 58 Q.A.C. 211].

108 It is the purchase of the future income stream with money or "other asset *of a capital nature*" which is the feature distinguishing an annuity from a mere debt. That feature, in my view, is lacking in the supplementary retirement income and deferred compensation arrangements. No sum of money or assets in the nature of capital were put forward either by the Claimants or by Confederation Life, in connection with the "purchase" of the future periodic income payments on retirement. While there is "consideration" for the payment of the income stream, in the form of the provision of labour and services to the Company, I am not prepared to hold in the circumstances of this case, that it is consideration of a capital nature in the sense that that concept is used in support of the purchase of an annuity.

109 No one would argue that the provision of labour in exchange for the payment of periodic salary amounts — i.e., an ordinary employment arrangement — constitutes that contract an "annuity" contract. The provision of future retirement income payments as partial consideration for employment services can be no different.

110 The same is true even with respect to the entitlement to elect a life annuity for the supplementary retirement income arrangements. Once again, the loose use of the word "annuity" can lead to misconceptions. While the life annuity granted under the Registered Pension Plan may very well be a true annuity — because it is backed by the making of capital contributions to the Plan by the employer, and by the general pre-funding which exists for such Plans — the Supplementary Pensioners are not entitled to such benefits qua supplementary retirement income claimants. There is no pre-funding for those benefits, nor any segregated amounts providing for their security. All the Supplementary Pensioners are entitled to do — those who are so entitled, at least — is to elect to take payments "in the same form and in the same manner as [they] elect for the pension income from the registered pension plan" (See the June 1993 Letter). It is a promise with respect to the manner of payment, not the establishment of an annuity in the true sense, as I understand it. It is simply the creation of a debt.

Not an Undertaking to Provide an Annuity by an Insurer

111 Even if the arrangements respecting the supplementary retirement income benefits and the deferred compensation claims do constitute "annuities", however, there is another reason why the Claimants in those categories are not entitled to succeed as "policyholders" of Confederation Life. The annuities are not issued by Confederation Life *as insurer*. They are promised by Confederation Life *as employer*. They are therefore not caught by the definition of "life insurance" in the *Insurance Act*, supra, in my opinion, and the Claimants are, likewise, not the holders of policies of life insurance as contemplated in para.161(1)(*c*) of the *Winding-up Act*, supra.

112 I accept that recent case law and amendments to insurance legislation have clarified the question of whether an annuity is "life insurance". In *Kerslake v. Gray* (1957), [1958] S.C.R. 3 the Supreme Court of Canada had ruled that such was not necessarily the case. Since that decision, however, many jurisdictions, including Ontario, have amended their legislation. Section 1 of the *Insurance Act*, supra, now defines annuities as

a form of life insurance. It states [emphasis added]:

> "life insurance" means an undertaking by an insurer to pay insurance money,
>
> (*a*) on death,
>
> (*b*) on the happening of an event or contingency dependent on human life,
>
> (*c*) at a fixed or determinable future time, or
>
> (*d*) for a term dependent on human life, and, without restricting the generality of the foregoing, includes,
>
> . . . . .
>
> (*g*) *an undertaking entered into by an insurer to provide an annuity* or what would be an annuity except that the periodic payments may be unequal in amount and such an undertaking shall be deemed always to have been life insurance.

113 It appears to be accepted in the literature that "by definition, *all* annuity contracts now constitute life insurance": see Norwood & Weir, supra, at p.19. I do not agree, however. In the insurance law context it is an annuity or an undertaking to provide an annuity *entered into by an insurer, in its capacity as insurer*, which in my opinion meets that test. Neither the undertaking by Confederation Life to provide a supplementary retirement income stream of periodic payments — or the right to elect to take an annuity — nor the undertaking to make periodic payments to the Deferred Compensation Claimants, *in the circumstances of this case*, constitute such an undertaking given or entered into *by an insurer*. They are undertakings given or entered into by Confederation Life qua *employer*, not qua *insurer*. The fact that the Company happened to be an insurance company is a pure coincidence.

114 The decision of the Quebec Court of Appeal in *Coopérants* is instructive in this regard, I believe. In that case, Coopérants — an insolvent insurer — had issued deferred annuity contracts to individuals and to groups in the normal course of its business. Many were for the purpose of funding retirement savings plans. As in the case at Bar, the issue before the Quebec Court of Appeal was whether the owners or holders of the annuity contracts were entitled to the priority protection of "policyholders" under para.161(1)(*c*) of the *Winding-up Act*. The Court held that they were. Leave to appeal to the Supreme Court of Canada was refused [reported (sub nom. *Raymond, Chabot, Fafard, Gagnon Inc. c. Bouchard*) (1994), 170 N.R. 79 (note)].

115 The Court in *Coopérants* came to this conclusion largely on the basis that the Legislatures of most of the Provinces had responded to the decision in *Kerslake v. Gray*, supra, by modifying their respective statutes so that the definition of the term "life insurance" would include annuity contracts: [1993] Q.J., para.39 [p.221 Q.A.C.]. In the French language version of the legislation, annuities "are assimilated to life insurance". In the English language version "policy" includes "any annuity contract".

116 It is important to note, however, that all of the annuity contracts at issue in *Coopérants* were arm's-length transactions entered into by the company in the ordinary course of business. They were not "in-house" contracts designed to enable Coopérants to fulfil its obligations, qua *employer*, to its employees. At para.43, the Court stated [p.221 Q.A.C.]:

> All the contracts in question in this appeal were transacted within the framework of the business of a life in-

> surance company with respect to the domain of retirement funds. Each and every one is linked to the various means generally offered by insurance companies to insure the capitalization and distribution of various pension plans.

117 The Court reviewed the history and evolution in the life insurance industry of the use of annuities as a primary financial services vehicle for the promotion of retirement savings plans. It pointed out that "for all of Canada in 1990, the annuities business by life insurance companies represented $11.853 billion, or 64% of the total premium revenues collected by life insurance companies" (para.45) [p.222 Q.A.C.]. In this context, and against this background, the Court concluded that by incorporating annuities into life insurance contracts the legislators had recognized the importance of annuities as a financial services product to the life insurance business and had dictated "an evolutive and dynamic interpretation of this practice that the courts must respect" (para.41) [p.221 Q.A.C.].

118 I note, however, that the "large and evolutive interpretation of the notion of annuity contract" adopted by the Court (para.77) [p.227 Q.A.C.] is applied in the context of arm's-length financial services products being marketed by life insurance companies to their customers. Such a broad definition of "annuity" is appropriate in the context of the sale of financial products by a life insurance company to its customers. It is not justified in the context of a life insurer, as employer, providing benefits to its employees as part of their compensation package, particularly where those benefits are in conflict with the statutorily protected rights of another group. In such circumstances, in my opinion, the Court ought not to strain to find an interpretation which would include classes of persons who would not, on a plain and ordinary meaning approach, be included in the protected group.

119 I believe this approach to the interpretation of the word "annuity" and the term "life insurance" is supported by the purpose behind the highly regulated and structured nature of the life insurance industry.

120 Brown & Menzies, *Insurance Law in Canada*, 2nd ed. (Toronto: Carswell, 1991) describe the supervision of the structure of the industry in this fashion (at p.26 [emphasis added; footnotes omitted]):

> As indicated, the federal statutes and legislation in force in most of the provinces address the question of insurer's solvency. Following two spectacular failures of insurance companies in England in 1867, *there developed considerable interest in Canada, as elsewhere, in protecting policy holders. The modern manifestation of that development is a comprehensive body of legislation providing for security deposits by insurers and for a system of supervision by government agencies.*

121 In *Coopérants* the Quebec Court of Appeal picked up this same theme in a passage that I have referred to, partially, elsewhere in these Reasons. I cite it in full here (paras.81-83) [p.228 Q.A.C.]:

> It would appear that the preservation of the financial security attached to an insurance policy was [the] underlying principle for the federal legislator when it stipulated that the claims of policyholders would be paid in priority in the event of the liquidation of a life insurance company.
>
> In assimilating an annuity contract transacted by an insurer to an insurance policy, the legislator even intended to preserve, due to the financial stability of insurance companies, the financial security attached to the annuity contract. An annuity and life insurance are, in effect, two means by which a person can protect himself against financial risks. Insurance permits an accumulation of a capital upon the death of the insured in order to protect the beneficiaries against the negative financial effects of death. The goal of an annuity is a liquidation of a patrimony (i.e., loosely translated, a body of invested capital) in order to ensure the annuit-

ant a stable revenue during the protection phase.

Insolvency and the winding-up of an insurance company are two events which threaten the protection and the financial security sought by the people who execute annuity contracts with an insurer, if they cannot benefit from the privileged status provided by the legislature in the Winding-Up Act.

122 The purpose of the regulatory scheme governing the insurance industry, and of the priority scheme enacted through s.161(1) of the *Winding-up Act*, supra, in my view, is to protect policyholders who invest funds with an insurance company. In such circumstances the regulatory scheme established under the *Insurance Companies Act*, supra, requires that an adequate reserve be established to cover the actuarial liability associated with the investment. What the "policyholder" priority of para.161(1)(*c*) does is to preserve access to that reserve by arm's-length purchasers of financial services products from life insurance companies, when such companies become insolvent.

123 It is not the senior officers of the Company — many of whom, including the Chairman and President, would have been at the helm in the period leading up to the collapse — whom the priority scheme is designed to protect. Vaulting the claims of such senior officers — and even the retired employees as well — into the same position as policyholders of the Company's products would mean ignoring the carefully constructed regulatory scheme which Parliament and the Legislatures have erected.

124 The only reason the Claimants are able to argue that their claims are claims of "policyholders" under the *Winding-up Act*, supra, is because the liquidation of their employer, Confederation Life, is the liquidation of an insurance company. Parliament, in my opinion, could not have intended to treat employees differently, in terms of priority on the liquidation of their employer, simply because of the nature of their employer's business. That, however, would be the result if the Claimants' position on the "policyholder" argument were to prevail. In my view, it cannot prevail.

125 I therefore hold that neither the Retirees nor the Supplementary Pensioners nor the Deferred Compensation Claimants are "policyholders" of Confederation Life, as that term is contemplated in para.161(1)(*c*) of the *Winding-up Act*, supra.

126 Finally, even if it could be said that the Claimants are "policyholders", as contemplated by s.161 of the *Winding-up Act*, supra, they would only rank, in the circumstances of this case, with "other creditors and *policyholders*" under subs.161(2), in my opinion. Ensuring the integrity of the legislative scheme of priority, intended as it is to protect arm's-length purchasers of insurance policies and annuities from insurers, commands nothing less.

127 I turn now to the issues of whether Confederation Life is bound by trust or fiduciary obligations in relation to its arrangements with the three groups of Claimants.

II. True or Express Trusts

128 All categories of Claimants are asserting the existence of an express trust in relation to their benefits.

129 For a Court to hold that a true or express trust exists, the party asserting the existence of such a trust must establish what are commonly referred to as "the three certainties". They are:

(i) certainty of intention on the part of the settlor to create a trust;

(ii) certainty of the subject matter of the trust i.e. the property to be settled upon the trustee in favour of the beneficiaries of the trust; and,

(iii) certainty of the object or persons intended to be the beneficiaries of the trust.

130 See: *Knight v. Boughton* (1840), *(*sub nom. *Knight v. Knight)* 49 E.R. 58 (Ch.) at p.68; D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at p.105.

131 In terms of pensions, it has been held that whether the pension arrangement is governed by contract or by trust principles depends upon the terms of the plan itself: see *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631, at p.639 S.C.R., particularly per Cory J.

132 While, in determining whether or not there was an intention to create a trust, the use of the words "in trust", or "as trustee", or words to that effect is not essential, the evidence must be clear that the settlor did, indeed intend to create a trust; a general intention to benefit someone will not suffice to create a trust: *Re Allan Realty of Guelph Ltd.* (1979), 29 C.B.R. (N.S.) 229 (Ont. S.C.) at pp.241-242; *Jones v. Lock* (1865), 1 Ch. App.25 at pp.28-29; J.E. Martin, *Hanbury & Maudsely: Modern Equity*, 13th ed. (London: Stevens & Sons, 1989) at p.80. A Court will give weight to the absence of any reference to a trust in a pension plan, in determining whether there was an intention to create a trust: *Crownx Inc. v. Edwards* (1994), 20 O.R. (3d) 710 (C.A.), affirming (1991), 7 O.R. (3d) 27 (Gen. Div.).

133 In cases such as the present one, where what is argued is that the alleged settlor (Confederation Life) and the proposed trustee (the Confederation Life Trustees, or the Human Resources Committee acting under the direction of the Board of Directors) are in effect one and the same, particular difficulties arise. Waters, supra, at pp.150-151 deals with such difficulties in the following passage [emphasis added; footnotes omitted]:

> The principles applicable to this mode of making a gift are perfectly clear. The owner of the legal or equitable interest in the property in question must make it evident that he intends to constitute himself a trustee, *he must leave no doubt* as to what property interest of his is to be the subject of the trust, and he must similarly leave no doubt as to who is to be the trust beneficiary. In other words, the three certainties must be established as in the case of the creation of all trusts. As Jessel M.R. pointed out in *Richards v. Delbridge* [(1874), L.R. Eq. 11], however, an authority quoted in many Canadian judgments, it is not necessary that the donor use the words, "I declare myself a trustee": *words of any kind, and even conduct, are sufficient, provided it is satisfactorily shown that the donor did in fact intend to constitute himself a trustee. ...*
>
> The burden of proof that the donor intended to make himself a trustee is on those who allege such a trust, however, and many factors may reveal the true intent. ...

134 See also on this point *Re Garden Estate*, [1931] 4 D.L.R. 791 (Alta. C.A.).

135 On behalf of the Supplementary Pensioners in Pay and the Deferred Compensation Claimants, Mr. Matheson submits that the Supreme Court of Canada has recognized the special nature of promises made with respect to retirement benefits and that such promises should be viewed as trust promises, in recognition of the special vested rights acquired by retirees in connection with their benefits. Mr. Zigler and Mr. Robertson make a similar submission on behalf of the Retirees and Supplementary Pensioners Not in Pay, respectively. In support of this proposition they all rely upon the decision in *Dayco (Canada) Ltd. v. C.A.W.* (1993), 102 D.L.R. (4th) 609 (S.C.C.).

136 In *Dayco*, supra, the Supreme Court of Canada held that retirement benefits, depending upon the wording of the promise, could survive the expiration of a collective agreement. This is so because when a worker withdraws from the employer-employee relationship upon retirement, his or her accrued employment benefits crystallize into some form of "vested" retirement right and cannot subsequently be terminated or "divested": see *Dayco*, supra, at pp. 619, 637, 654 and 659, per La Forest J.

137 The key to the *Dayco* decision for the purposes of this case, however, is to be found in the statement of La Forest J. at p.637, that [emphasis added]:

> the old collective agreement is not rendered a nullity. *Rights that have accrued* under that agreement *remain enforceable.*

138 In short, the rights that have accrued to the retired employees cannot be terminated and may continue to be enforced. This is the essence of the "vesting" concept in this context. The right remains *enforceable*. Being *enforceable* is not necessarily the equivalent to being *secured* in the sense of pre-funded or the equivalent of being subject to a trust. There is nothing in *Dayco*, in my opinion, which leads to the conclusion that because the retirement benefits had become vested upon retirement, and therefore remained enforceable, they had become tantamount to trust benefits.

139 In my view, the claims of all categories of Claimants on the express trust ground cannot be sustained on the evidence and materials filed. They fail on at least two of the three "certainties", namely certainty of intention and certainty of subject matter. It may be that there is sufficient certainty in the description of the class of persons entitled to benefit in each case to meet the certainty of subject matter test — see Waters, supra, at pp.122-123 — but in view of the clear failure on the first two of the certainties, it is not necessary to determine that point with finality.

140 It is readily apparent that no segregated monies or assets were ever set aside or designated to fund either the Group Benefits, the supplementary retirement income arrangements or the Deferred Compensation Plan. Indeed the evidence and the materials filed are consistent only with the conclusion — and I so find — that the purported settlor, Confederation Life, had no intention of doing so and no intention of settling a trust.

141 With respect to the Group Benefits, the Company by-law stipulates that they may be altered or discontinued at any time, and the Guidelines absolve the Trustees of any responsibility for ensuring that the Group Benefit Plans are "funded". Whether or not the employees and Retirees were ever advised of these factors is not relevant to a consideration of the employer's intention. The Group Benefits were funded by yearly pay-as-you-go policies, and in the case of the Major Medical and Dental benefits these were "administrative services only" contracts.

142 In the case of the supplementary retirement income arrangements, what the Company authorized was a "retiring allowance", and what the Retirees were told in the Letters they received was that they were being provided with a retiring allowance. The retiring allowance was subject to three conditions, namely a non-compete, a confidential information agreement and an agreement to be available for consulting purposes, subject to health considerations. The imposition of conditions to the availability of the supplementary retirement income, it seems to me, is at least some indication that no express trust was intended. Moreover, the communications made it plain that the retiring allowance was not "vested" in the event that employment was terminated for cause, and Mr. Matheson candidly acknowledged that a benefit could not be vested for one purpose but be vested for another. While vesting is not equivalent to the creation of a trust claim, it would be some evidence of an

intention on the part of the employer to establish an inalienable right to the benefit.

143 I note as well that the supplementary retirement income arrangements did not fall within the purview of the Confederation Life Trustees. Its administration was the responsibility of the Corporate Human Resources Department of the Company. This leads me to the conclusion — at least from the employer's perspective — that the Guidelines which applied to the Trustees with respect to the funding of the Registered Pension Plan did not apply to the supplementary retirement income benefits. Finally, it is patently obvious from the various Towers Perrin Reports and the failure of Confederation Life to make changes as a result of the advice contained in them, not only that the supplementary retirement income arrangements were unfunded and unsecured but that the Company had determined — undoubtedly because of the costs involved in doing so — not to alter that situation. Moreover, its practice in this respect was in keeping with that of most comparable Canadian corporations.

144 The November 1993 Towers Perrin Report states (at p.1):

> These benefits are paid monthly to retirees through "payroll". Unlike the registered plan benefits that are well funded and secure against any calamity happening to Confederation Life, receipt of these benefits is dependent on the future financial health of the company. This is consistent with common practice in Canada. Less than 10% of companies have funded or otherwise secured these kinds of obligations.

145 The April 15, 1994 Towers Perrin Report, addressed to Mr. Cunningham repeated the same theme:

> Securing retirement promises made to executives outside a registered pension plan has two major elements:
>
> • documenting the promise so that executives can prove their claim to benefits, and
>
> • setting up financial arrangements to fund the promises or to be available to provide the benefits if the company cannot.
>
> Confederation Life has dealt with the documentation issue and the current focus is on creating financial security. Our surveys show that over 90% of companies that have these promises have decided that they will not create any financial security other than by accumulating a book reserve on the balance sheet. They expect to provide the benefits on a pay-as-you-go basis from current revenue and they are not putting any backup in place to secure their promises. Only the rare company has decided to fund or otherwise secure their promises. The reason is cost. Creating security costs more than most companies want to pay.

146 In the case of the supplementary retirement income arrangements, there is the existence of the account — Account 2332G (later 20332) — in the Company's records to be considered. This Account did not represent segregated assets, however, but was merely an accounting record created to record the accruing actuarial liabilities attributable to the supplementary retirement income arrangements, for bookkeeping purposes. It represents the accumulated book reserve on the balance sheet that Towers Perrin refer to. In a memorandum dated October 20, 1983, to Mr. Burns, and copied to Mr. Cunningham, the V.P. Corporate Actuarial & Finance (with whom Mr. Cunningham deposes he worked "to determine the level of contribution required to be put into account 2332G in order to meet pension benefit liabilities") reported that:

> "Pension" payments above the then ruling Revenue Canada maximum are not part of the pension plan obligations, *and must therefore be covered by the company's general funds*. The purpose of this memo is to discuss the size of this additional liability, and how to account for it.

147 The liability was accounted for by accruing it in account 2332G.

148 Payments to the Supplementary Pensioners were made out of the general funds of Confederation Life, not from any funds or assets in Account 2332G or its successor; and the records that were prepared to show the market value of the assets of what was called, for these purposes, the "Supplementary Pension", showed "zero". I am not prepared to hold that the establishment of such an account and the record keeping associated with it evidence conduct sufficient to demonstrate either the requisite declaration of trust or the requisite intention to create a trust on the part of Confederation Life.

149 Mr. Cunningham, himself, was well aware of the unfunded and unsecured nature of the Supplementary Pension arrangement. In a January 21, 1983 memorandum to Mr. Burns, the President, he wrote [emphasis ad- ded]:

> Retiring Allowance Programs are not usually pre-funded since such amounts are not tax deductible to the Company, and any investment income thereon would be taxable. As noted above, only the actual payments made can be deducted from income. The existence of a Retiring Allowance Program however does not necessarily create a contingent liability for the Company.
>
> . . . . .
>
> ... *If the Company did pre-fund* the additional liability, then a recommended rate would be 0.05% of payroll which translates into approximately $20,000 per year. The liability and cost for the Retiring Allowance Program would be reviewed annually at the same time as the Group Pension Plan valuation.

150 Each year the Company's pension consultants prepared an actuarial valuation for pension accounting in which the "Sr. Officers' Supplemental Pension Program (Non-Registered)" was included as one of five "Plans". The market-related value of the assets for that Program is consistently shown as "zero", however. This is of some significance because counsel for the Claimants rely heavily upon Note 13 to the Company's financial statements for the 1992 and 1993 fiscal years. That Note deals with Company pension costs, and states, in part:

> The Company maintains several pension plans which include substantially all employees. The latest actuarial valuations were completed for transaction to [fiscal year end] and projected to [calendar year end].

151 Note 13 showed that the "several pension plans" referred to had assets at market related values as of January 31, 1993, of $441,535,000 and an *excess* of assets over pension benefit obligations of $88,638,000. Counsel submit that the "several pension plans" include the foregoing reference to the Sr. Officers' Supplemental Program, and thus, that the Financial Statement — issued and approved by Confederation Life's Board of Directors — constitutes an express declaration of trust of the assets in question to the supplementary retirement income arrangements as well as the Registered Pension Plans.

152 I cannot agree. The Note is founded upon the pension consultants' annual report, which clearly distinguishes between the supplementary retirement income arrangements and the other Plans and attributes zero assets to the former. This is consistent with all of the other evidence.

153 Thus, neither the existence of account 2332G nor the references in the Notes to Confederation Life's Financial Statements can serve to found the existence of an express trust. Contributions were made each year to meet pension benefit liabilities, and they were accounted for in account 2332G; but they were made from the

Company's general funds. There were no assets built up in the account to defray those payments. In this respect, Mr. Cunningham's "understanding", to which he deposed in his affidavit sworn February 13, 1995, "that the balance in account 2332G represented assets of the Company from which payments for pension benefits would be drawn" cannot be correct. It is inconsistent with all of the evidence.

154 The various factors which I have outlined regarding both the Group Benefits and the supplementary retirement income arrangements illustrate a lack of certainty both with respect to the intention to create a trust and with respect to the subject matter of the purported trust.

155 The same thing may be said for the Deferred Compensation Claims. No monies or assets were set aside to fund the deferred payments. In fact, the relevant document expressly states that such will not be the case and that credits to the accounting records in question were "entirely a matter of internal bookkeeping of the Employ- er".

156 Mr. Prophet argued, delicately, that the deferral of income in the given years by Messrs. Rhind and Burns had the effect of transferring or conveying that salary entitlement back to Confederation Life to be held in the Member's deferred compensation account, thus "settling" the amounts on the Company as trustee. By its conduct in accepting these contributions to the Plan and maintaining detailed ledgers for the deferred compensation accounts, he submitted, the Company manifested an intention that it would act as trustee with respect to the amounts credited from time to time to those accounts. This argument cannot succeed. It contradicts the very structure which gave the Deferred Compensation Plan its taxation validity, namely, that there would be *no* funds set aside in the account by either employer or employee to which the employee had any entitlement or power to control pending retirement. Moreover, Revenue Canada's advance ruling respecting the Plan is premised on the Plan being treated as a "retirement allowance" — a defined term under the *Income Tax Act* (Canada) and regulations — and on the agreement that it was not an "employee benefit plan" *or an "employee trust"* within the meaning of s.248 of the Act.

157 It remains to consider, on this aspect of the case, a reference in the Notes to Confederation Life's 1993 audited Financial Statements — the last such statement, and the only such reference — to "segregated trusteed funds". Each of the Claimant groups relies upon this reference. They submit it constitutes an express declaration of trust.

158 Note 1(g) to the 1993 Financial Statements states [emphasis added]:

> (g) Company pension costs and other employee benefits
>
> The Company maintains a variety of defined benefit pension plans for its employees and agents. The Company also provides other post-retirement life, health and dental insurance benefits for its employees and agents. *The assets supporting these benefits are held in segregated trusteed funds.*
>
> . . . . .
>
> The Company also provides certain health care and life insurance benefits for its employees upon retirement. Eligible employees are those who retire from the Company at normal retirement age. The cost of these benefits is expensed as the related insurance premiums are incurred.

159 The reference to "segregated trusteed funds" in relation to anything other than the Company's Re-

gistered Pension Plan appears to be a factual error, however. This is confirmed in a letter from Goodman & Goodman, solicitors for the Agent of the Provisional Liquidator, to counsel, dated February 10, 1995, which said:

> Our client has advised us that there were no "segregated trusteed funds" held in respect of the post retirement life, health and dental insurance benefits.
>
> We have been advised that discussions took place concerning amendment of the note ... It was intended to make it clear in future notes that the reference to "segregated trusteed funds" applied only to the defined benefit pension plan and not the other post retirement insurance benefits. We understand that Mr. Roger Cunningham was involved in these discussions and was aware of the foregoing.

160 It may be that the reference to segregated trusteed funds does not apply to the Retirees, in any event, because it is located in the passage from the Notes which relates to "employee" benefits, as opposed to the section of the Note dealing with health care and life insurance benefits "upon retirement", in which case it is plainly stated that the benefits are expensed. I do not need to base my conclusions with respect to the non-existence of an express trust on this latter consideration, however, as I am satisfied that an errant comment in a Financial Statement cannot operate to create a trust which did not otherwise exist.

161 For all of the foregoing reasons, I hold that the arguments of all Claimants based upon the alleged existence of an express trust must fail.

162 In dealing with this portion of the Claimants' arguments I have referred throughout to "express" trusts. It may be that the more appropriate expression would be "true" trusts, because the concept incorporates not only trusts created by express declaration, but also true trusts — meeting the three certainties — which necessarily arise by implication from the circumstances of the case. No such trusts exist here, expressly or by implication, in that sense. Counsel made their submissions utilizing the parlance of "express trust" — no doubt to distinguish those submissions from others relating to "constructive" trusts, which also arise by implication from the circumstances of the case — and I have followed that approach as well.

III. Constructive Trust

163

(1) Fiduciary Obligations

164 The Claimants argue that Confederation Life stands in a fiduciary relationship to them regarding their rights under the Group Benefit Plans, the supplementary retirement income arrangements, and the Deferred Compensation Plan. That fiduciary obligation, they submit, required the Company to put their interests ahead of its own and those of its policyholders in ensuring that these Employee Benefits were provided in a secured fashion. Confederation Life did not do so, thus breaching its fiduciary duties and therefore, the Claimants conclude, the Court should impress the Company's general assets with a constructive trust sufficient to fund the Retirees' Group Benefits, the supplementary retirement income arrangements and the Deferred Compensation Plan.

165 The fiduciary notion is an equitable concept of considerable sweep. It has enjoyed a significant evolution during the latter part of the 20th century. Its inherently flexible nature and broad scope is well summed up in the oft-cited remark of Arnup J.A. in *Laskin v. Bache & Co.* (1971), 23 D.L.R. (3d) 385, [1972] 1 O.R. 465

(C.A.), at p.392 D.L.R., that the categories of fiduciary, like the categories of negligence, are not closed. The existence of a fiduciary obligation, by its very nature, is founded upon the presence of some position of trust, confidence or loyalty, and it is the function of the fiduciary principle to monitor abuses of those factors which have been reposed by one person in another: see *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, [1994] 9 W.W.R. 609, at pp.404-405 S.C.R., per La Forest J. and at p.461 per Sopinka and McLachlin JJ.; *Keech v. Sandford* (1726), 25 E.R. 223.

166 In recent years the Supreme Court of Canada has had occasion to deal with the concept of fiduciaries on a number of occasions, and the following statement by Wilson J. (then in dissent) in *Frame v. Smith*, [1987] 2 S.C.R. 99 at p.135-136, is frequently cited — to use her words — as "a rough and ready guide" in determining whether a fiduciary relationship exists. She began the Supreme Court's search for "an underlying fiduciary principle" in this fashion:

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses ... [references omitted] ... Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

167 This conceptual approach was followed in *Guerin v. R.*, [1984] 2 S.C.R. 335 and in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574. In *Hodgkinson v. Simms*, supra, it has been developed further. There, La Forest J., speaking for the majority (in the result), said at pp. 409-410 (S.C.R.) [underlining added]:

> In *Lac Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith*. I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are *per se* fiduciary, Wilson J.'s three-step analysis is a useful guide.
>
> As I noted in *Lac Minerals*, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relation ships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the

specific circumstances of that particular relationship; see at p.648. *In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue.* Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

168 At p.412 (S.C.R.) La Forest J. continued [emphasis added]:

As is evident from the different approaches taken in [*Norberg v. Wynrib*, [1992] 2 S.C.R. 226], the law's response to the plight of vulnerable people in power-dependency relationships gives rise to a variety of often overlapping duties. Concepts such as the fiduciary duty, undue influence, unconscionability, unjust enrichment, and even the duty of care are all responsive to abuses of vulnerable people in transactions with others. *The existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards.*

169 This analysis is helpful, I believe, in the context of the case at bar. Employer-employee relationships are not per se fiduciary; they are based on contract, and grounded in the employer-employee relationship. There are many familiar instances, however, where employees have been found to owe fiduciary duties to their employers — situations involving the disclosure of confidential information, trade secrets, customer lists, competing businesses, for example. Nothing in principle precludes the relationship existing in reverse, i.e., the imposition of a fiduciary obligation vis-à-vis its employees by the employer. It is a question of context, and the factual circumtances which exist.

170 Indeed, in *Stanton v. Reliable Printing Ltd.* (1994), 25 C.B.R. (3d) 48 (Alta. Q.B.) such a relationship was found to exist, and in the context of a winding-up proceeding. A printing company was wound up and all of its employees were dismissed without cause and without notice. The receiver sold the company's equipment. In a dispute with unsecured trade creditors the company's unionized former employees argued that they were entitled to priority for their pay out of the proceeds in lieu of notice. The employees succeeded. They succeeded because the existence of a provincial statutory scheme regard ing the protection of wages and the provisions of a collective agreement both created an environment in which the employer was obliged to safeguard the severance entitlements created for its employees. Acknowledging that the employer-employee relationship did not, in itself, create a fiduciary situation, Veit J. stated [at p.56; emphasis added]:

I conclude that the nature of the relationship — which for centuries we thought was well described by the term "master-servant" — harbours a vulnerability and one that is not present in the relationship between the trade creditor and the employer. Time is a factor in that vulnerability, and so is the subservience to management. The nature of severance entitlements is similar to that of pensions: both are entitlements earned through employment. Both are vulnerable because the employee cannot have the employer's discretion in managing the business. Only one of these entitlements, has, however, been protected by statute [in the sense of establishing a statutory trust]. *However, if there were nothing more, the mere existence of the employer-employee relationship, as important and unique as that relationship is, might not entitle severance payments to the protection of a fiduciary designation. There may be a vulnerability without a requirement on the em-*

ployer to act in the interests of the employee. In this case, there are additional factors that must be taken into account in relation to that last obligation.

171 I agree with this analysis of the employer-employee relationship. Such a relationship does have aspects to it that differ from the straightforward arm's-length relationship of mere contracting parties. A person's place of employment is their working home. From an employer's perspective, an employee is not merely a supplier of goods or services, but a supplier of knowledge, skill and labour which, as the Confederation Life Employee Handbook notes, is the simple reason for the Company's success. Compensation — again, according to the Handbook — is designed "to provide a fair return for the contribution each staff member makes to the Company's operating success." In any employment situation, there are "power dependency" characteristics, although one cannot be categorical about the nature of these because it is a matter of degree in individual situations and, indeed, there may be circumstances in which the employees, rather than the employer, are in the "power" as opposed to the "dependency" position. The analysis which focuses upon the ability to exercise a discretion and to influence others' interests, and upon vulnerability, fits in certain circumstances — at least with respect to such things as employee programs that lie within the purview of the employer to create and to implement.

172 Nonetheless, the employer-employee relationship — which is the basis for the benefits flowing to all classes of Claimants here — is not per se fiduciary. It is not the sort of relationship which by itself has as its "essence" the kind of discretion, influence over interests, and *inherent* vulnerability "arising out of the inherent purpose of the relationship" which creates a rebuttable presumption "that one party has a duty to act in the best interests of the other party"; *Hodgkinson v. Simms*, supra, at p.409 (S.C.R.). As Veit J. noted in *Stanton v. Reliable Printing Ltd.*, supra, "there may be a vulnerability without a requirement on the employer to act in the interests of the employee".

173 The search for a fiduciary element in the employer-employee relationship, then, must move to the fact-driven analysis articulated by La Forest J. in *Hodgkinson*. Does a fiduciary obligation, although "not innate" to the relationship "arise as a matter of fact out of the specific circumstances of [the] particular relationship"? To assess this question, one must ask: Was it within the reasonable expectation of the parties that the employer would forsake its own interests and oblige itself to act solely in the interests of the employee in relation to the matter in question?

174 The exercise of assessing and weighing the applicability of the various fiduciary indicia to the facts of a particular case is a difficult one, requiring a careful consideration of the circumstances. Professor P.D. Finn, whose writings in this field are cited regularly in the highest courts, sums up the nature of the exercise very well, in my view, in the following passage from an article entitled "The Fiduciary Principle", in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1. He states [emphasis added]:

> If, from whatever combination of factual conditions, the parties in their relationship are so circumstanced that one is reasonably entitled to expect that the other is acting or will act in his interests, then that person should be entitled, on bare grounds of public policy to have that expectation protected.
>
> This said, the critical question is when will parties be found to be so circumstanced? *It is obviously not enough that one is in an ascendant position over another: such is the invariable prerequisite for the unconscionability principle. It is obviously not enough that one has the practical capacity to influence the other: representations are made, information is supplied (or not supplied) as of course with the object of, and in fact, influencing a host of contractual dealings. It is obviously not enough that the other party is in a posi-*

tion of vulnerability: such is the almost inevitable state in greater or lesser degree of all parties in contractual relationships. It is obviously not enough that some degree of trust and confidence are there: these are commonly placed in the skill, integrity, fairness and honesty of the other party in contractual dealings. It is obviously not enough that there is a dependence by one party upon the other: as the good faith cases illustrate, a party's information needs can occasion this. Indeed elements of all of the above may be present in a dealing — and consumer transactions can illustrate this — without a relationship being in any way fiduciary. What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship.

175 Balancing these factors in the context of this case, then, requires an examination of the Retirees' Group Benefit Plans, the supplementary retirement income arrangements, and the Deferred Compensation Plan. I have dealt at some length with these Employee Benefits in the section of these Reasons dealing with the Facts and in the context of the express trust arguments. Much of what was said in those contexts is also applicable to the constructive trust analysis, including the fiduciary analysis, and I will not repeat more than is necessary here.

176 As outlined above, the Confederation Life Group Benefit Plans had their origins in the mid-1920's and have continued to develop and to provide expanded and improved benefits since that time. The supplementary retirement income arrangements were a response, in the 1970's, to Revenue Canada limits on the amounts that could be paid from a registered pension plan, and an attempt to provide senior officers with the same proportionate retirement income that could be enjoyed by less highly remunerated employees. The Deferred Compensation Plan was a tax-planning device of the early 1980's.

177 None of these Employee Benefits were the result of negotiations or collective bargaining; nor did they find their way into some form of contractual document like a collective agreement. As far as I can determine from the evidence, changes in Group Benefits or supplementary retirement income arrangements were all implemented at the initiative of the Company, which then made available the improved benefits to its active and retired employees, advising them of the changes through revised versions of the Booklets, Handbooks and Retirement Pamphlets issued from time to time.

178 The Company By-Law, which set up the current Group Benefit Plans in 1955, while establishing a Board of Trustees to administer the Plans, makes it clear that: (1) the benefits will be determined by Confederation Life from time to time and (2) the Company's Board of Directors can at any time cause the benefits to cease. The practice with respect to changes in the benefits has been quite consistent with the first of these provisions, and, while they have not always done so, the Employee Handbooks and Retirement Pamphlets as they existed at the time of the Winding-Up Order reflect the latter.

179 The Group Benefit Plans are not pre-funded, supported by any segregated trust funds, or secured in any other way. They are "pay-as-you-go" plans. The Life Policies are funded on a yearly renewable term basis through experience-rated policies issued by Confederation Life itself. The Major Medical and Dental benefits are provided through administrative-services-only contracts which, as the Handbooks note "are not insured". Nothing is to be found, anywhere in the evidence, to the effect that the employer was obliged to, or, indeed intended to pre-fund or secure the payment of the Group Benefits in any fashion; nor is there anything to indicate that the employees expected such to be done.

180 The same is true with respect to the supplementary retirement income arrangements. They are not pre-

funded or secured, and all of the Company documentation emanating from the officers involved in dealing with the subject indicates a recognition and understanding of that fact. The July 16, 1975 Resolution of the Board which authorizes this benefit, simply authorizes that senior officers be provided upon retirement with a retirement allowance "as authorized by the Board of Directors", suggesting, as Mr. Burns points out in a later memorandum, that each case is to be individually considered at the time of retirement. There is nothing in either the April 1983 Letters sent to eligible officers or in Mr. Cunningham's subsequent "clarifying" June 1993 Letter which suggests that the supplementary entitlement is pre-funded or otherwise secured.

181 In the context of the Deferred Compensation Plan, the circumstances are even clearer in this respect. The strictures of the *Income Tax Act* (Canada) and the advance ruling obtained from Revenue Canada make it clear that no monies were being set aside or deposited anywhere by Confederation Life to fund or protect the deferred payments. Any records kept of Mr. Rhind's and Mr. Burn's entitlement, including interest accumulations, were merely for bookkeeping purposes.

182 I note as well — again — the comments of Towers Perrin. Over 90% of companies which have outstanding retirement promises to executives provide for the benefits in question on a pay-as-you-go basis without creating any financial security, because of the high cost of doing otherwise. From the shareholders' perspective, such costs can rarely be justified.

183 In short, in my view, the evidence does not support a finding that there was a mutual understanding the Employee Benefits would be pre-funded or secured, and there is nothing upon which to base a finding that the employees had any reasonable expectation that Confederation Life had undertaken to subordinate its own interests, and those of its policyholders, to those of the employees and retirees with respect to the establishment of such benefits. On that basis, the very important ingredient for the creation of a fiduciary relationship, namely, the relinquishing of one's own self-interest and agreeing to act solely in the interests of, and on behalf of, the other party, is missing: *Hodgkinson v. Simms*, supra, at pp. 409-410 and 412 (S.C.R.).

184 I conclude, in the circumstances of this case, that Confederation Life did not stand in a fiduciary relationship towards the Retirees, the Supplementary Pensioners or the Deferred Compensation Claimants in relation to the provision of the Employee Benefits or, at least, in relation to an obligation to pre-fund or secure such Plans.

185 Counsel argued on behalf of the Claimants that Confederation Life is precluded from terminating their benefits because those benefits had "vested" and because the Company had not given adequate or any warning to the Claimants that the benefits could be terminated. Where rights have vested at the time of retirement, they submitted, the employer may not divest such rights or thereafter decrease (although it may increase) the benefits: see *Dayco*, supra. Moreover, if the employee Booklets, Handbooks and Retiree Pamphlets do not warn the beneficiaries of the possibility that benefits could be terminated, the Company should not be allowed to rely on the Plan documents to terminate the Benefits; nor should it be allowed to rely upon a term of the Plans that it kept secret from the retirees: *James v. Richmond Hill (Town)* (1986), 54 O.R. (2d) 555 (H.C.) at p. 561, per Griffiths J.; *Madott v. Chrysler Canada Ltd.* (1989), Labrosse J. (Ont. H.C.), unreported; *Daniels v. Canadian Tire Corp.* (1991), 5 O.R. (3d) 773 (Gen. Div.) at p. 777, per McMurtry A.C.J.O.C.

186 In my view these arguments do not advance the Claimants' position. As I have indicated earlier in these Reasons, they fail to distinguish between the concept of "vesting", which relates to the locking-in of an entitlement, and the obligation to fund a benefit flowing from that entitlement. In the absence of an obligation to pre-

fund or otherwise secure the Employee Benefits, the fact that they may be vested in the Claimants upon their retirement is small comfort to them. Similarly, if indeed the Company is in breach of an obligation not to terminate the Plans — which I do not find — that breach is of little consequence, in the context of the winding-up, unless it can be remedied by way of some access to a segregated part of Confederation Life's general assets or to some assets impressed with a trust.

187 As there is no fiduciary relationship between the Company and the Claimants in relation to the Employee Benefits, there can be no constructive trust imposed as a remedy for breach of the obligations arising out of such a relationship. This leaves the question of whether a constructive trust should be imposed on the basis of unjust enrichment.

(2) Unjust Enrichment

188 I conclude that it should not.

(a) Unjust Enrichment: The Three-fold Parameters

189 The principles which give rise to the imposition of a constructive trust, based upon unjust enrichment, require the finding of a benefit to or enrichment of one party, a corresponding detriment to or deprivation suffered by the other party, and an absence of any juristic reason for the benefit or enrichment: see *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Becker v. Pettkus*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; *LAC Minerals*, supra; *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621 (S.C.C.).

190 In *Rathwell*, supra, Dickson J. (as he then was) formulated the principle in this fashion (at p. 455 [emphasis added]):

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; *but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment.*

191 While most of these leading authorities emanating from the Supreme Court have been cases dealing with those concepts in family law matters, it is clear that the principles have equal application in commercial contexts. *LAC Minerals*, supra, for instance, involved a commercial transaction.

192 As I shall explain, I am doubtful that the benefit-detriment dichotomy which exists in the circumstances of this case amounts to the type of corresponding enrichment and deprivation contemplated by the unjust enrichment principle. I do not think it matters for these purposes, though, because in my view the claims of the Retirees, the Supplementary Pensioners, and Messrs. Rhind and Burns all fail to meet the "absence of juristic reason" test, and thus an unjust enrichment claim is not made out. Moreover, I would not in any event impose the constructive trust remedy sought, as I do not believe it would be appropriate in this instance to do so. There is not a sufficient connection between the contributions of the Claimants and the assets which it is sought to impress with the trust; and, in addition, the winding-up/insolvency context of proceedings brings a dimension to the analysis which works against the application of constructive trust principles which would place the Claimants in an advantageous position over other Confederation Life claimants.

1995 CarswellOnt 318, 33 C.B.R. (3d) 161, 8 C.C.P.B. 1, C.E.B. & P.G.R. 8227, 8 E.T.R. (2d) 72, 31 C.C.L.I. (2d) 77, 24 O.R. (3d) 717

The "Enrichment-Detriment" Analysis

193 In carrying out the enrichment-detriment analysis the Courts have generally taken an economic approach, recognizing these elements as the "morally neutral" components of the mix, and looking to the third element, that of the absence of juristic reason for the enrichment, as the source of "unjustness". As stated by McLachlin J. in *Peter v. Beblow*, supra, at p. 645:

> This court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment: *Pettkus v. Becker, supra; Sorochan v. Sorochan* (1986), 29 D.L.R. (4th) 1, [1986] 2 S.C.R. 38, 23 E.T.R. 143; *Peel (Regional Municipality) v. Canada* (1992), 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762 [...] It is in connection with the third element — absence of juristic reason for the enrichment — that such considerations (those outlined earlier in her Reasons) may more properly find their place. It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

194 In addition, in terms of the enrichment-detriment consideration, the courts have indicated that once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic — two sides of the same coin, as it were: see *Peter v. Beblow*, supra, at pp. 631-632, per Cory J.

195 Accordingly, on this analysis, if Confederation Life has received a benefit in economic terms and the Claimants have suffered a detriment in economic terms, the first two elements of the unjust enrichment test will have been met. I accept that each of the Complainants will suffer a detriment if the provisions of the benefits under the Group Benefit Plans, the supplementary retirement income arrangements and the Deferred Compensation Plan are not continued during their retirement, as promised. I also accept that Confederation Life has benefitted either by the provision of their labour and employment services — in the context of the Retirees and Supplementary Pensioners — or from the control over and use of the funds that Messrs. Rhind and Burns elected to defer from their incomes in the years in question under the terms of the Deferred Compensation Plan.

196 As I have indicated and shall explain momentarily, however, I am not satisfied that the enrichment/detriment circumstances of this case fall within that concept as contemplated in the unjust enrichment authorities.

Absence of "Juristic Reason"

197 While a number of authorities discuss the question of what factors should be taken into account in determining whether there is an absence of juristic reason for the enrichment, none that I have reviewed deal with the question of what the phrase "juristic reason" actually means. In *Rathwell*, supra, where the phrase appears to have originated, Dickson J. used the expression "such as a contract or disposition of law" in giving examples of what could amount to "an absence of any juristic reasons ... for the enrichment" (p. 455). He considered the notion further in *Sorochan*, supra, saying (at p. 46 [emphasis added]):

> The third condition that must be satisfied before a finding of unjust enrichment can be made is also easily met on the facts of this case. There was no juristic reason for the enrichment. Mary Sorochan *was under no obligation, contractual or otherwise*, to perform the work and services in the home or on the land.

198 Cory J. was of a similar view in *Peter v. Beblow*, supra, stating at p. 363 [emphasis added]:

> When a claimant is under *no obligation contractual, statutory or otherwise to provide the work and services*

to the recipient, there will be an absence of juristic reasons for the enrichment.

199 That the concept of "juristic reasons" is a broad one, involving many factors, and that it is the element in the unjust enrichment exercise which involves an examination of the "unjustness" of the situation, is apparent from the following statement of Madam Justice McLachlin in *Peter v. Beblow*, supra, at p. 645:

> It is in connection with the third element — absence of juristic reason for the enrichment — that such considerations may more properly find their place. It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".
>
> What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? The test is flexible, and the factors to be considered may vary with the situation before the court. ...
>
> In every case, the fundamental concern is the legitimate expectation of the parties ...

200 The need to consider the parties' expectations and whether retention of the benefit would be "unjust" is emphasized by Dickson J. in *Becker v. Pettkus*, supra, at pp. 848-849 and again in *Sorochan*, supra, at p. 46. "The test put forward" in this respect, according to Cory J., "is an objective one": *Peter v. Beblow*, supra, at p. 635.

201 The caselaw indicates that a contractual debtor-creditor relationship will be sufficient to establish the existence of a juristic reason for an enrichment that can be accounted for on the basis of that contrac tual relationship. I note, for example, the decision of the Saskatchewan Queen's Bench in *Royal Bank v. Pioneer Trust Co. (Liquidator of)* (1988), 68 C.B.R. (N.S.) 124 and the decision of the Ontario Court of Justice (General Division) in *Pikalo v. Morewood Industries Ltd. (Trustee of)* (1991), 7 C.B.R. (3d) 209. Both of these decisions arose in an insolvency context.

202 In *Pioneer Trust*, supra, the trust company had obtained $30,000 in cash from the Royal Bank on February 7, 1985, in exchange for a cheque in the same amount in favour of the Royal Bank. Later that day the Minister of Finance directed the Superintendent of Insurance to take control of Pioneer Trust's assets. Proceedings under the *Winding-up Act* were commenced, and a liquidator was appointed. The cheque was returned to the Royal Bank. The Royal Bank submitted a claim to the liquidator. It then brought an action, claiming, among other things, that the liquidator held the sum of $30,000 in trust for it as a constructive trustee.

203 In dealing with this claim Gerein J. readily accepted that there was an enrichment and corresponding deprivation. However, because the parties were in a debtor-creditor relationship there was a juristic reason for the enrichment. According to Gerein J. at p. 133:

> It is not unjust in law to hold the plaintiff to that status with the attendant consequences. To do otherwise would have no basis in law and would cause wrongful harm to the other creditors.

204 In *Pikalo*, supra, Chadwick J. dealt with a claim for a constructive trust by a lessor in the context of a bankruptcy of the lessee. The court viewed the lessor as an unsecured creditor and described the relationship between the parties as being "purely contractual". In holding that this fact took the claim outside the realm of constructive trust, Chadwick J. said at p. 214:

> As in most bankruptcy cases, the unsecured creditor may suffer financial hardship in the appearance of an

unjust enrichment or benefit to either the bankrupt estate or a secured creditor, such as the bank in this case.

205 Finally, it appears that the absence or presence of a juristic reason in connection with the enrichment need not necessarily arise out of any relationship between the party asserting the claim for unjust enrichment and the party enriched: see *Royal Bank v. Harowitz* (1994), 17 O.R. (3d) 671 (Gen. Div.); *807933 Ontario Inc. v. Allison (Trustee of)* (1995), (sub nom. *Re Allison)* 22 O.R. (3d) 102 (Gen. Div.). This is of some significance here because it is Confederation Life's other creditors, rather than Confederation Life itself, who will "benefit" if the Company's assets are not impressed with a constructive trust to secure the Group Benefits, the supplementary retirement income arrangements and the Deferred Compensation Plan.

206 Several propositions can be distilled from the foregoing authorities respecting the concept of "juristic reason", it seems to me. They may be summarized as follows:

(i) An obligation to make the contribution which leads to the enrichment — whether that obligation arises in a debtor-creditor or other contractual context, or whether by reason of the principles of common law or of equity, or whether it arises by way of a statutory provision — may constitute a juristic reason.

(ii) The reasonable expectations of the parties must be considered, in particular, whether the party providing the contribution leading to the enrichment did so with a reasonable expectation of receiving an interest in property, and the other party knew or ought to have known of this reasonable expectation. The test in this respect is an objective one.

(iii) It must be evident that the retention of the benefit would be "unjust" in the circumstances of the case.

(iv) Finally, the juristic reason for the enrichment need not always be tied irrevocably to the person who asserts the unjust enrichment but may arise out of a relationship between the person enriched and some other person.

207 In short, a "juristic reason" simply means some underlying justification, grounded in a legal or equitable base, for the circumstances that have arisen, notwithstanding that the benefit/detriment equilibrium has since become unbalanced.

208 There are, as I shall outline, a number of such reasons underlying the imbalance in this case.

(b) Unjust Enrichment: Gateway to Constructive Trust

209 A finding of unjust enrichment provides a gateway to the imposition of a constructive trust. It does not automatically open the gate, however. The process is two-staged. If an unjust enrichment has occurred the next step is to determine whether the imposition of a constructive trust *is an appropriate remedy in the circumstances* .

210 At the outset it is wise, I think, to heed the caution expressed in the judgment of La Forest J. in *LAC Minerals*, supra. At pp. 677-678 (S.C.R.) he states [emphasis added]:

I do not countenance the view that a proprietary remedy can be imposed whenever it is "just" to do so, unless further guidance can be given as to what those situations may be.

. . . . .

> Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. 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 .*

211 The focus of the enquiry, then, should be on whether there is a justifiable reason for recognizing a right of property in the claimant, or what is tantamount to a right in property — which would be the effect in the Confederation Life context of impressing the Company's general assets with a trust to secure the Claimants' claims.

212 A number of guideposts have been established by the courts to help in navigating the path between the unjust enrichment gateway and the imposition of a constructive trust. They include:

> a) whether a monetary award would be sufficient in the circumstances;
>
> b) whether there is a sufficient factual connection or link between the contribution leading to the unjust enrichment and the property or asset in question;
>
> c) whether the claimant reasonably expected to obtain a proprietary interest in the property or asset; and,
>
> d) whether the competing equities point toward the imposition of a constructive trust.

Monetary Award Insufficient — The Inadequacy Consideration

213 It is obvious that a monetary award would be of little assistance to the Claimants in this case, in view of the winding-up and insolvency of Confederation Life. As Bell J. noted, in *Barnabe v. Touhey* (1994), 18 O.R. (3d) 370 (Gen. Div.) at p.379 [emphasis added]:

> In my view, none of the remedies suggested, other than the declaration of a constructive trust, would be appropriate in this case. A simple money judgment would not be a satisfactory remedy here *given the bankruptcies of Touhey and Sigouin.* In *Jesionowski v. The "Wa-Yas"*, [1993] 1 F.C. 36 at p.58, 55 F.T.R. 1 at p.27, Reed J. stated that, before a constructive trust is awarded, there must be some special reason to grant the plaintiff the additional rights which would flow from a right to property. She listed examples of special reasons including "a need to give priority to the plaintiff in a bankruptcy situation". I agree.

214 I think it warrants noting, however, that the mere fact of insolvency and the mere "need to give priority" to a claimant in such a situation is not, by itself, sufficient to trigger the automatic application of the constructive trust mechanism. Priority is almost always a "need" for someone in an insolvency. Tempered against the inadequacy consideration is the need to be aware of the effect of a declaration of constructive trust in such a context — the beneficiary of the trust essentially becomes a secured creditor, thus taking priority over all other unpaid general creditors. Hence the imposition of a constructive trust cannot be an automatic consideration simply because a monetary award is obviously not an adequate remedy. While priority will almost always be required by the claimant in an insolvency, it must also be just and appropriate in the circumstances to make an order that will have the effect of granting it.

A Connecting Link

215 The Supreme Court of Canada has held that in order to impose a constructive trust — and thereby, in effect, to recognize the claimant as a beneficial owner of the property in question — there must be a factual connection between the unjust enrichment and the property or asset in question.

216 Dickson J. described the requirement in *Becker v. Pettkus*, supra, at p.852, in these words [emphasis ad- ded]:

> For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The *indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property*, the beneficial ownership of which is in dispute ... *The question is really an issue of fact: was her contribution sufficiently substantial and direct* as to entitle her to a portion of the profits realized upon the sale of the Franklin Centre property and to an interest in the Hawkesbury properties, and the beekeeping business?

217 In *Sorochan*, supra, the Chief Justice elaborated upon this view. At p.50, he said [emphasis added]:

> These cases reveal the need to retain flexibility in applying the constructive trust. In my view, the constructive trust remedy should not be confined to cases involving property acquisition. *While it is important to require that some nexus exist between the claimant's deprivation and the property in question, the link need not always take the form of a contribution to the actual acquisition of the property. A contribution relating to the preservation, maintenance or improvement of property may also suffice.* What remains primary is whether or not the services rendered have a "clear proprietary relationship", to use Professor McLeod's phrase. When such a connection is present, proprietary relief may be appropriate. ... As stated in *Pettkus* ... "The equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs."

218 There need not be an already recognized right of property before the constructive trust may be imposed. As a remedy, it may be used *to create* a right of property in appropriate circumstances, thus obviating the need to find a pre-existing property right by means of equitable tracing rules: see *LAC Minerals*, supra, at p.676, per La Forest J.; and *Peter v. Beblow*, supra, at p.639, per Cory J.

219 Once it is established that the claimant's contribution is "sufficiently substantial and direct" to entitle him or her to a property interest, the extent of the property interest must be determined. In general, the amount of the contribution governs the extent of the constructive trust; it must be proportionate to, or reflect the extent of, the contribution of the claimant to the property: *Becker v. Pettkus*, supra, at p.277; *Peter v. Beblow*, supra, at p.651.

Reasonable Expectations

220 Another consideration in the analysis of whether a constructive trust is the appropriate remedy is whether the claimant reasonably expected to obtain an actual proprietary interest as opposed to monetary relief: see *Sorochan*, supra, at p.52; and *Peter v. Beblow*, supra, at p.637. As stated by Dickson C.J.C. in *Sorochan* at p.52-53 [emphasis added]:

> A reasonable expectation of benefit is part and parcel of the third pre-condition of unjust enrichment (the absence of a juristic reason for the enrichment). At this point, however, in assessing whether a constructive

> trust remedy is appropriate, *we must direct our minds to the specific question of whether the claimant reasonably expected to receive an actual interest in property and whether the respondent was or reasonably ought to have been cognizant of that expectation.*

Competing Equities

221 Equitable remedies entail the necessity of balancing interests. In the context of a constructive trust claim against the assets of an insolvent constructive trustee, it is important to be aware of the interests of the insolvent's other creditors as well as those of the constructive trust claimant. In particular, in the context of this case, it is important to be aware of the interests of the general policyholders of Confederation Life. Widows and widowers, and those who will depend upon the viability of their life insurance policies and annuities when they become widows and widowers, are no less a group in need of protection and deserving of concern than are retired employees, supplementary pensioners and deferred compensation claimants. In fact, the statutory scheme which governs an insurance company winding-up accords them a stipulated priority. This factor cannot be ig- nored.

222 In *Coopérants* the Quebec Court of Appeal ascribed the following rationale to the *Winding-up Act* scheme, in a passage cited earlier (para.81 [p.228 Q.A.C.; emphasis added]):

> It would appear that the preservation of the financial security attached to an insurance policy was [the] underlying principle for the federal legislator when it stipulated that the claims of policyholders would be paid in priority in the event of the liquidation of a life insurance company. *The Winding-up Act demonstrates the desire of the legislator to protect people who put their confidence in an insurance company because they are generally institutions whose financial stability is not in doubt.*

223 In this context, then, who is it who can more readily be said to have accepted the risk of the Company's insolvency in their dealings with it? Is it the policyholders who have purchased its financial services at arm's length, putting their confidence in it in that sense as an institution "whose financial stability is not in doubt"? Or is it the Retirees, Supplementary Pensioners and Deferred Compensation Claimants, who also placed their confidence in the Company but did so more in its capacity as an employer and provider of the Employee Benefits than as a provider of institutional financial services? Some authors have suggested that one way to approach the matter of whether someone should be granted a preference over other creditors in an insolvency situation through the application of the constructive trust doctrine, is to ask whether that person, or group of persons, accepted the risk of the constructive trustee becoming insolvent: see D.M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989), 68 Can. Bar Rev. 314; J.D McCamus, "The Restitutionary Remedy of Constructive Trust" (1981) Law Society of Upper Canada, Special Lectures, *New Developments in the Law of Remedies* 89.

(c) Unjust Enrichment in Relation to the Facts Here

224

(i) The Retirees

225 The Retirees' claim to succeed on the basis of unjust enrichment founders, in my view, on the shoals of both the "benefit-detriment" analysis and the "juristic reason" analysis. In addition, even if an "unjust enrichment" could be said to have occurred in these circumstances, the remedy of impressing the general assets of

Confederation Life with a constructive trust sufficient to fund the Group Benefit plans ad infinitum — or at least until all eligible claimants had retired and ceased to make claims — would be inappropriate. It would be inappropriate in the circumstances because there is not a sufficient connection between the benefits/detriment and the assets in question, in my opinion; and it would be inappropriate because in the balancing exercise of weighing the interests of the Retirees against those of the policyholders, in this insolvency and winding-up situation, Parliament has said that the policyholders are to be given priority: the *Winding-up Act*, supra, s. 161(1).

Enrichment/Detriment

226 Is there a benefit or enrichment, on the part of Confederation Life, and a corresponding detriment or deprivation, on the part of the Retirees, as contemplated by the doctrine of unjust enrichment, in the circumstances of this case? I conclude that there is not.

227 To be sure, it can be said that Confederation Life has benefitted from the services of its former employees, and that they, in turn, will suffer a detriment as a result of the cessation of the Group Benefits. A deeper analysis is necessary in my view, however, than is reflected in that simple overview in order to resolve the dilemma before the Court.

228 The circumstances here are different than those usually characterizing an unjust enrichment case. One generally asks the question whether it is right that the beneficiary of the enrichment be allowed to keep the benefit or be permitted to continue to enjoy the enrichment. Here, however, Confederation Life does not enjoy a benefit or an enrichment in that sense. Its "enrichment" lies in having received in the past the benefit of the retired employees' labour, skills and knowledge. The "deprivation" of the Retirees lies in the future partial failure of the consideration for those contributions, i.e., in the future loss of the Group Benefits which formed part of their compensation package. That deprivation, though, is not related to the enrichment; rather it relates to the Company's financial collapse. In short, the circumstances give rise to a rare exception to the proposition that "once enrichment has been found, the conclusion that the plaintiff has suf fered a corresponding deprivation is virtually automatic": see *Peter v. Beblow*, supra, at p. 631, per Cory J.

229 The imbalance in the benefit/detriment equilibrium here arises as a result of the winding-up and liquidation of the Company. It does not result from some unfair "taking advantage" by the person benefitting from the enrichment. What happened, in Mr. Grout's colourful but succinct description, is simply that "Confederation Life went bust". Until the Company's unexpected financial collapse in August 1994, the retiree/former employer relationship worked quite well, in terms of the Group Benefits. Confederation Life honoured its obligations. The Retirees received the Group Benefits which formed part of the compensation package governing the terms of their former employment.

230 It may be argued that the "enrichment" in these circumstances arises because Confederation Life has had the advantage of the retired employees' services without having to bear the cost of providing the Group Benefits on a pre-funded, fully-secured basis and that its policyholders and creditors will be enriched in the winding-up proceedings if the Company's assets are not called to account for that necessary pre-funding or security. While I think it is not untoward to consider the interests of the Retirees in contrast to those of the policyholders and creditors in the "benefit/detriment" exercise, the issue to be determined is whether there was an obligation to pre-fund or secure the Group Benefits. It is not permissible to define the benefits/detriment equation, which is a stepping stone toward the determination of that issue, by predetermining the issue.

231 Thus, in my view, there has not been an enrichment and a corresponding deprivation in the circum-

stances of this case which could give rise to a finding of unjust enrichment.

Juristic Reason

232 Even if I am in error in arriving at the foregoing benefit/detriment conclusion, however, I also find there are several juristic reasons for any benefit or enrichment that the Company may have received.

233 The first is to be found in the contractual/employment relationship between the parties. Where services are rendered pursuant to a contract and in accordance with the terms of the contract, the contract constitutes a juristic reason for a deprivation. Here, the Retirees had provided their labour, skills and knowledge to Confederation Life in accordance with their contractual employment arrangements; conversely, the Company had benefitted from those contributions and agreed to remunerate the former employees through a compensation package which featured, as one important aspect of it, provision of the Group Benefits. Thus, unlike in the matrimonial cases in the context of which the principles I have been reviewing were developed and in which the spouse who suffered the detriment was under no legal, contractual or statutory obligation to provide the services in question, the Retirees had been required by contract to provide their services. The basis for Confederation Life's "enrichment" in the receipt of those services is the contractual employment relationship. As the subject of a winding-up proceeding — the source of the Retirees' "deprivation" — Confederation Life does not derive any benefit or enrichment from the cessation of the Group Benefits. The fact that a contract cannot be fulfilled does not render the "juristic reason" which it created for the benefit/detriment nugatory.

234 A second juristic reason for the "enrichment" — if such is the case — is the existence of the winding-up proceedings themselves. Policyholders of insurance companies which are undergoing liquidation pursuant to the *Winding-up Act* are entitled to priority over other creditors under para.161(1)(*c*) of that Act. Absent the argument that the Retirees are, themselves, "policyholders" — addressed earlier in these Reasons — the Retirees are not entitled to "jump the queue" in the statutory scheme of things. Such a legislative scheme, in my view, is a "disposition of law", as contemplated by Dickson J. in *Rathwell*, supra, and in *Becker v. Pettkus*, supra, and thus provides a "juristic reason" for the enrichment.

235 Finally, leaving aside the specific statutory scheme of distribution in the *Winding-up Act*, the general insolvency nature of the proceedings is a factor to be considered as part of the "juristic reason" mix. There are insolvency cases in which constructive trusts have been imposed, and, indeed, one such case is *Stanton v. Reliable Printing Ltd.*, supra, involving an employee claim to priority over unsecured creditors for severance benefits. See also *Barnabe v. Touhey*, supra, where Madam Justice Bell fixed a new law firm's accounts receivable with a constructive trust in favour of former partners and at the expense of a secured creditor bank in circumstances where the partners of the new firm were in bankruptcy.

236 However, the fact that the cessation of Group Benefits is the direct result of the insolvency and liquidation proceedings puts the present case on a different footing, in my opinion. All payment and benefit obligations were honoured by Confederation Life right up to the date of the winding-up, August 12, 1994. Deprivation of the Group Benefits did not result from some morally questionable conduct on the part of Confederation Life. The Company simply failed, to the considerable surprise of many people.

237 Where it was not part of the contractual-employment arrangements that the Group Benefit plans would be pre-funded or otherwise secured — as it was not here — insolvency considerations, which in volve the balancing of interests of a number of financially disadvantaged groups, are relevant factors to address. It is not unjust, in such circumstances, for a group such as the Retirees, to be held to the contractual/employment arrangements

that have governed the relationship in the pre-insolvency/winding-up regime.

Constructive Trust — Is it the Appropriate Remedy?

238 Even if the facts of this case had survived the "unjust enrichment" analysis, I would not have been inclined to grant the remedy of a constructive trust on that basis, in any event.

239 There is little doubt that a monetary award would be of little assistance to the Retirees in this case. The reason why the proceedings are before this Court in the first place is that there is not enough money to satisfy all of those who have claims against the assets of Confederation Life.

240 However, I am not able to conclude that there is a sufficient connection between the Retirees' contributions of labour, skill and knowledge, on the one hand, and the Company's general assets, on the other hand, to justify the imposition of a constructive trust. Unquestionably, those contributions aided the Company in the conduct of its business — indeed, as the Handbook says, Confederation Life's "good people" are the secret to its success — and in principle such types of contributions *could* form the basis of a proprietary trust (as they did, for instance, in the family law cases); but there is simply nothing in the evidence to indicate either that the Retirees harboured any sort of expectation that they would be obtaining an interest in the Company's assets, or that any such assets would be earmarked to fund and secure their benefits. The reasonable expectation that the Group Benefits would be provided in partial consideration for their contributions — which the Retirees undoubtedly held — does not equate to an expectation that they would acquire what is tantamount to a proprietary interest in Company assets necessary to ensure their continuance. Similarly, there is nothing in the evidence to establish that Confederation Life harboured any awareness that the Retirees held such expectations. In fact, the evidence is clear that from Confederation Life's standpoint, the Group Benefits were not pre-funded or secured, and could be altered or terminated virtually at any time.

241 Finally, as I stated earlier in these Reasons, it would be inappropriate, in my view, to impose a constructive trust upon the general assets of the Company in order to secure payment of the Group Benefits because in the balancing exercise of weighing the interests of the Retirees against those of the policyholders, in this insolvency and winding-up situation, Parliament has said that the policyholders are to be given priority: the *Winding-up Act*, supra, subs. 161(1).

242 Ms. Rowland argued skilfully on behalf of the Retirees that, in balancing the interests and prejudices to the Retirees and the policyholders, the Court must take into account the reality that the policyholders, as owners of the Company, had elsewhere to look and other sources to which they can look for protection; the Retirees, on the other hand, are limited to their claim against the Company. She pointed out that as owners of the Company, the policyholders had received $120,000,000 in dividends during the year before the collapse, notwithstanding Confederation Life has sustained a loss that year; that they rank ahead of commercial creditors by reason of the *Winding-up Act* priority; and that they have another source, in the form of the Canadian Life and Health Insurance Compensation Corporation, to provide them with at least partial protection. Contrast this, she continues, with the fact that the Retirees have none of these protections and, for the most part, are not in a position to shop around to replace the benefits which they thought were in place for life upon their retirement, and the use of a constructive trust to preserve what the Retirees understood they had all along becomes reasonable.

243 I agree that these factors need to be weighed in the balance, and I have done so. I am not satisfied, in the final analysis, however, that they are sufficient to tip the scales in favour of the Retirees.

244 In summary, then, the Retirees' claim for the imposition of a constructive trust on the basis of unjust enrichment fails, because there is neither the "benefit/detriment" factual basis for such a claim, nor is there an absence of juristic reason for the imbalance between their contributions as employees and the future loss of Group Benefits. Moreover, there is no sufficient connection between the Retirees' contributions as employees and the general assets upon which it is sought to impose a constructive trust, in the sense that the Retirees had no reasonable expectation that the Group Benefits would be pre-funded or secured and, accordingly, that they would be able to look to some portion of Confederation Life's assets in that regard; nor was the Company aware of any such expectation.

(ii) The Supplementary Pensioners

245 For similar reasons, I reject the submission that a constructive trust should be imposed for the benefit of the Supplementary Pensioners.

Enrichment/Detriment

246 I am satisfied that the circumstances relating to the claims of the Supplementary Pensioners do not meet the kind of enrichment-detriment criteria envisaged by the authorities on unjust enrichment canvassed earlier in these Reasons. At the date of the Winding-Up Order, no imbalance of this nature existed and — as is the case with the Retirees' benefits — Confederation Life will not reap any benefit from its financial downfall and inability to continue to fund the supplementary retirement income arrangements on an ongoing basis.

Juristic Reason

247 In any event, there is not an absence of juristic reason for the situation that has arisen. The supplementary retirement income arrangements were put in place to top up the retirement incomes of retiring officers of the Company, as part of their overall benefit/employment package. Each participant performed their part of the bargain until the Winding-Up situation prevented the Company from doing so. As I have found, in the section of these Reasons dealing with the express trust arguments, it was never intended that the supplementary retirement income arrangements would be secured or pre-funded, but that they would be paid on an ongoing annual basis. While the senior officers who were the beneficiaries of these arrangements certainly had the expectation that their supplementary income payments would be forthcoming, as agreed, I am not able to find on these materials that they had any reasonable expectation that those benefits would be pre-funded or otherwise secured. Indeed, with respect to the most active officers, such as Mr. Burns and Mr. Cunningham, the conclusion is inescapable that they knew very well the exact opposite was the case.

248 The conclusion to which I am led, therefore, is that the supplementary retirement income arrangements, as they existed at the date of the Winding-Up Order, reflected the pay-as-you-go retiring allowance initially authorized — and the only arrangement duly authorized — by the Board of Directors. Lack of pre-funding did not constitute a failure by Confederation Life to comply with its undertaking to its employees, although its inability to continue to fund the benefits as they occur, to be sure, does. In short, it is the financial collapse of Confederation Life which has led to the unfortunate situation in which the supplementary retirement income benefits are not being paid, not the absence of any legal or equitable basis — or "juristic reason" — for the situation that has arisen.

Constructive Trust — Is it the Appropriate Remedy?

249 Moreover, even if the requisite criteria for the establishment of an "unjust enrichment" did exist, I would not impose a constructive trust as a remedy in favour of the Supplementary Pensioners. My reasons are similar to those relating to the same point regarding the Retirees. There is not a sufficient link between the benefit/detriment alleged and the property which it is sought to impress with the trust — the general assets of Confederation Life. Nor would it be an equitable balancing of the interests, particularly given the statutory scheme favouring policyholders in insurance company collapses.

250 As important as they are to the recipients involved, ample retirement benefits for senior officers and employees remain benefits that accrue to those who are closely connected to the operations of the Company, and they are not necessarily always in the interests of those for whom the operations of the Company are carried out, namely the shareholders — or, in this case, the policyholders. As the Towers Perrin Report of September 14, 1992 — which was commissioned to suggest ways of providing secured funding for supplementary retirement benefits — noted [emphasis added]:

> But, as you know, there are no laws to give [supplementary non-registered retirement income arrangements for executives] (SRIA's) security *and few companies fund them.* Companies plan to make monthly benefit payments directly to the executives from operating revenues.
>
> Generally, executives do not care where their benefits come from — if they get them. But they may worry about what will happen if the company is unable or is unwilling to make the payments. Those concerns usually focus on the possibility of:
>
> • a change of control of the corporation;
>
> • the bankruptcy of the corporation; and/or
>
> • a future decision to renege on the promises that have been made to them.
>
> If such concerns are high, executives seek external "funding" to increase their feeling of security. Unlike the case for registered plans, such funding almost invariably increases the cost of providing the benefits. *From the shareholders' perspective those costs can rarely be justified unless funding is necessary to attract, retain and motivate key executives.* To date, funding has not been that critical.
>
> So most companies decide not to fund the SRIA benefits unless/until there is a specific, imminent security concern (e.g., the company is "in play" or on the brink of bankruptcy). ...

251 Apart from confirming that Confederation Life's supplementary retirement income arrangements were not pre-funded, the foregoing passage illustrates that the Company was not only not an exception, it was in the mainstream in this respect. To restructure this situation, in circumstances in which to impress the general assets of the Company with a trust sufficient to fund the benefits fully — thereby favouring the corporate officers over the statutorily preferred policyholders — would be an inappropriate use of the Court's power to impose a constructive trust, in my view.

(iii) The Deferred Compensation Claimants

252 Precisely the same analysis applies with respect to the Deferred Compensation Claimants, as applies with respect to the Retirees and the Supplementary Pensioners. I will not repeat it here, except to say the "equities" apply with even greater force in not favouring the two most senior and responsible officers of the Company

over the interests of the policyholders.

IV. The Court's Power to Impose Duties upon a Liquidator under s. 33 of the Winding-up Act

253 Section 33 of the *Winding-up Act* reads as follows [emphasis added]:

> 33. A liquidator, on his appointment, shall take into his custody or under his control all the property, effects and choses in action to which the company is or appears to be entitled, *and shall perform such duties with reference to winding-up the business of the company as are imposed by the court* or by this Act.

254 Counsel for the Retirees submitted the Court should exercise its powers under the latter part of that section and direct the Provisional Liquidator to continue to fund the Group Benefits at least during the duration of the winding-up and to take action against those responsible for the funding of the Group Benefits. This argument was based upon the premise, however, that Confederation Life was in breach of fiduciary and/or trust obligations owing to the Retirees. As I have concluded that no such obligations existed, the argument loses its force.

V. Other Issues with Respect to the Supplementary Pensioners

255

(1) Is There a Distinction between the Supplementary Pensioners "In Pay" and Those "Not In Pay"?

256 As indicated earlier in these Reasons, there are 11 eligible former employees who were already receiving payments under the supplementary retirement income arrangements at the time of the Winding-Up Order, and 20 who were eligible but who had not yet commenced to receive their payments. Although none of the counsel who opposed the position of the Supplementary Pensioners advanced the submission that the two groups should be treated separately, they were nonetheless represented by separate counsel. As Mr. Robertson, who was appointed to represent those "Not in Pay" put it, there was some concern that an argument might be made that a difference existed because of a difference in "vesting" rights between the two groups.

257 Mr. Robertson submitted that there was no such difference, and I agree. To the extent that "vesting" is an issue in these proceedings, I am satisfied that a Supplementary Pensioner in these circumstances has the same vested rights with respect to their entitlement whether they were actually in receipt of benefits at the time of the Winding-Up Order or they were not.

258 I draw no distinction between the two groups for the purposes of my decision and these Reasons.

(2) The "Pension" Issues Respecting the Supplementary Retirement Income Arrangements

259 The *Pension Benefits Act*, supra, applies to every "pension plan" that is provided for persons in Ontario, and requires that every "pension plan" be registered with the Superintendent of Pensions: ss. 3 and 6.

260 Counsel for the Supplementary Pensioners "In Pay" and for those "Not in Pay" submit that Confederation Life's supplementary retirement income arrangements with its employees constitute a pension plan to which the *Pension Benefits Act*, supra, applies. Therefore, they argue, they attract the pre-funding requirements of s. 55 and the deemed statutory trust and statutory lien and charge of s. 57, all as articulated in the questions set out in the section of these Reasons entitled "Directions Sought and Issues".

(a) Is Confederation Life's Supplementary Retirement Income Arrangement a "Pension Plan" within the Meaning of the Pension Benefits Act?

261 The purpose of Confederation Life's supplementary retirement income arrangements is to "top up" the retirement income of senior corporate executives to that which it would otherwise have been under the Registered Pension Plan were it not for the Revenue Canada limits on payments out of such plans, based upon the employee's full salary and service. In general terms, the formula for determining what amount a retiring officer will receive is the difference between

a) what would otherwise be payable under the registered plan, were it not for the Revenue Canada limits and

b) the pension amount actually payable under the provisions of the registered plan.

262 The target range for the total package appears to have been 4% of final average earnings multiplied by a person's years of service.

263 I am satisfied, in spite of the "supplementary pension" nomenclature attributed to them by those involved — particularly in later years — that these arrangements are not "pension plans" as envisaged by the *Pension Benefits Act*, supra. There are two main reasons for this conclusion. In the first place, the supplementary retirement income arrangements, in my view, are precisely what they were initially — and only — authorized to be, namely "retiring allowances consistent with the service and contribution by [the member] to the Company as authorized by the Board of Directors". As such, they are specifically excluded from the purview of the *Pension Benefits Act*, supra, by virtue of the definition of a "pension plan" in s. 1 of the Act. In the second place, the arrangements do not constitute a "pension plan", as that term is contemplated in the *Pension Benefits Act*, supra, because they do not constitute a "plan *organized and administered to provide pensions* to employees" as required by the Act.

The Arrangements as "Retiring Allowances"

264 "Retiring allowances" are specifically excluded from "pension plans" which are defined in s. 1 of the *Pension Benefits Act*, supra, as follows:

> "pension plan" means a plan organized and administered to provide pensions for employees, but does not include,
>
> . . . . .
>
> (*b*) a plan to provide a retiring allowance as defined in subsection 248(1) of the *Income Tax Act* (Canada),

265 The initial consideration of "the matter of the Company providing a supplementary pension to those officers who might be retiring and whose pensions would be limited by existing maximums" is reflected in the Minutes of the meeting of the Board of Directors of June 21, 1972. Under the heading "Pensions — Supplementary" the foregoing was noted, and the Minutes continued [emphasis added]:

> It was deemed to be in the best interests of the Company to provide a supplemental pension to such participants and the concept of so doing was approved in principle. *It was agreed, however, that Management should be requested to investigate the method of handling the matter, possibly by way of an employment agreement.*

266 Not until three years later did the Board deal with the matter again. On July 16, 1975 it passed the only existing resolution authorizing such a scheme. In spite of the use of the words "supplemental pension" and the heading "Pensions — Supplementary" in the earlier resolution, the July 16, 1975 Resolution stated [emphasis added]:

> THAT WHEREAS it is the intention of Confederation Life Insurance Company to recognize the valuable, loyal and devoted service of the Senior Officers of the Company, Be It Resolved that *on retirement there be provided a retiring allowance* consistent with the service and contribution by such members to the Company as authorized by the Board of Directors.

267 It is acknowledged that this is the sole corporate resolution on Confederation Life's part which authorizes the payment of additional retirement income benefits to employees. There is no formal plan document which sets out a supplementary pension plan for the senior officers. Throughout the 1980's — with infrequent exceptions — the concept of the topping up payments is referred to consistently in corporate memoranda and records as the "retiring allowance", the "supplementary retiring allowance" or the "retirement allowance". Mr. Cunningham was the author or recipient of numerous documents containing such references. When, in his affidavit, he defines the "arrangement to supplement the pension benefits received under the [Company's registered pension plan]" established "in accordance with" the June 21, 1972 and July 16, 1975 Board resolutions as "the *Supplementary Plan*", he could only have been referring, therefore, to the retiring allowance arrangement authorized in the July 16, 1975 resolution.

268 This is confirmed by the April 1983 Letters which Mr. Cunningham says were sent to each of the eligible senior officers, on the instructions of Mr. Burns, "briefly describ[ing] the Plan and its operations". Those Letters state that the Company agrees to provide the retiring officer with "*a retiring allowance* payable monthly commencing on the 28th day of the month following [the officer's] retirement". The Company agrees to do so "in recognition of [the officer's] valuable, loyal and long devoted service" and recites that it is being done "in accordance with a resolution of the Board of Directors". There is only one such resolution, namely, that of July 16, 1975 authorizing the provision of a retiring allowance.

269 The concept of a "retiring allowance" is defined in the *Income Tax Act* (Canada), s. 248(1) as follows:

> "retiring allowance" means an amount (other than a superannuation or pension benefit ...) received
>
> (*a*) upon or after retirement of a taxpayer from an office or employment in recognition of his long service ...
>
> . . . . .
>
> by the taxpayer or, after his death, by a dependant or a relation of the taxpayer or by the legal representative of the taxpayer.

270 Both the Board resolution of July 16, 1975 and the April 1983 Letters reflect these concepts — a payment to be received upon retirement in recognition of service to the employer.

271 I note that "retiring allowance" excludes an amount received as a "pension benefit". The definition of "pension plan" in the PBA, as I have recited earlier, excludes "a plan to provide a retiring allowance" as defined in the *Income Tax Act* (Canada). This suggests to me that a given vehicle for the provision of supplementary re-

tirement income to an officer or employee may have the appearance of both a retiring allowance and a pension benefit, but that if it is designed to be a "retiring allowance" it is not considered to be a "pension benefit", and vice versa. What, then, is a "pension benefit"?

272 The PBA, s. 1, includes the following definitions:

> "pension" means a pension benefit that is in payment;
>
> "pension benefit" means the aggregate monthly, annual or other periodic amounts payable to a member ... during the lifetime of the member ... to which the member ... will become entitled under the pension plan ...

273 In short, a pension benefit is simply the total amount payable to an employee upon retirement under a pension plan. And a "pension plan", as observed earlier, is "a plan organized and administered to provide pensions for employees". The word "plan" itself is a vague and elastic concept. It can be made to apply to a wide range of circumstances, and how wide that range may be depends upon how broad a definition one might choose to adopt. Do the facts demonstrate "a scheme of action, project, design, the way in which it is proposed to carry out some proceeding", as broadly articulated by the *Shorter Oxford English Dictionary*; or "a formulated and especially detailed method by which a thing is to be done", as more precisely defined in the *Concise Oxford Dictionary*?

274 Leaving aside for the moment the question of whether the Confederation Life arrangements are something which are "organized and administered" to provide pensions, and assuming that they constitute a "plan" of some sort, it appears to me that they are capable of filling the description of either a plan to provide a pension benefit or a plan to provide a retiring allowance. They call for the payment of periodic amounts during the lifetime of the recipient, to which the recipient will become entitled under the arrangement (a "pension benefit": PBA, s. 1). They envisage the payment of an amount received upon or after retirement from an office or employment in recognition of the recipient's long service (a "retiring allowance": *Income Tax Act* (Canada), s. 248(1)).

275 In such circumstances, it only makes sense to characterize the arrangement in the manner in which it was authorized and characterized by the Company itself, in the constating resolution, and in the initial documentation and correspondence with the Retirees. What was created was a plan to provide a "retiring allowance". The retiring allowance is designed to provide supplemental retirement income for senior officers of the Company, to which it is offered in order to "top up" the maximum retirement payments permissible under the Company's Registered Pension Plan.

276 As late as March 8, 1988, this was still recognized by Mr. Cunningham. In a memorandum bearing that date he wrote to Mr. Pitts, the Vice-President of Group Pensions [emphasis added]:

> Our Board of Directors have previously approved by resolution that *specific individuals as reported by management* to the Board Salary committee will be *entitled to receive an additional retirement allowance benefit*. The Company has defined that those eligible in Canada will be the senior officers of the Company.
>
> *The retirement allowance benefit* is the amount in excess of the government maximum calculated *on the same formula as the salaried pension plan* for the retirement, death or termination benefit.
>
> We have initiated a full review of the current administration of the retirement allowance benefit, ie. Board

> Resolution, group policy, in dividual certificates, and annual employee statements. We expect to be in a position to recommend revisions to Pat Burns in the fall. In the meantime, I wanted to assure you of your eligibility and the basic form of the benefit that you would be entitled [to].

277 While the review mentioned was initiated in the ensuing years, and some recommended revisions were proposed, no Board resolutions were ever passed changing the nature of the supplementary retirement income arrangements as established by the July 16, 1975 Board Resolution and as described in the April 1983 Letters and Mr. Cunningham's memorandum of March 8, 1988.

278 Beginning in the early 1990's, however, the nomenclature changed. References to "retiring allowances" became less frequent and references to such things as "supplementary pension arrangements", the "Sr. Officers' Supplementary Pension arrangement", "the Company supplementary plan for senior officers" and the "Supplementary Pension Plan" became common in corporate memoranda and documentation relating to such retirement benefits. Indeed, there are at least five offers of employment, on the basis of which individuals apparently joined the Company, in which reference is made to "the Supplementary Pension" or the "Supplementary Pension Plan".

279 I observe that there is some coincidence between the timing of this general change in nomenclature and the creation of the Board of Directors' sub-committee known as the Human Resources and Compensation Committee — of which Mr. Cunningham was the Chair — and the involvement of Towers Perrin in studying the Company's supplementary retirement income arrangement. Whether these circumstances account for the change in terminology or not, I do not think that the change in nomenclature itself can alter the nature of what it was that Confederation Life was agreeing to provide to its senior officers, in the absence of a new corporate form of authorization. No such new corporate form of authorization — either in the form of a different resolution of the Board of Directors, or in the form of some other re-defined "plan" duly approved by the Company — exists.

280 In June 1993 Mr. Cunningham sent the second form letter to senior officers of Confederation Life entitled to the supplementary retirement income benefit. Its contents are outlined in some detail earlier in these Reasons. Mr. Cunningham deposes that in or about 1992, upon a review of the supplementary pension arrangements by the Corporate Human Resources Department, he became concerned about the documentation describing the benefits which were to be received. He was also concerned that details of the benefits be communicated to the more recently eligible senior officers. Consequently, "in order *to clarify the terms* of the Supplementary Plan (as his af fidavit had defined the plan for a retiring allowance authorized in the July 16, 1975 Board resolution)", he sent a letter "*restating its terms* to each eligible member". I will recapitulate a portion of that letter here for sake of convenience [emphasis added]:

> The purpose of this letter is to clarify and confirm your entitlement to the Senior Officers' Supplementary Pension *arrangement*.
>
> *In accordance with a resolution of the Board of Directors* and in order to ensure that your post retirement income compares equitably to other employee members of the registered Pension Plan for Salaried Employees, when measured as a percentage of pre-retirement income, *the Company agrees to provide you with a Supplementary Pension on your retirement*. This supplement will be in addition to the pension benefit you will receive from the registered pension plan and recognizes that the amount of pension benefit which can be provided under the provisions of the registered Plan is limited by Revenue Canada regulations.

281 The core authority for the proposal, therefore, as stated, is "a resolution of the Board of Directors". Only one such resolution exists — that of July 16, 1975, authorizing a retiring allowance. Moreover, neither the

June 1993 Letter itself, nor Mr. Cunningham's explanation of it, purports *to change* the arrangement as previously established; they merely purport *to clarify and confirm* it. While the Letter goes on to outline a tie-in between the supplementary retirement income arrangement and the Registered Pension Plan, in terms of the formula for payment and the escalation of any benefits, these factors alone cannot operate to incorporate the terms of the Registered Pension Plan into the supplementary retirement income arrangements and thus turn them into a pension plan, in my view — which is the effect of what counsel submit should be the case. The supplementary retirement income arrangement is a "top up" arrangement. It is designed to fit with the income flow from the Registered Pension Plan to supply the retired senior officers with an income stream in retirement that "compares equitably to other employee members of the registered [plan] ... when measured as a percentage of pre-retirement income". It stands to reason that the payment of the two amounts might be intertwined and that the benefits would advance together, in order to give effect to this objective.

282 Moreover, it seems to me, the argument that the terms and provisions of the Registered Pension Plan are engrafted upon the supplementary arrangements would defeat the very purpose of the top up principle. What it would mean is that the Registered Pension Plan and the supplementary arrangements would be so intertwined that they would become, in effect, one — the registered one — and the Revenue Canada limits would then apply to limit payments out to the recipients!

283 What, though, of the senior officers who received letters describing the supplementary retirement income benefit as a "supplementary pension" arrangement or plan; and, indeed, what of those who accepted employment on the basis that they would be the recipient of such a benefit? Is the Company entitled to resile from a position which it appears to have held out to them, through officers with the apparent authority to do so, that they had supplementary pension benefits? It seems to me that the answer to such questions is this: however the benefit is described to the recipients, they could not reasonably have expected to receive anything other than whatever it was that the Company provided under the description "supplementary pension arrangement" or "supplementary pension plan" or one of their derivatives.

284 If in fact, what was being provided was not a "pension plan" but some other form of retirement income vehicle, referring to it as a pension plan cannot make it such. It may give the recipient some form of claim against the authors of the correspondence and the Company, on the basis of misrepresentation or some other related cause of action. It may be that the misrepresentation is a relevant factor for consideration in assessing the appropriateness of other remedies — such as the imposition of a constructive trust, for example, which I have dealt with elsewhere. But the misdescription cannot operate to transmogrify something that is not a pension plan into a pension plan. A leopard does not change its spots and become a cougar simply by calling it a cougar, despite the fact there may be some similarities between the two species.

Not a Plan "Organized and Administered" to Provide Pensions

285 There is another reason why, in my opinion, the Confederation Life supplementary retirement income arrangements do not constitute a "pension plan" within the meaning of the *Pension Benefits Act*, supra. On the facts of this case, they simply do not fit what is contemplated as a pension plan in the legislation. If the arrangements constitute a "plan" at all, they are not a plan "*organized and administered to provide pensions*".

286 In construing legislation a Court must look, so far as possible, to the plain wording and meaning of the language used, and do so in the context of the legislation as a whole: *Driedger on the Construction of Statutes*, 3rd ed., Ruth Sullivan, ed., (Toronto: Butterworths, 1994) at pp. 3-7. Earlier I referred to the vagueness in mean-

ing of the word "plan". Even if one accepts the broader and more general approach of the *Shorter Oxford English Dictionary*, however — "plan" as a "scheme of action, project, design, *the way in which it is proposed to carry out some proceeding*" — it is plain that the Legislature intended to give the word a more restricted meaning. It is not just any "plan" which makes a "pension plan". It is a plan that is *organized*. It is a plan that is *administered*. It is a plan that is organized and administered *to provide pensions*. This leads me to conclude that the Legislature intended a pension plan to be something more in line with the *Concise Oxford* definition of "plan", i.e., "plan" as "*a formulated and especially detailed method* by which a thing is to be done."

287 Some indication of what the Legislature had in mind by a plan "organized and administered to provide pensions" is to be found in the provisions of subs.10(1) of the *Pension Benefits Act*, supra. There the statute stipulates what must be set out in the documents that create and support a pension plan. The criteria include:

1. The method of appointment and the details of appointment of the administrator of the pension plan.

2. The conditions for membership in the pension plan.

3. The benefits and rights that are to accrue upon termination of employment, termination of membership, retirement or death.

4. The normal retirement date under the pension plan.

5. The requirement for entitlement under the pension plan to any pension benefit or ancillary benefit.

6. The contributions or the method of calculating the contributions required by the pension plan.

7. The method of determining the benefits payable under the pension plan.

8. The method of calculating interest to be credited to contributions under the pension plan.

9. The mechanism for payment of the cost of administration of the pension plan and pension fund.

10. The mechanism for establishing and maintaining the pension fund.

11. The treatment of surplus during the continuation of the pension plan and on the wind up of the pension plan.

12. The obligation of the administrator to provide members with information and documents required to be disclosed under this Act and the regulations.

13. The method of allocation of the assets of the pension plan on windup [sic].

14. Particulars of any predecessor pension plan under which members of the pension plan may be entitled to pension benefits.

15. Any other prescribed information related to the pension plan or pension fund or both.

288 With the exception of a nod in the direction of items numbered 3 and 7 above, and possibly item number 4, the Confederation Life arrangements do not feature any of these characteristics. There is no formal plan document setting out the terms and benefits of the arrangement. In fact, there appears to have been a number of

different arrangements. This explains why I have been using the plural "arrangements" in describing this benefit throughout these Reasons. In spite of the April 1983 Letters and the June 1993 Letter, an examination of the correspondence gathered together by counsel for the Provisional Liquidator in vol. 36 or the Record reveals that the use of terminology and the expressed terms of the arrangements vary from senior officer to senior officer. Mr. Zarnett advised that this collection represents the highest documentary claim for each individual.

289 I am asked not to deal with the Supplementary Pensioners on an individual basis, and indeed the evidence is not adequate to enable me to do so. However, a review of the documentation gathered together in vol. 36 is instructive, I think, in assessing whether the treatment of this retirement benefit is a plan "organized and administered to provide pensions".

290 Eight of the 11 Supplementary Pensioners "In Pay" received the April 1983 form letter stipulating the provision of a retiring allowance, or an identical letter or one *similar to it*. Even the letter to Mr. Pitt, which was dated January 13, 1992 — during the period when references to "supplementary pension arrangements" and nomenclature of that sort were more common — is framed in terms of a retiring allowance. Two of these Claimants received the June 1993 Letter or a similar one (one such Claimant had also received a 1983 letter) and two received individualized packages referring to "supplementary pensions" in one form or another.

291 Of the 20 Supplementary Pensioners "Not in Pay", 8 received the June 1993 Letter or something similar to it. Twelve received individual packages, 3 of which related to termination or pre-emptive parachute situations and 5 of which were the subject matter of offers of employment with the Company. The nomenclature in these packages and in the June 1993 set of letters is in terms of "supplementary pension arrangements" or related language.

292 Keeping in mind Mr. Cunningham's evidence that all eligible senior officers received either the April 1983 Letters or the June 1993 Letter — and some, presumably, both — the added layers of

293 "similar" letters and individual arrangements and the lack of many of the indicia of a pension plan as laid out in subs. 10(1) of the *Pension Benefits Act*, supra, all lend credence to the view that what was presented to the senior officers of Confederation Life was not a "pension plan" but a more general plan to provide retiring allowances in their individual cases.

294 I conclude, therefore, that the supplementary retirement income arrangements which Confederation Life agreed to provide to its senior officers do not constitute a "pension plan" to which the *Pension Benefits Act*, supra, applies.

(b) Regulation 909, as Amended

295 The Regulations under the *Pension Benefits Act*, supra, exempt certain pension plans from the application of the Act and regulations. In October 1994 — 2 months after the Winding-Up Order — subs. 47(3) of Reg. 909 was amended to add the following exemptions:

> 5. A retirement compensation arrangement as defined in subsection 248(1) of the *Income Tax Act* (Canada).
>
> 6. A plan that provides only benefits that exceed the maximum benefit limits applicable to a pension plan that is registered under the *Income Tax Act* (Canada).
>
> 7. A plan that permits only contributions that are in excess of the maximum contribution limit applicable to

a pension plan that is registered under the *Income Tax Act* (Canada).

296 It was submitted that this amendment makes it clear that the type of arrangements in place at Confederation Life for supplementary retirement compensation are not caught by the PBA. The counter argument was that the amendment does not apply because it postdates the Winding-Up Order and cannot be given retrospective effect. In view of my conclusion, on the other grounds, that the arrangements do not constitute a pension plan, and therefore are not governed by the provisions of the Act, it is not necessary to decide whether the Regulation does or does not apply. I would have been reluctant, however, to interpret the amended Regulation in a manner that would give it retrospective effect in view of the general rule against attributing a retroactive and retrospective effect to legislation unless such a construction is expressly or by necessary implication required by the language of the legislation in question: see, *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, 66 D.L.R. (3d) 449, at p. 460, [1975] 1 S.C.R. 271, at p. 279, per Dickson J.; L.P. Pigeon, *Drafting and Interpreting Legislation* (Toronto: Carswell, 1988) at pp. 75-76.

297 I am satisfied that the amendment to Reg. 909 as of October 28, 1994 is of neutral impact in the determination of the issues before me.

(c) The Deemed Statutory Trust and Lien of s. 57 of the Pension Benefits Act

298 There are a number of other pension-related issues that were raised and dealt with in argument.

299 Two such related issues are the twin questions of whether — assumingthe *Pension Benefits Act*, supra, applies to the arrangements — Confederation Life is deemed to hold in trust an amount equal to the due but unpaid contributions required under the legislation and regulations and therefore whether the assets of the Company are subject to a lien and charge in such an amount? These requirements, which are to be found in subss.57(3) and (5) of the Act, are generally referred to as the deemed statutory trust and lien provisions. Since I have concluded that the supplementary retirement income arrangements in place at Confederation Life are not a "pension plan" within the meaning of the PBA, it is not necessary to address these issues at length.

300 If the arrangements did constitute a pension plan within the meaning of the PBA, however, Confederation Life's promise to pay the supplementary pension benefits — as the Ontario Court of Appeal had noted in *Re St. Marys Paper Inc.* (1994), 19 O.R. (3d) 163, at p. 168 — would be "a promise which is subject to the carefully calibrated regulatory scheme set out in the PBA and its regulations". It would be subject to the minimum standards set out in the Act, including the minimum funding requirements of s. 55(1). In *Re St. Marys Paper*, Justices Arbour and Osborne stated (at p. 173) [emphasis added]:

> The PBA and regulations impose an obligation on an "employer"[FN1] 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. This obligation is central to the regulatory scheme established by the PBA.* The Act requires that its minimum funding standards be met.

Consequently, if the Confederation Life supplementary retirement income arrangements were governed by the "carefully calibrated regulatory scheme set out in the PBA", it would follow, in my view, that the deemed statutory trust and the deemed statutory charge and lien of subss.57(3) and (5) would be operative. I think arguments to the effect that the Company, in the particular circumstances of the Confederation Life arrangements, is not an employer required to make contributions to a pension plan cannot prevail in view of the law as articulated in *Re St. Marys Paper Inc.*, supra.

(d) The Constitutional Issue

301 If the provisions of the PBA governed the Confederation Life arrangement and the deemed trust and statutory lien provisions of the Act therefore applied, I would be confronted with the constitutional issue that has been argued. In as much as I have concluded that neither of these eventualities is the case, in the circumstances here, I do not intend to comment upon the interesting and difficult question of whether there would be such an active conflict between the operation of s. 57 of the PBA and the priority scheme of s. 161 of the *Winding-up Act*, supra, to cause the doctrine of paramountcy to be invoked: see *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191. It is an accepted principle of constitutional adjudication that a Court should avoid determining a constitutional question unless it is necessary to do so in order to decide the matter before it: see, for example, *Tremblay c. Daigle*, [1989] 2 S.C.R. 530, at pp. 571-572. In this case it is not necessary to do so.

Part F: Conclusion

302 For all of the foregoing reasons, then, the questions posed by the Provisional Liquidator for advice and directions will be answered as follows:

> 1) The Claimants have claims against the estate of Confederation Life Insurance Company. They are claims, however, as ordinary creditors or, at least, claims which rank behind those of Confederation Life's policyholders under para. 161(1)(*c*) of the *Winding-up Act*, supra, (except to the extent that any may be entitled to the preferred status of employee claims under s. 72 of that Act, about which there was no evidence).
>
> 2) None of the Claimants is entitled to succeed on the basis either that their claim constitutes an express trust or that their claim should attract the imposition of a constructive trust.
>
> 3) None of the Claimants is entitled to succeed on the basis that their claim is a claim under a policy in respect of which priority is accorded to a policyholder by the provisions of para. 161(1)(*c*) of the *Winding-up Act*, supra.
>
> 4) Specifically, with respect to the claims of the Supplementary Pensioners, the claim to a supplementary retirement income benefit does not constitute a "pension plan" to which the *Pension Benefits Act*, supra, ap- plies.

303 I was asked to answer the Provisional Liquidator's questions posed with respect to the Supplementary Pensioners Not in Pay in keeping with the following alternative assumptions:

> (i) Assume, without deciding, that the making of the Winding-Up Order terminated the employment of all members of the class whose employment was not previously terminated; and,
>
> (ii) Assume, without deciding, that the making of the Winding-Up Order did not terminate the employment of any member of the class who was on August 11, 1994, an employee of Confederation Life Insurance Company.

304 My conclusions with respect to the supplementary retirement income arrangements do not vary with whether the recipients are "In Pay" or "Not in Pay", nor with whether the recipients are deemed to have been terminated by virtue of the Winding-Up Order. Accordingly, it is not necessary to address these alternative assumptions further.

305 All parties are entitled to their costs out of the estate. I may be spoken to with regard to the scale of those costs, and I am prepared to fix them if counsel cannot agree.

306 In conclusion, I would like to express my appreciation to all counsel for their thorough, skilful and helpful assistance in dealing with these difficult questions.

Order accordingly.

APPENDIX "B"

The following are the classes of Claimants:

(i) *Retirees* of Confederation Life and their spouses and dependent children (the "Retirees") for the continued payment of their major medical, dental, and group life insurance;

(ii)

(I) *"Supplementary Pensioners In Pay"*, i.e., former employees of Confederation Life claiming payment of supplementary pension benefits in accordance with the supplementary pension arrangement of Confederation Life, and who were receiving such payments as at the date of the Winding-Up Order but whose payments were subsequently terminated by the Liquidator (or, where such former employees are deceased, the persons claiming under them);

(II) *"Supplementary Pensioners Not in Pay"*, i.e., former employees of Confederation Life claiming payment of supplementary pension benefits in accordance with the supplementary pension arrangement of Confederation Life, and who had not commenced receiving payments as at the date of the Winding-Up Order (or, where such former employees are deceased, the persons claiming under them); and,

(iii) *the former Chairman of the Board of Directors and the former President of Confederation Life for the payment of deferred compensation* pursuant to the deferred compensation plan of Confederation Life.

FN1 The issue in the case was whether the appellant, a trustee in bankruptcy, was an "employer" within the meaning of the PBA.

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1997 CarswellOnt 62, 32 O.R. (3d) 102, 14 C.C.P.B. 1, 41 C.C.L.I. (2d) 1, 145 D.L.R. (4th) 747, (sub nom. Confederation Life Insurance Co. (Liquidation), Re) 97 O.A.C. 18, C.E.B. & P.G.R. 8308 (headnote only), C.E.B. & P.G.R. 8308 (headnote only), 70 A.C.W.S. (3d) 649

Canada (Attorney General) v. Confederation Life Insurance Co.

In the matter of Confederation Life Insurance Company; and in the matter of the Insurance Companies Act, S.C. 1991, as amended; and in the matter of the Winding-up Act, R.S.C. 1985, c. W-11, as amended; The Attorney General of Canada (Applicant) and Confederation Life Insurance Company (Respondent)

Ontario Court of Appeal

Carthy, Austin and Charron JJ.A.

Heard: November 5-8, 1996
Judgment: January 20, 1997
Docket: CA C22862, C22863

Proceedings: Affirming (1995), 8 C.C.P.B. 1, C.E.B. & P.G.R. 8227 (headnote only), 33 C.B.R. (3d) 161, 8 E.T.R. (2d) 72, 31 C.C.L.I. (2d) 77, 24 O.R. (3d) 717 (Gen. Div.)

Counsel: *Donald C. Matheson, Q.C.*, and *Clifton P. Prophet*, for supplementary pensioners and for deferred compensation claimants.

Graham D. Smith and *Michèle S. Altaras*, for KPMG Inc., agent of Superintendent of Financial Institutions, provisionalliquidator of Confederation Life Insurance Company.

David P. Roney, for Canadian Life & Health Insuarance Compensation Corporation.

Leslie M. McIntosh, Peggy A. McCallum and *Richard J.K. Stewart*, for Attorney General for Ontario and the Superintendent of Pensions.

Subject: Corporate and Commercial

Corporations --- Winding-up — Under Dominion Act — Claims of creditors — Miscellaneous issues.

Corporations — Winding-up — Under Dominion Act — Claims of creditors — Supplementary retirement income and deferred compensation arrangements — Employer and employees entering into such arrangements before employer becoming insolvent and winding up — Employees arguing that arrangements were annuities and that their funding had preferred priority — Arrangements promising periodic payments for life but not setting

1997 CarswellOnt 62, 32 O.R. (3d) 102, 14 C.C.P.B. 1, 41 C.C.L.I. (2d) 1, 145 D.L.R. (4th) 747, (sub nom. Confederation Life Insurance Co. (Liquidation), Re) 97 O.A.C. 18, C.E.B. & P.G.R. 8308 (headnote only), C.E.B. & P.G.R. 8308 (headnote only), 70 A.C.W.S. (3d) 649

aside capital for funding — Arrangements conditional on employees' good behaviour and financial health of employer — Arrangements not being annuities — Winding-up Act, R.S.C. 1985, c. W-11, s. 161(1)(c).

Pensions --- Miscellaneous issues.

Pensions — Miscellaneous issues — Supplementary retirement income arrangements — Employer and employees arranging for "top up" retirement benefits — Employer becoming insolvent and winding up — Employees arguing that arrangements were pension plans and that amounts required to fund arrangements were subject to deemed statutory trust — Arrangements not providing for funding and payments being conditional on good behaviour — Arrangements not administered or organized as pension plans as required by Pension Benefits Act — Court not obliged to add terms to assist employees — Arrangements not being pension plans and not governed by statutory trust — Pension Benefits Act, R.S.O. 1990, c. P.8, s. 10(1).

At the time it became insolvent, the respondent life insurance company operated supplementary retirement income ("top up") arrangements and deferred compensation arrangements for two groups of former employees. Those employees applied for a declaration that such arrangements were either trust assets that fell outside the insurer's estate, or policies within the meaning of s. 161(1)(c) of the *Winding-up Act*, such that the employees enjoyed preferred claim status under that provision. It was also argued that the supplementary retirement arrangements constituted pension plans subject to the funding requirements of the *Pension Benefits Act* (Ont.) (the "PBA").

The application was dismissed. The court found that the supplementary retirement arrangements were unfunded, unsecured, contingent on the insurer's ability to pay, and subject to conditions of good behaviour. The court held that central to the concept of annuity was the alienation of capital that was then turned into a flow of income, and thus the supplementary arrangements were not true annuities. The court also held that the arrangements were not annuities because they were entered into by the insurer as employer, not in its capacity as insurer. With respect to the deferred compensation arrangements, the court found that no funds were ever set aside, and none of the documentation referred to the plan as an annuity or policy. The court found that both types of arrangements were debts only, and created no express or constructive trust. Finally, the court found that the parties to the supplementary retirement arrangements considered them to be "retiring allowances," which were specifically excluded from the ambit of the PBA. The court found that the arrangements were not organized or administered to provide pensions, in the manner set out under s. 10(1) of the PBA. Accordingly, they were not pension plans subject to the PBA.

The employees appealed. They argued that the determination that the arrangements were not annuities was based on Quebec case law relying on the requirements for annuities set out in the *Civil Code of Quebec*, which was not relevant in Ontario. They argued that it was not the contribution of capital assets that distinguished an annuity from debt, but rather the promise of a stream of future payments, and the promisee's reliance on those payments. It was also argued that even if the supplementary retirement arrangements did not comply with the PBA, they still fell within the definition of "pension plan" in the PBA, and thus there was a deemed statutory trust for an amount sufficient to fund them.

Held:

The appeal was dismissed.

1997 CarswellOnt 62, 32 O.R. (3d) 102, 14 C.C.P.B. 1, 41 C.C.L.I. (2d) 1, 145 D.L.R. (4th) 747, (sub nom. Confederation Life Insurance Co. (Liquidation), Re) 97 O.A.C. 18, C.E.B. & P.G.R. 8308 (headnote only), C.E.B. & P.G.R. 8308 (headnote only), 70 A.C.W.S. (3d) 649

The interpretation of "annuity" in any insurance context in Canada was relevant. The lower court's reference to Quebec case law dealt with both the Code and with annuities from a common law perspective that suggested that an annuity's value depended on the capital remitted to the debtor. The case law was highly relevant, and supported the court's conclusions. The parties never intended that annuities be created, nor that the necessary funding be provided. The only similarity of the arrangements to insurance policies or annuities was the promise of periodic payments for a life or lives. They were conditional on good behaviour, and, to the knowledge of all, dependent upon the continued financial health of the employer. The arrangements were employer-employee contracts, and not policies of insurance.

The lower court was correct in finding that the supplementary retirement arrangements were not organized or administered as set out in s. 10(1) of the PBA. The right to payment was conditional on the employee's giving the employer additional benefits such as non-competition agreements; the right to payment was never vested, so that if an employee was terminated for cause, he or she received nothing; and there was never any intention to fund the arrangement. Those aspects were not compatible with a pension registrable under the PBA. Where knowledgeable people deliberately set out to create an arrangement with known limitations, the PBA does not oblige the court to add terms for their assistance. The supplementary arrangement was not governed by the deemed statutory trust under the PBA. The appeal should be dismissed.

Cases considered:

British Union & National Insurance Co., Re, [1914] 1 Ch. 724, reversed [1914] 2 Ch. 77 (C.A.) — *distinguished*

Coopérants, Société mutuelle d'assurance-vie / Coopérants Mutual Life Insurance Society, Re (1993), 58 Q.A.C. 211, [1994] R.L. 268 [leave to appeal to S.C.C. refused (1994), (sub nom. *Raymond, Chabot, Fafard, Gagnon Inc. c. Bouchard)* 170 N.R. 79 (note), 63 Q.A.C. 150 (note) (C.S.C.)] — *applied*

Kerslake v. Gray (1957), (sub nom. *Gray v. Kerslake)* [1958] S.C.R. 3, [1957] I.L.R. 1-279, 11 D.L.R. (2d) 225 — *considered*

St. Marys Paper Inc., Re (1994), 26 C.B.R. (3d) 273, 19 O.R. (3d) 163, C.E.B. & P.G.R. 8174 (headnote only), 116 D.L.R. (4th) 448, 4 C.C.P.B. 233, (sub nom. *St. Marys Paper Inc. (Bankrupt), Re)* 73 O.A.C. 1 (C.A.) [affirmed 11 C.C.P.B. 11, 38 C.B.R. (3d) 88, 26 O.R. (3d) 416, C.E.B. & P.G.R. 8254 (headnote only), 131 D.L.R. (4th) 606, [1996] 1 S.C.R. 3] — *considered*

Ceylon Commissioner of Inland Revenue v. Rajaratnam, [1971] T.R. 451 (P.C.) — *considered*

Statutes considered:

Civil Code of Quebec, S.Q. 1980, c. 39

generally*referred to*

art. 1787*considered*

Civil Code of Quebec, S.Q. 1991, c. 64

1997 CarswellOnt 62, 32 O.R. (3d) 102, 14 C.C.P.B. 1, 41 C.C.L.I. (2d) 1, 145 D.L.R. (4th) 747, (sub nom. Confederation Life Insurance Co. (Liquidation), Re) 97 O.A.C. 18, C.E.B. & P.G.R. 8308 (headnote only), C.E.B. & P.G.R. 8308 (headnote only), 70 A.C.W.S. (3d) 649

art. 2367*referred to*

art. 2368*referred to*

art. 2369*referred to*

art. 2379*referred to*

art. 2384*referred to*

art. 2386*referred to*

art. 2393*considered*

Code civil du Québec, L.Q. 1980, c. 39

art. 1787*considered*

Insurance Act, R.S.O. 1950, c. 183

generally*referred to*

Insurance Act, R.S.O. 1990, c. I.8

s. 1 "insurance"*considered*

s. 1 "life insurance" (g)*considered*

Insurance Companies Act, S.C. 1991, c. 47 —

generally*considered*

Pension Benefits Act, R.S.O. 1990, c. P.8

generally*considered*

s. 10(1)*considered*

s. 57(3)*referred to*

s. 57(5)*referred to*

Winding-up Act, R.S.C. 1985, c. W-11

s. 72*referred to*

s. 159(3)*referred to*

s. 161(1)*considered*

s. 161(1)(c)*considered*

1997 CarswellOnt 62, 32 O.R. (3d) 102, 14 C.C.P.B. 1, 41 C.C.L.I. (2d) 1, 145 D.L.R. (4th) 747, (sub nom. Confederation Life Insurance Co. (Liquidation), Re) 97 O.A.C. 18, C.E.B. & P.G.R. 8308 (headnote only), C.E.B. & P.G.R. 8308 (headnote only), 70 A.C.W.S. (3d) 649

Regulations considered:

Pension Benefits Act, R.S.O. 1990, c. P.8

General, R.R.O. 1990, Reg. 909

s. 47(3) [am. O. Reg. 665/94, s. 3(1)]

APPEAL by former employees from judgment reported at (1995), 8 C.C.P.B. 1, C.E.B. & P.G.R. 8227 (headnote only), 33 C.B.R. (3d) 161, 8 E.T.R. (2d) 72, 31 C.C.L.I. (2d) 77, 24 O.R. (3d) 717 (Gen. Div.) dismissing application for declaration that supplementary retirement income and deferred compensation arrangements had preferred priority on winding-up of employer.

The judgment of the court was delivered by *Austin J.A.*:

1 Two groups appeal from the decision of Blair J. (reported (1995), 24 O.R. (3d) 717) denying their claims on the liquidation of Confederation Life Insurance Company ("Confederation").

2 Confederation collapsed in 1994. A winding-up order was made under the *Winding-up Act*, R.S.C. 1985, c. W-11 ("the Act") on August 15, 1994. The assets were not sufficient to pay all of the claims. Part III of the Act deals with insurance companies and, in that part, s. 161(1) sets out the order in which claims are to be paid. In lay terms, it provides as follows:

> (a) first, the costs of the liquidation;
>
> (b) second, the claims of preferred creditors specified in Section 72 of the *Winding-up Act*, being claims of employees for arrears of wages or salary accrued during the three months immediately preceding the winding-up order;
>
> (c) third, the claims of policyholders for claims that have arisen under policies of insurance issued by the company with priority given to claims under policies of "life insurance";
>
> (d) fourth, expenses paid by the Superintendent of Financial Institutions and assessed against other insurance companies in accordance with the *Insurance Companies Act*; and
>
> (e) fifth, other creditors of the company.

The two groups of appellants sought to have themselves classified as holders of annuities so as to bring themselves within s. 161(1)(c) as "policyholders." They argue further that the policies in question constitute life insurance for the purposes of the priorities established under s. 161(1). The word "policyholders" is not defined by the Act. Section 159(3) of the Act, however, defines "policy" by reference to the *Insurance Companies Act*, S.C. 1991, c. 47, as amended, as meaning "... any written contract of insurance whether contained in one or more documents ... and includes an annuity contract." "Life insurance" is not defined under either the *Winding-up Act* or the *Insurance Companies Act*. However, the *Insurance Act*, R.S.O. 1990, c. I.8, s. 1 defines "insurance" as meaning:

> ... the undertaking by one person to indemnify another person against loss or liability for loss in respect of a

> certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance;

"Life insurance" is defined in the same section as including:

> (g) an undertaking entered into by an insurer to provide an annuity or what would be an annuity except that the periodic payments may be unequal in amount and such an undertaking shall be deemed always to have been life insurance; ("assurance-vie")

3 Returning to the appellants, the larger group, referred to for convenience as "supplementary pensioners," consists of some 31 of the senior executives or former executives of Confederation, or their beneficiaries. All were or would have been entitled to payment by Confederation of amounts of money above and beyond their entitlement under Confederation's pension plan registered under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("the *PBA*"). It is argued that the arrangement under which these supplementary payments were made and were to be made constituted an annuity and thus a policy of life insurance within the meaning of s. 161(1)(c) of the Act, thereby giving this group priority as policyholders over ordinary creditors.

4 In the alternative, it was claimed that the arrangement fell within the ambit of the *PBA*, and, as a result, Confederation's assets were impressed with a trust for the benefit of the supplementary pension holders. If successful, this argument would put the supplementary pensioners ahead of any of the claims ranked in s. 161(1).

5 The second group is made up of Messrs. J.A. Rhind and P.D. Burns, formerly Chairman and President, respectively, of Confederation. In the years 1980 to 1985, they participated in an arrangement pursuant to which part of what would have been their yearly compensation, instead of being paid out to them, was not, the company agreeing that it would be paid out to them following retirement. They would then pay tax on it, presumably at a lower rate than if it had been paid out during the years when it was earned. They, too, argued that this particular arrangement also constituted an annuity or policy of life insurance within the meaning of s. 161(1)(c) of the Act, thereby giving them the priority of policyholders as opposed to ordinary creditors.

6 Blair J. found that the supplementary pensioners were not policyholders because they were not annuitants. Neither were their arrangements within the *PBA*. He found that they were simply ordinary creditors. He also found that the deferred compensation claimants were not annuitants; they too were ordinary creditors.

7 In dealing with the larger group, Blair J. found that its claim to annuities depended upon two resolutions passed by Confederation in 1972 and 1975 which were never formalized. The arrangement operated on a case-by-case basis. What was authorized by the resolutions was a "retiring allowance" which, by the early 1990s, was being called a "supplementary pension arrangement." After a thorough examination of such documentation as was available, Blair J. found that the arrangement operated largely upon an individual pay-as-you-go basis and that the payments were:

> (a) unfunded;
>
> (b) unsecured;
>
> (c) contingent on the financial ability of Confederation to pay;

(d) unable to be transferred upon a change of employment;

(e) unavailable to those terminated for cause;

(f) conditional on the recipient being available to serve Confederation in a consulting capacity;

(g) conditional on the recipient not competing without Confederation's approval; and

(h) conditional on the recipient not communicating confidential information.

8 On the basis of these findings, Blair J. concluded that these arrangements were not true annuities and, even if they were, they were not annuities provided by way of "an undertaking entered into by an insurer" as contemplated by the life insurance provisions of the *Insurance Act*.

9 In finding that these were not true annuities, Blair J. concluded that:

> Central to the concept of an annuity is the alienation of capital — the payment of a sum of money or other asset *of a capital nature* — which is then turned into a flow of income, so that the capital is used up and replaced by the flow of income. In *O'Connor v. Minister of National Revenue, supra*, Thorson J. said, at p. 176 Ex. C.R., p. 167 D.L.R.:
>
> *"Ordinarily an annuity is thought of as a series of annual payments which a person has purchased or arranged for with a sum of money or other asset of a capital nature.* As Best J. said in *Winter v. Mouseley* (1819), 2 B. & Ald. 802 at 806 [106 E.R. 558]:
>
> > 'I have, however, always understood the meaning of an annuity to be where the principal is gone forever, and it is satisfied by periodical payments.'
>
> "In *Halsbury's Laws of England*, Second Edition, Vol 17, at page 181, this definition of an annuity is given:
>
> > 'An annuity is an income purchased with a sum of money or an asset, which then ceases to exist, the principal having been converted into an annuity.'
>
> "This accords with the ordinary acceptance of the term. The capital that went into the purchase of the annuity has been turned into a flow of income, so that the capital has disappeared altogether and only the flow of income continues."
>
> [Emphasis by Blair J.] (p. 747, *d — h*)

10 Blair J. also relied upon the decision in *Re Coopérants, Société mutuelle d'assurance-vie / Coopérants Mutual Life Insurance Society* (1993), 58 Q.A.C. 211. That too was the liquidation of an insurance company. The issue was whether various individual claimants and groups of claimants held annuities or whether they were ordinary creditors. Blair J. referred to paras. 92 to 96 of an unofficial English translation of the reasons of the Quebec Court of Appeal, para. 94 of which is as follows:

[*para 94*]

1997 CarswellOnt 62, 32 O.R. (3d) 102, 14 C.C.P.B. 1, 41 C.C.L.I. (2d) 1, 145 D.L.R. (4th) 747, (sub nom. Confederation Life Insurance Co. (Liquidation), Re) 97 O.A.C. 18, C.E.B. & P.G.R. 8308 (headnote only), C.E.B. & P.G.R. 8308 (headnote only), 70 A.C.W.S. (3d) 649

> The permanent alienation of the capital is a characteristic which distinguishes the annuity contract from the contract of loan for interest, because the capital is not reimbursable. [References not copied.]

The original reads as follows:

> [*para 92*]
>
> L'aliénation permanente du capital serait l'élément qui distingue le contrat de rente du contrat de prêt à intérêt, car le capital n'est pas remboursable. ...

11 Blair J. concluded that, without some consideration of a capital nature, some sort of pre-funding of the arrangement, it could not be a true annuity.

12 He also held that the arrangements could not be classified as annuities because they were not "entered into by an insurer" but were promised by Confederation as an employer. As such, they were not within the definition of "life insurance" in the *Insurance Act*. The fact that the employer happened to be an insurance company, he said, was pure coincidence. If a non-insurer employer made the same promise and the same arrangement, no one would suggest for a moment that it constituted an annuity. In *Coopérants*, all the contracts were arm's-length transactions entered into in the normal course of business. They were not, as here, in-house arrangements.

13 Blair J. adopted the analysis of the history of annuities in the Canadian retirement investment market and the consequent assimilation of "annuities" with life insurance by statute as detailed in *Coopérants*. He concluded that:

> The purpose of the regulatory scheme governing the insurance industry, and of the priority scheme enacted through s. 161(1) of the *Winding-up Act*, in my view, is to protect policyholders who invest funds with an insurance company. In such circumstances *the regulatory scheme established under the Insurance Companies Act requires that an adequate reserve be established to cover the actuarial liability associated with the investment. What the "policyholder" priority of s. 161(1)(c) does is to preserve access to that reserve by arm's length purchasers of financial services products from life insurance companies, when such companies become insolvent.*
>
> . . . . .
>
> The only reason the claimants are able to argue that their claims are claims of "policyholders" under the *Winding-up Act*, is because the liquidation of their employer, Confederation Life, is the liquidation of an insurance company. Parliament, in my opinion, could not have intended to treat employees differently, in terms of priority on the liquidation of their employer, simply because of the nature of their employer's business. That, however, would be the result if the claimants' position on the "policyholder" argument were to prevail. In my view, it cannot prevail. [Emphasis added.]

14 The second group of appellants, the deferred compensation claimants, also argued that they were annuitants and entitled to priority as policyholders under s. 161(1)(*c*) of the Act. The mechanics of their arrangement were outlined earlier. Mr. Burns retired in 1993 and received payments under the Deferred Compensation Plan until the winding-up order was made. Mr. Rhind had not yet received any such payments as he was not yet retired according to the definition under the Plan. As of December 31, 1993, including interest, there was

1997 CarswellOnt 62, 32 O.R. (3d) 102, 14 C.C.P.B. 1, 41 C.C.L.I. (2d) 1, 145 D.L.R. (4th) 747, (sub nom. Confederation Life Insurance Co. (Liquidation), Re) 97 O.A.C. 18, C.E.B. & P.G.R. 8308 (headnote only), C.E.B. & P.G.R. 8308 (headnote only), 70 A.C.W.S. (3d) 649

$707,142.76 in Mr. Rhind's deferred compensation account and $478,637 in Mr. Burns' account. These were book entries only. None of the money had been set aside, nor was it ever intended by anyone that it should be set aside.

15 The Deferred Compensation Plan was reduced to writing and was approved by Revenue Canada. None of the language employed includes the word annuity nor is there any suggestion in the plan that it is a policy of insurance. The plan provides that upon retirement the deferred amount is payable at equal intervals over a period from one month to fifteen years at the retiree's choice. Other provisions deal with the events of death before retirement and death after retirement but before the payment out of all of the money. The only unusual feature of the plan is the provision that if the individual is convicted of a criminal act he may be disentitled. The provision reads as follows:

> **Conviction of A Criminal Act**
>
> If the Member engages in any theft, breach of trust, embezzlement or other fraudulent activity which is, in the opinion of the Employer, detrimental to the best interest of the Employer all of the Member's rights hereunder shall forthwith terminate and he shall have no right to the payment of any amount hereunder.

No explanation was provided for the inclusion of this clause, nor was there any suggestion as to how it could be consistent with an annuity.

16 Using the same approach as he did with respect to the supplementary pension arrangement, Blair J. concluded that the Deferred Compensation Plan did not constitute an annuity. I agree entirely with his conclusions with respect to annuities. Neither arrangement under consideration is a true annuity.

17 The attack on his decision with respect to annuities was based on three cases: *Coopérants, supra, Re British Union & National Insurance Co.*, [1914] 1 Ch. 724, reversed [1914] 2 Ch. 77 (C.A.), and *Ceylon Commissioner of Inland Revenue v. Rajaratnam*, [1971] T.R. 451 (P.C.). It is argued that in dealing with *Coopérants*, Blair J. relied on the requirements for an annuity as set out in the *Civil Code* of the Province of Quebec and that the instant case being an Ontario liquidation, those provisions are neither applicable nor relevant. It is also submitted that those parts of the reasons in *Coopérants* dealing with annuities at common law do not support the conclusions reached by Blair J. It is argued that the English decisions in *British Union* and *Ceylon* demonstrate that it is not the contribution of an asset of a capital nature which distinguishes an annuity from a mere debt, but rather the promise of a stream of future payments and the promisee's reliance on the receipt of these payments. It is submitted that the reasoning in these latter cases ought to have been followed in this case.

18 I agree that Blair J.'s specific reference at p. 747*h* of his reasons is to those paragraphs of the *Coopérants* reasons dealing with the *Civil Code*. Blair J. was dealing with an unofficial English translation; the paragraph numbers there are [92] to [96]. The numbering in the French original is slightly different and, in (1993), 58 Q.A.C. p. 230, the paragraphs are numbers [90] to [93].

19 Paragraph [94] (English) and paragraph [92] (French) is central to the present inquiry and is repeated here:

> [94] The permanent alienation of the capital is a characteristic which distinguishes the annuity contract from the contract of loan for interest, because the capital is not reimbursable.

1997 CarswellOnt 62, 32 O.R. (3d) 102, 14 C.C.P.B. 1, 41 C.C.L.I. (2d) 1, 145 D.L.R. (4th) 747, (sub nom. Confederation Life Insurance Co. (Liquidation), Re) 97 O.A.C. 18, C.E.B. & P.G.R. 8308 (headnote only), C.E.B. & P.G.R. 8308 (headnote only), 70 A.C.W.S. (3d) 649

> [92] L'aliénation permanente du capital serait l'élément qui distingue le contrat de rente du contrat de prêt à intérêt, car le capital n'est pas remboursable. ...

20 That statement is based upon Article 1787 of the *Code* which reads as follows:

> 1787. Constitution of rent is a contract by which parties agree that yearly interest shall be paid by one of them upon a sum of money due to the other or furnished by him, to remain permanently in the hands of the former *as a capital* of which payment shall not be demanded by the party furnishing it, except as hereinafter provided.
>
> Art. 1787. La constitution de rente est un contrat par lequel les parties conviennent du paiement par l'une d'elles de l'intérêt annuel sur une somme d'argent, due à l'autre ou par elle comptée, pour demeurer permanemment entre les mains de la première *comme un capital* qui ne doit pas être demandé par la partie qui l'a fourni, excepté dans les cas ciaprès mentionnés. [Emphasis added.]

21 Clearly, the *Code* recognizes the existence of a capital fund as essential to the concept of an annuity.

22 I do not agree that the fact that such a provision is in the *Code* is not relevant to an Ontario court concerned with the significance of the word "annuity" in an Ontario context. The decision of the Supreme Court of Canada in *Kerslake v. Gray* (1957), (sub nom. *Gray v. Kerslake)* [1958] S.C.R. 3, to the effect that an annuity did not fall within the definition of life insurance in the *Insurance Act* of Ontario, resulted in legislation across Canada to make an annuity life insurance by definition. See *Coopérants* at p. 220, para. [34] (French). Accordingly, this court must be concerned with the interpretation of "annuity" in an insurance context anywhere in Canada.

23 Although Blair J.'s specific reference was to that part of the reasons in *Coopérants* dealing with the *Code* , the Quebec Court of Appeal in that case also considered annuities from a common law perspective. In particular, reference may be made to paragraphs [43], [46], [78], [79], [81] and [82] (English) and [38], [41], [76], [77], [79] and [80] (French):

> [43] All the contracts in question in this appeal were transacted within the framework of the business of a life insurance company with respect to the domain of retirement funds. Each and every one is linked to the various means generally offered by insurance companies to insure the *capitalization* and distribution of various pension plans.
>
> [46] Life insurance companies constitute the principal sources of financing of group retirement plans for enterprises with a limited number of persons and which specifically seek a safe *capitalization* of their pension plan. Plans with a large number of participants have a tendency to retain the services of other financial institutions.
>
> [78] An examination of the R-9 contracts demonstrates that all the contracts were entered into during the course of the annuities' business transacted by insurers. These various contracts confer on the participant of a retirement plan either the right to a policy subscribed in his name for the case of assured deferred annuity contracts or the right to require, upon retirement, that the accumulated value in his deposit account be applied to the purchase of an annuity according to the terms provided in the retirement plan, in the case of deferred annuity contracts. *The value of the annuity will thus depend on the sum in capital remitted to the*

debtor and the interest accrued thereon.

[79] All these contracts have the same object and goal: the payment of retirement benefits to individuals. It is without doubt, however, that these contracts do not confer the same guarantee, because the amount of future benefits is only guaranteed for assured deferred annuity contracts. All the non-assured deferred annuity contracts guarantee, however, *the value of the sum paid to the debtor for the accumulation of an annuity* and a minimum interest on this capital. In remitting the premiums it receives into its general fund, the insurance company transfers for its own profit *the capital* that it must, in virtue of the annuity contracts entered into by it, remit to the participants upon their retirement. *In order to guarantee this obligation, the Act respecting Insurance (R.S.O., c. A-32, section 276) requires every insurance company to maintain sufficient re- serves.*

[81] *It would appear that the preservation of the financial security attached to an insurance policy was underlying principle for the federal legislator when it stipulated that the claims of policyholders would be paid in priority in the event of the liquidation of a life insurance company.* The *Winding-up Act* demonstrates the desire of the legislator to protect people who put their confidence in an insurance company because they are generally institutions whose financial stability is not in doubt.

[82] In assimilating an annuity contract transacted by an insurer to an insurance policy, the legislator even intended to preserve, due to the financial stability of insurance companies, the financial security attached to the annuity contract. An annuity and life insurance are, in effect, two means by which a person can protect himself against financial risks. Insurance permits an accumulation of a capital upon the death of the insured in order to protect the beneficiaries against the negative financial effects of death. The goal of *an annuity is a liquidation of a patrimony in order to ensure the annuitant a stable revenue during the protection phase.*

[38] Les contrats faisant l'objet du présent litige ont tous été conclus dans le cadre des activités d'une société d'assurance-vie dans le domaine des caisses de retraite. Ils se rattachent tous à l'un ou l'autre des divers modes généralement offerts par les sociétés d'assurance pour assurer *la capitalisation* et la distribution des divers régimes de retraite.

[41] Les sociétés d'assurance-vie constituent les sources les plus courantes de financement de régimes de retraite collectifs pour les entreprises comptant un nombre limité de personnes et qui recherchent particulièrement la sécurité concernant *la capitalisation* de leur régime de pension. Les régimes comportant un grand nombre de participants ont tendance à retenir les services d'autres institutions financières.

[76] L'examen des contrats R-9 a permis de constater que tous ces contrats s'inscrivent dans le commerce des rentes pratiquées par les assureurs. Ces divers contrats confèrent au participant à un régime de retraite, soit le droit d'entrer en possession de la police souscrite en son nom dans le cas des contrats de rentes différées assurées, soit le droit d'exiger, lors de la retraite, que la valeur accumulée de son compte de depôt soit appliquée à l'achat d'une rente selon les modalités prévues au régime de retraite, dans le cas des contrats de rentes différées. *La quotité de la rente dans ces contrats dépendra alors de la somme en capital remise à la débitrice et de l'intérêt gagné sur le capital.*

[77] Tous ces contrats ont un même objet et une même finalité: le versement de prestations de retraite à des individus. Sans doute tous ces contrats ne confèrent-ils pas la même garantie puisque le montant des prestations futures n'est garanti que dans les contrats de rentes différées assurées. *Tous les contrats de rentes différées non assurées garantissent cependant la valeur de la somme versée à la débitrice pour*

l'accumulation de la rente et un taux minimum sur ce capital. En versant les cotisations qu'elle reçoit à son fonds général, la société d'assurance aliène à son profit un capital qu'elle devra, en vertu des contrats de rentes qu'elle a conclus, remettre aux participants lors de leur retraite. *Pour garantir cette obligation, la Loi sur les assurances (L.R.O. 1977, c. A-32, article 276) impose à toute société d'assurance de maintenir des réserves suffisantes.*

[79] *Or la préservation de la sécurité financière attachée à une police d'assurance apparaît comme le principe directeur qui a guidé le législateur fédéral lorsqu'il a prévu que les réclamations des porteurs de police seraient acquittées prioritairement lors d'une liquidation d'une société d'assurance-vie.* La *Loi sur les liquidations* exprime la préoccupation du législateur de protéger les personnes qui ont fait confiance à une société d'assurance parce qu'il s'agit généralement d'institutions dont la viabilité financière n'est pas mise en doute.

[80] En assimilant le contrat de rente pratiqué par un assureur a une police d'assurance, le législateur entendait de même préserver, grâe à la stabilité financière des sociétés d'assurances, la sécurité financière attachée à un contrat de rente. La rente et l'assurance sur la vie sont, en effet, les deux moyens par lesquels une personne peut se protéger contre les risques financiers. L'assurance permet l'accumulation d'un capital au décès de l'assuré en vue de protéger les bénéficiaires contre les effets financiers néfastes de ce décès. *La rente a pour objectif la liquidation d'un patrimoine assurant le crédirentier d'un revenu stable pendant la période de protection.* [Emphasis added.]

24 In my view, the decision in *Coopérants*, based upon both common law and the *Code Civil*, is both highly relevant and persuasive in the instant context and fully supports the conclusions reached by Blair J.

25 (The new Quebec *Civil Code* came into effect on January 1, 1994. Substantial parts of it have been rewritten and reorganized. For instance, there are now separate parts dealing with annuities generally and with insurance generally. Both are found in Book Five, "Obligations", Title Two "Nominate Contracts", Annuities in Chapter XIV and Insurance in chapter XV. Chapter XIV "Annuities," Section I "Nature of the contract and scope of the rules governing it" consists of three articles. They read as follows:

2367 A contract for the constitution of an annuity is a contract by which a person, the debtor, undertakes, gratuitously or in exchange for the alienation of capital for his benefit, to make periodical payments to another person, the annuitant, for a certain time.

The capital may consist of immovable or movable property; if it is a sum or money, it may be paid in cash or by instalments.

2368. Where the debtor undertakes to pay the annuity in return for the transfer, for his benefit, of ownership of an immovable, the contract is called alienation for rent and it is principally governed by the rules respecting the contract of sale, to which it is similar.

2369. An annuity may be constituted for the benefit of a person other than the person who furnishes the cap-

In such a case, the contract is not subject to the forms required for gifts even though the annuity so constituted is received gratuitously by the annuitant.

1997 CarswellOnt 62, 32 O.R. (3d) 102, 14 C.C.P.B. 1, 41 C.C.L.I. (2d) 1, 145 D.L.R. (4th) 747, (sub nom. Confederation Life Insurance Co. (Liquidation), Re) 97 O.A.C. 18, C.E.B. & P.G.R. 8308 (headnote only), C.E.B. & P.G.R. 8308 (headnote only), 70 A.C.W.S. (3d) 649

Section III "Certain effects of the contract" includes the following articles:

> *2379.* The designation or revocation of an annuitant, other than the person who furnished the capital of the annuity, is governed by the rules respecting stipulation for another.
>
> However, the designation or revocation of an annuitant, in respect of annuities transaction by insurers or of retirement plan annuities, is governed by those rules respecting the contract of insurance which relate to beneficiaries and subrogated holders, adapted as required.
>
> . . . . .
>
> *2384.* The debtor of an annuity may appoint an authorized insurer to replace him, by paying him the value of the annuity.
>
> Similarly, the owner of an immovable charged as security for the payment of the annuity may substitute the security offered by an authorized insurer for that securing the annuity.
>
> The annuitant may not object to the substitution, but he may require that the purchase of the annuity be made with another insurer, or he may contest the determined capital value or the value of the annuity arising therefrom.
>
> . . . . .
>
> *2386.* The non-payment of the annuity is not a reason to permit the annuitant to demand recovery of the capital alienated for the constitution of the annuity; it only allows him, beyond demanding payment of the amount due, to seize and sell the property of the debtor, and to require or order the use of a sufficient amount, from the proceeds of the sale, to ensure payment of the annuity or to require that the debtor be replaced by an authorized insurer.
>
> Payment of the capital may be required, however, if the debtor becomes insolvent or bankrupt or decreases, by his act and without the consent of the annuitant, the security he has furnished to ensure the payment of the annuity.

26 In Chapter XIV, "Insurance", Section I "General provisions", § 1. — "Nature of the contract of insurance and classes of insurance", Article 2393 provides as follows:

> *2393.* Life insurance guarantees payment of the agreed amount upon the death of the insured; it may also guarantee payment of the agreed amount during the lifetime of the insured, on his surviving a specified period or on the occurrence of an event related to his existence.
>
> Life or fixed-term annuities transacted by insurers are assimilated to life insurance but remain also governed by the chapter on Annuities. However, the rules in this chapter relating to unseizability apply to such annuities with priority.

27 It appears that although the *Code* now provides expressly for what might be called "gratuitous annuities," such as those considered in *Ceylon, supra*, arrangements of the nature of those under consideration in the instant case are, for regulatory purposes, to be a form of life insurance and, as such, must conform with the funding and

reserve requirements of life insurance.

28 The new *Code* was not referred to by Blair J. or by counsel on the appeal.)

29 *British Union* is not mentioned by Blair J., although the court was advised that it was referred to him. British Union was incorporated in 1909 to carry on a variety of types of insurance business, including life insurance and annuities. The company deposited 20,000£ into court as a requirement of carrying on a life insurance business. A Mr. Urch was employed as general manager and, when the company ceased the life insurance business, negotiations took place with a view to his retirement. These led to litigation which was settled on terms whereby the company agreed to pay him an annuity at a fixed rate for life. In return, he gave up any claim under his employment contract with the company. He also agreed to a form of non-competition clause. The company was later wound up. The claims of the life policyholders were settled but there were many claims on the fire and accident policies and many general creditors. The issues litigated were whether the remaining policyholders ranked ahead of the general creditors and whether Urch's claim ranked ahead of the remaining policyholders.

30 It was held at first instance by Astbury J. that, while annuity holders generally could share with life policyholders, Urch could not because his annuity had not been granted in the ordinary course of business:

> ... But it is to be observed that in those cases [annuities sold in the ordinary course] the consideration for the grant of the annuity would form part of the life annuity fund, and the persons entitled to be so regarded as policyholders would be confined, and I think ought to be confined, to those who have made the appropriate subscriptions to the life annuity fund of the company. [p. 739]

31 Urch's claim was accordingly dismissed.

32 On appeal the claim was allowed. Cozens-Hardy M.R. held that the deposit fund was part of the life assurance fund and it was:

> ... absolutely the security of the life policyholders and cannot be dealt with as free general assets of the company until after all such claims have been satisfied.
>
> The only question is whether Mr. Urch is a life policyholder within the meaning of the Act.

33 Swinfen Eady L.J. said, at p. 87:

> ... I am of opinion that an annuity granted in good faith and for value is entitled to the security of the life assurance fund.

Urch was found to hold a valid annuity for which valid consideration had been paid, notwithstanding that it had not been paid in cash. No inquiry appears to have been made as to whether British Union made the appropriate or required adjustments to its books in order to fund the annuity granted to Urch. There can be no doubt that both sides entered the transaction in good faith and intended to grant and to receive an annuity.

34 Here, there was no such intention that annuities be created, nor was there ever any intention that the necessary funding be provided. The members of the group of supplementary pensioners were the senior executives of the company. Most, if not all of them, would have been aware that there was no funding whatever. Having re-

gard to these different circumstances. I do not find *British Union* persuasive in this context.

35 The other case relied upon by the appellants is *Ceylon*; it is not referred to in the reasons of Blair J. In *Ceylon*, for income tax purposes, a taxpayer sought to deduct from his income, payments made by him to his two brothers. The payments were made pursuant to deeds of covenant under seal whereby, for natural love and affection, the paying brother covenanted to pay each of the others a specified sum annually for seven years. The Privy Council agreed with the Supreme Court of Ceylon that:

> ... A right to receive recurring annual payments, which are income in the hands of the payee [and thus subject to tax], can properly be described as an "annuity," even though the payee has not acquired the right by purchasing it for a capital sum but in some other way (as, for example, by testamentary bequest or under a voluntary covenant). [p. 454]

36 It is argued that, in the instant case, there was more than a voluntary covenant, there was the solemn promise of Confederation, given to its senior executives in return, no doubt, for long and faithful service, to make the payments in question. But while the same word "annuity" is used, the contexts are entirely different.

37 Our context involves the distribution of the assets of an insurance company and the potential dilution of the rights of the owners of commercially purchased insurance policies who are protected from the time of purchase by reserves. The dilution would be effected by employment agreements whose only similarity to policies of insurance or annuities is the promise of periodic payments for a life or lives. Yet they are conditional upon good behavior, and, to the knowledge of all, dependent upon the continued financial health of the company, the very failure of which precipitated the claims. It would be a distortion of the intent and purpose of the Act to import language from *Ceylon*, an income tax case, to convert an employer-employee contract into a policy of insurance.

38 I would therefore dismiss the appeal in so far as it rests upon the proposition that either of the appellant groups is entitled to succeed on the basis that its members are policyholders.

39 The alternative argument of the supplementary pensioners was that the characteristics of the arrangement made by Confederation to "top up" their retirement income were such that the arrangement fell within the definition of a "pension plan" in the PBA. As a consequence, Confederation was bound to observe the requirements of that Act and there was therefore a deemed statutory trust of an amount sufficient to fund the arrangements and a statutory lien and charge against the company's assets for that amount.

40 Blair J. concluded that the so-called supplementary pension arrangement was not a pension plan as contemplated by the PBA for two reasons. First, they were not intended to be pensions but retirement allowances which are expressly excluded from the PBA. Second, the arrangement did not constitute a "plan organized and administered to provide pensions to employees" as required by the PBA.

41 The appellants relied heavily on the decision of this court in *Re St. Marys Paper Inc.* (1994), 19 O.R. (3d) 163 (C.A.). Ernst & Young Inc. was the trustee in bankruptcy of St. Marys Paper and continued the operation so as to be able to sell it as a going concern. Although the trustee agreed to continue the pension plans, it expressly did not accept responsibility for any unfunded pension liabilities. The administrator of the plans took the position that, as the trustee had become the employer, the PBA imposed responsibility upon the trustee for the unfunded liabilities. The trustee's application for a declaration to the contrary was refused. In dismissing the

appeal from that refusal, the majority of this court said, at pp. 173 and 174:

> 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. This obligation is central to the regulatory scheme established by the PBA. The Act requires that its minimum funding standards be met. It does not allow for special deals which dilute or might eliminate these minimum funding requirements. Thus, the fact that the workers may be taken to have agreed that the appellant would not be responsible for the plans' unfunded liabilities is no assistance to the appellant. ...
>
> . . . . .
>
> In our opinion, the appellant was an "employer" which was obligated by its agreement with the employees, and was therefore required by statute to make contributions under the two pension plans. ...
>
> . . . . .
>
> Although it undoubtedly did not intend to do so, in our view, the appellant dealt with St. Marys workers in such a way as to make itself liable for special payments in respect of the two pension plans' unfunded liabilities.

42 In my view, *St. Marys* has no application in the present circumstances. In *St. Mary's*, the pension plan was clearly within the PBA, whereas here, that is the question to be answered. I agree with Blair J. that the Confederation arrangement did not fit within the ambit of the PBA. The arrangement that was authorized by resolution was to provide a "retiring allowance" and that is what it was called until the early 1990s. No resolution was ever passed to change the name or the character of the payments. The PBA, by its definition of "pension plan," excludes a "retiring allowance" from its ambit. Blair J. concluded that these were retiring allowances. In my view, it is not necessary to decide whether the payments made here were in fact retiring allowances; all that is necessary is to decide whether or not they were pension benefits. I agree with Blair J. that they were not.

43 I also agree with him that this was not a plan "organized and administered" to provide pensions as required by the definition of "pension plan" in the PBA. Section 10(1) of that Act reads as follows:

> *10.* (1) The documents that create and support a pension plan shall set out the following information:
>
> 1. The method of appointment and the details of appointment of the administrator of the pension plan.
>
> 2. The conditions for membership in the pension plan.
>
> 3. The benefits and rights that are to accrue upon termination of employment, termination of membership, retirement or death.
>
> 4. The normal retirement date under the pension plan.
>
> 5. The requirements for entitlement under the pension plan to any pension benefit or ancillary benefit.
>
> 6. The contributions or the method of calculating the contributions required by the pension plan.

7. The method of determining benefits payable under the pension plan.

8. The method of calculating interest to be credited to contributions under the pension plan.

9. The mechanism for payment of the cost of administration of the pension plan and pension fund.

10. The mechanism for establishing and maintaining the pension fund.

11. The treatment of surplus during the continuation of the pension plan and on the wind up of the pension plan.

12. The obligation of the administrator to provide members with information and documents required to be disclosed under this Act and the regulations.

13. The method of allocation of the assets of the pension plan on windup.

14. Particulars of any predecessor pension plan under which members of the pension plan may be entitled to pension benefits.

15. Any other prescribed information related to the pension plan or pension fund or both.

44 I agree with the observation of Blair J. that:

> With the exception of a nod in the direction of items number 3 and 7 above, and possibly item number 4, the Confederation Life arrangements do not feature any of these characteristics. [p. 794]

45 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 with a pension registrable under the PBA, thus supporting the conclusion that Confederation's arrangement was not a plan "organized and administered" to provide pensions.

46 Perhaps more important, s. 10(1) of the PBA requires that:

> The documents that create and support a pension plan shall set out ...
>
> 6. The contributions or the method of calculating the contributions required by the pension plan.

That is, 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. There was never any funding.

47 The appellant's response to such arguments is that, while Confederation's arrangement may inadvertently, or even advertently, have failed to comply with the minimum requirements of the PBA, its essential characteristics bring it within the Act. Once within the Act, the court may be called upon to strike down any offend-

ing features, such as non-competition covenants. In my view, the evidence presented is totally inadequate to support or justify such an exercise. Where knowledgeable people deliberately set out to create an arrangement with known and accepted limitations, the PBA does not oblige the court to add terms for their assistance, particularly when to do so would be to benefit the authors at the expense of others.

48 In his reasons, Blair J. dealt with the question whether, in the event the supplementary pension plan was found to engage the PBA, s. 57(3) and (5) of the PBA created a "deemed trust" and a lien on the assets of Confederation. In view of my conclusions, it is not necessary to consider that question nor whether Ontario Regulation 909, s. 47(3), as amended to October 28, 1994, by Ontario Regulation 665/94, s. 3(1) had any retrospective application.

49 I would therefore dismiss both appeals. I would award counsel for the liquidator their costs on each appeal, although they were argued as a single appeal, on a solicitor and client basis, from the proceeds of the liquidation. As counsel for the supplementary pensioners were appointed by the court to represent that class, I would award them their costs on the same basis and from the same source. The other parties before this court did not ask for costs and accordingly I would award them none.

Appeal dismissed.

END OF DOCUMENT

TAB 3

2008 CarswellOnt 7448, 45 E.T.R. (3d) 84

2008 CarswellOnt 7448, 45 E.T.R. (3d) 84

Elliott (Litigation Guardian of) v. Elliott Estate

In the Estate of Jean Elliott

KAREN BROWN, as Litigation Guardian of the Property and Personal Care for Barbara Elliott (Applicant) and ESTATE OF JEAN ELLIOTT and GORDON ELLIOTT (Respondents)

SHIRLEY FLAGLER (Applicant) and GORDON FREDERICK ELLIOTT, KAREN BROWN, Executors and Trustees of the Estate of JEAN ELLIOTT, Deceased, MARGARET DELORY, KATHRYN LEE, GORDON FREDERICK ELLIOTT, KAREN BROWN and KAREN BROWN, as Litigation Guardian of the Property and Personal Care for BARBARA ELLIOTT (Respondents)

Ontario Superior Court of Justice

Lauwers J.

Heard: September 19, 2008
Judgment: December 5, 2008
Docket: Peterborough 197/08, 228/08

Counsel: J.S. Hauraney for Karen Brown

D.J.M. O'Neill for Gordon F. Elliott

J. McGarrity for Shirley Flagler

Subject: Estates and Trusts

Estates and trusts --- Trusts — Express trust — Creation — Three certainties — Intention — General principles

On testator's death, she had five surviving independent adult children, and one dependent child — Dependant had down syndrome — Testator didn't include dependent in her will as she intended to make provision for her through separate agreement — During her life, testator set up GIC account with $50,000 to be held in trust for dependent — Applicant was guardian of property and personal care and also litigation guardian of dependent — Applicant brought application for order that estate pay reasonable provisions for proper support of dependent — It was ordered that GIC account be held in trust for dependent — GIC fund constituted discretionary inter vivos trust for dependent created by testator — Testator used fund during her life for purposes other than maintenance of dependant.

Estates and trusts --- Trusts — Express trust — Creation — Three certainties — Subject-matter

On testator's death, she had five surviving independent adult children, and one dependent child — Dependant had down syndrome — Testator didn't include dependent in her will as she intended to make provision for her through separate agreement — During her life, testator set up GIC account with $50,000 to be held in trust for dependent — Applicant was guardian of property and personal care and also litigation guardian of dependent — Applicant brought application for order that estate pay reasonable provisions for proper support of dependent — It was ordered that GIC account be held in trust for dependent — GIC fund constituted discretionary inter vivos trust for dependent created by testator — Testator used fund during her life for purposes other than maintenance of dependant.

Estates and trusts --- Trusts — Express trust — Creation — Three certainties — Object

On testator's death, she had five surviving independent adult children, and one dependent child — Dependant had down syndrome — Testator didn't include dependent in her will as she intended to make provision for her through separate agreement — During her life, testator set up GIC account with $50,000 to be held in trust for dependent — Applicant was guardian of property and personal care and also litigation guardian of dependent — Applicant brought application for order that estate pay reasonable provisions for proper support of dependent — It was ordered that GIC account be held in trust for dependent — GIC fund constituted discretionary inter vivos trust for dependent created by testator — Testator used fund during her life for purposes other than maintenance of dependant.

Estates and trusts --- Trustees — Nature of trustee's office — Appointment of new trustees — Under statutory power.

Estates and trusts --- Trustees — Nature of trustee's office — Removal of trustee.

Estates and trusts --- Trustees — Powers and duties of trustees — Accounts — Miscellaneous issues.

Cases considered by *Lauwers J.*:

Bathgate v. National Hockey League Pension Society (1994), 1994 CarswellOnt 643, 16 O.R. (3d) 761, 1 C.C.P.B. 209, 69 O.A.C. 269, 2 C.C.E.L. (2d) 94, 110 D.L.R. (4th) 609, 2 E.T.R. (2d) 1 (Ont. C.A.) — referred to

Bathgate v. National Hockey League Pension Society (1994), 4 E.T.R. (2d) 36, 4 C.C.P.B. 272 (note) (S.C.C.) — referred to

Byers v. Foley (1993), 2 E.T.R. (2d) 55, 109 D.L.R. (4th) 761, 16 O.R. (3d) 641, 1993 CarswellOnt 558 (Ont. Gen. Div.) — followed

Canada (Attorney General) v. Ristimaki (2000), 2000 CarswellOnt 30, 46 O.R. (3d) 721, 4 R.F.L. (5th) 167 (Ont. S.C.J.) — referred to

Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc. (2002), 217 D.L.R. (4th) 178, 50 C.C.L.I. (3d) 6, 2002 CarswellOnt 2707, 61 O.R. (3d) 296, 162 O.A.C. 203 (Ont. C.A.) — considered

Consiglio, Re (1973), [1973] 3 O.R. 326, 36 D.L.R. (3d) 658, 1973 CarswellOnt 861 (Ont. C.A.) — con- sidered

Granite Insurance Co. v. Toronto Dominion Bank (2006), 2006 CarswellOnt 9609, 62 C.C.L.I. (4th) 91 (Ont. S.C.J.) — referred to

Guy v. Northumberland (County) Department of Social Services (2001), (sub nom. *Guy v. Ontario Works)* 147 O.A.C. 261, (sub nom. *Guy v. Ontario Works (Administrator))* 201 D.L.R. (4th) 752, 2001 CarswellOnt 1856 (Ont. Div. Ct.) — referred to

Jones v. Lock (1865), (1865-66) L.R. 1 Ch. App. 25 (Eng. Ch. App.) — referred to

Letterstedt v. Broers (1884), (1883-84) L.R. 9 App. Cas. 371, [1881-85] All E.R. Rep. 882 (South Africa P.C.) — referred to

Lilly v. Phillips (2006), 2006 CarswellOnt 5171 (Ont. S.C.J.) — referred to

Mellen, Re (1933), [1933] O.W.N. 246 (Ont. C.A.) — referred to

Mellen, Re (1933), [1933] O.W.N. 118 (Ont. H.C.) — considered

Ocean Man Trust, Re (1993), 1993 CarswellSask 88, 50 E.T.R. 150, 113 Sask. R. 179, 52 W.A.C. 179 (Sask. C.A.) — referred to

Ontario (Director of Income Maintenance, Ministry of Community & Social Services) v. Henson (1987), 1987 CarswellOnt 654, 28 E.T.R. 121, (sub nom. *Director of Income Maintenance (Ontario) v. Henson)* 26 O.A.C. 332 (Ont. Div. Ct.) — referred to

Ontario (Director of Income Maintenance, Ministry of Community & Social Services) v. Henson (1989), 36 E.T.R. 192, 1989 CarswellOnt 542 (Ont. C.A.) — referred to

Ontario (Director of Income Maintenance, Ministry of Community & Social Services) v. Powell (1989), 36 O.A.C. 310, 38 E.T.R. 205, 1989 CarswellOnt 546 (Ont. Div. Ct.) — referred to

Ozad v. Ontario (Director of Income Maintenance, Ministry of Community & Social Services) (1998), 1998 CarswellOnt 6699 (Ont. Div. Ct.) — referred to

Paul v. Constance (1977), [1977] 1 W.L.R. 527, [1977] 1 All E.R. 195 (Eng. C.A.) — considered

Transamerica Occidental Life Insurance Co. v. Toronto Dominion Bank (1998), 22 E.T.R. (2d) 106, 1998 CarswellOnt 1311, 60 O.T.C. 11 (Ont. Gen. Div.) — referred to

Statutes considered:

Statute of Frauds, R.S.O. 1990, c. S.19

s. 4 — referred to

ss. 9-11 — referred to

Succession Law Reform Act, R.S.O. 1990, c. S.26

s. 58 — referred to

Trustee Act, R.S.O. 1990, c. T.23

Generally — referred to

s. 1 "personal representative" — referred to

s. 3(1) — considered

s. 3(2) — considered

s. 5(1) — referred to

s. 37 — referred to

APPLICATION by litigation guardian of dependent for order that estate pay reasonable provisions for proper support of dependent.

***Lauwers J.*:**

1 There are five surviving independent adult children of the late Robert Elliott and Jean Elliott, being Gordon Elliott, Karen Brown, Shirley Flagler, Margaret Delory and Kathryn Lee, and one dependant adult child, being Barbara Elliott, who has Down syndrome. Robert Elliott predeceased Jean Elliott, who in turn passed away on January 12, 2005.

2 Jean Elliott's last Will and Testament (the "Will"), dated December 15, 1986, named four of her independent children as beneficiaries. Gordon Elliott was excluded from the Will as a beneficiary since he had previously received the family farm and its equipment. Barbara Elliott was excluded from the Will because Jean Elliott intended to make provisions for her through a separate agreement, described below. The current executors of the Estate of Jean Elliott (the "Estate") are Gordon Elliott and Karen Brown.

3 There are two applications before the Court. The first, in which Shirley Flagler is the applicant, is for an order under section 37 of the *Trustee Act*, R.S.O. 1990, c. T.23 replacing the current executors of the Estate with Edward Holek, a chartered accountant. The respondents are her siblings, including Karen Brown in her capacity as guardian of property of Barbara Elliott. Margaret Delorey and Kathryn Lee are unrepresented.

4 The second application is by Karen Brown, who, by virtue of her position as guardian of property and personal care for Barbara Elliott, is acting as litigation guardian for Barbara Elliott. The respondents are the Estate and Gordon Elliott. The application is for an order under section 58 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 that the Estate "pay reasonable provisions ... for the proper support of Barbara Elliott."

The Consent to Order

5 The represented parties have signed a Consent to Order to deal with some of the issues. It is set out below to establish the context for the remaining issue to be decided and to lay out more of the relevant facts:

The following terms are made on consent:

(a) The current executors of the Estate of Jean Elliott namely Gordon Elliott and Karen Brown shall be removed and replaced by Edward Holek. Mr. Holek shall not be required to provide security.

(b) Gordon Elliott and Karen Brown shall provide their accounts in the form required by Rule 74.17 within four weeks of this order. That accounts shall include all assets held jointly with third parties on the date of death of Jean Elliott. The account shall cover the period between Jan 12, 2005 and September 19, 2008.

(c) All Estate assets shall be transferred and delivered to Ed Holek including Kawartha Credit Union (this account shall not include Kawartha Credit Union Acct. 1087782 which is dealt with below).

(d) There shall be no executor's fees payable to Karen Brown or Gordon Elliott.

(e) The trustees namely Karen Brown and Gordon Elliott as named is the contract dated February 11, 1993 (exhibit B of Shirley Flagler's affidavit sworn July 30, 2008) shall be replaced by Edward Holek. Mr. Holek shall administer Barbara Elliott's Trust Fund based upon the terms of the said contract.

(f) The portion of the beneficiaries' share of the Estate pursuant to paragraph 1 of the 1993 agreement, specifically Gordon Elliott, Karen Brown, Shirley Flagler, Margaret Delorey and Kathryn Lee, shall be paid into the trust fund for the benefit of Barb Elliott to be administered by Ed Holek after the will [of] Jean Elliott is finally administered.

(g) All receipts and expenses claimed to date by Karen Brown with regard to payments made for the benefit of Barbara Elliott shall be provided to Ed Holek for his approval to be paid from the trust fund following its creation pursuant to the February 11, 1993 agreement.

(h) The Estate shall pay costs in the amount of $6,500 plus GST to each of Dave O'Neill, James Hauraney and John McGarrity [legal counsel to the parties] and payable from the Estate at the time that funds are dispersed to the beneficiaries.

(i) No further legal fees will be paid from the Estate, with respect to the parties within.

6 In seeking the removal and replacement of the co-executors, Karen Brown and Gordon Elliott, the application of Shirley Flagler relied on subsection 5(1) of the *Trustee Act*:

Power of court to appoint new trustees

5.(1) The Superior Court of Justice may make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

7 The administration of a trust in the interests of the beneficiaries can become impossible or improbable because of friction and hostility between the personal representatives or trustees: *Bathgate v. National Hockey League Pension Society* (1994), 16 O.R. (3d) 761 (Ont. C.A.) at 777, leave to appeal to S.C.C. refused, 24095 (April 18, 1994) [(1994), 4 E.T.R. (2d) 36 (S.C.C.)]. See also *Letterstedt v. Broers* (1884), [1881-85] All E.R. Rep. 882 (South Africa P.C.); *Ocean Man Trust, Re*, [1993] S.J. No. 367 (Sask. C.A.). For example, in *Con-*

siglio, Re, [1973] 3 O.R. 326 (Ont. C.A.) at 328, the Ontario Court of Appeal held that misconduct on the part of a trustee is not a necessary requirement to justify his removal by the Court, and the Court would be required to interfere "when the continued administration of the trust with due regard for the interests of the *cestui que trust* has by virtue of the situation arising between the trustees become impossible or improbable." This situation was present in that case:

> It was clear from the outset that there had developed wide spread misunderstandings among the three trustees and that as a result of accusations made, bitterness had developed that would render it virtually impossible for the trustees to agree on policies having to do with the efficient management of the Trust.

8 Karen Brown and Gordon Elliott have reached an impasse, as the evidence shows and the consent effectively admits. The administration of the Estate and the establishment of the Barbara Elliott Trust Fund, discussed below, have been put on hold as a result. The Estate has already incurred legal costs and would continue to diminish if Karen Brown and Gordon Elliott were to remain co-executors. I commend the parties for having responsibly reached an agreement that Mr. Holek should take over as executor of the Estate.

9 An order will issue substantially in the terms of the consent set out above.

The Remaining Legal Issue

10 The Consent to Order went on to provide:

> (j) The following issue, not on consent shall be ruled upon by the presiding Judge.
>
> The funds held on deposit at Kawartha Credit Union in the sum of approximately $50,000 (acct. 24-087782 held by Gord Elliot and Karen Brown in trust for Barbara Elliott) shall be dealt with in one of the two ways described below:
>
> (i) It shall be delivered to Edward Holek and added to the Trust Fund for the benefit of Barb Elliott and administered upon the same terms as the February 11, 1993 agreement and added to the trust fund for the benefit of Barb Elliott or,
>
> (ii) It shall be delivered to Karen Brown, as Guardian of property for the benefit of Barbara Elliott.

11 This last issue is addressed in these reasons.

Background Facts

12 As noted above, Jean Elliott passed away on January 12, 2005. Barbara Elliott was excluded from the Will because Jean Elliott intended to make provision for her through a separate agreement, which was dated February 11, 1993 (the "Agreement"). It was made between Barbara Elliott's parents, Robert Elliott and Jean Elliott, and their independent children. The purpose of the Agreement was to benefit Barbara Elliott while at the same time avoiding the risk that she would be disqualified from continuing to receive benefits from the Ontario Disability Support Program. It provided:

> Out of the said trust fund, GORDON FREDERICK ELLIOTT and KAREN LEVINA BROWN shall pay or apply the said monies (both principal and interest) for the maintenance and benefit of BARBARA JOAN

> ELLIOTT. The trust monies are not intended for the basic living requirements of the said BARBARA JOAN ELLIOTT (which are presently provided for by her Government Living Allowance), but are to be used for the purchase of items or other things which will improve the living standards and enjoyment of life of the said BARBARA JOAN ELLIOTT. In addition they should pay some monies, as the Parents are doing now, to the place where BARBARA JOAN ELLIOTT is living each year.

13 Under the Agreement, the beneficiary children under the Will would each contribute one-seventh of the amount they received from their parents' Estates into a trust fund for Barbara Elliott (the "Barbara Elliott Trust Fund"). Gordon Elliott, who was not a beneficiary under the Will, also agreed to make a contribution equal to the one made by each of his siblings.

14 The Barbara Elliott Trust Fund contemplated by the Agreement will be established under the order made herein pursuant to the Consent to Order excerpted above.

15 Since the death of Jean Elliott, Barbara Elliott has resided with and has been cared for by her sister, Karen Brown. By the Order of Justice D. Gunsolus, dated September 21, 2007, Karen Brown was appointed as guardian of property and personal care of Barbara Elliott, who is a person under disability and requires ongoing personal care.

16 There was a lack of clarity around the origin and purpose of another source of funds, which I will call the "GIC Fund". It is held in account 24-087782 at the Kawartha Credit Union and contains approximately $50,000 (the "GIC Account"). The genesis of both the GIC Fund and the later GIC Account was explained by Gordon Elliott in his affidavit, sworn September 17, 2008, in the following terms:

> The sum of $50,000.00 was set aside for Barbara prior to our mother's death which amount was held in the form of GICs. After our mother's death, as the GICs became due they were deposited into the general estate account. In or about February of 2006, the sum of $50,000.00 was deposited by myself and Karen Brown into an account separate from the Estate account, which is held jointly between Karen Brown and me. I am holding the sum of approximately $50,000.00 in account #1087782 jointly with my sister Karen in trust for Barbara. My mother intended that this sum should be added to the trust fund at the same time or after the estate funds had been disbursed.

17 Because the origin of the GIC Fund and the circumstances of the creation of the GIC Account were initially disputed by Karen Brown, I requested additional submissions in writing after the oral argument.

18 Counsel for Karen Brown, supported by counsel for Shirley Flagler, provided some additional background facts as to how the $50,000 account arose. While Jean Elliott and Robert Elliott were still alive, they provided their daughter, Margaret Delory, with a $50,000 five-year, interest-free loan. After the five-year time period elapsed, the loan was changed into a gift. Each of the other independent children (with the exception of Gordon Elliott) were also given a gift of $50,000 or an equivalent amount after deducting any outstanding loans the children had with their parents. Gordon Elliott had received the family farm and a new truck in lieu of the $50,000 and an interest in the Estate. These gifts were all made in 1997.

19 Around the same time, again according to Karen Brown, Jean Elliott and Robert Elliott invested money in GICs for Barbara Elliott to provide her with an equivalent benefit. At one point, counsel for Karen Brown referred to this amount as a "gift", but later stated: "It could be said that this money was an *inter vivos* trust however it was not the parents' plan that this money be exposed for tax and ODSP reasons." As expressed by

counsel, Shirley Flagler "takes the position that an *inter vivos* trust was created during the course of Jean Elliott's life for the benefit of Barbara Elliott. This money did not form part of the Estate of Jean Elliott and should therefore be managed by Karen Brown, who has already been appointed the Guardian of Property for Barbara Elliott."

20 In response, counsel for Gordon Elliott stated:

> All six children of Jean Elliott, with the exception of Barbara Elliott, received the equivalent of a gift of Fifty Thousand ($50,000.00) Dollars during the life of Jean Elliott. For this reason, it was intended by the testator Jean Elliott that the equivalent of approximately Fifty Thousand ($50,000.00) Dollars should also be passed to Barbara Elliott, however, in a fashion such that her pension benefits under the Ontario Disability Support Program would not be interrupted.

21 Although initially Karen Brown stated that the GIC Account at the Kawartha Credit Union was opened during the lifetime of Jean Elliott, the agreed evidence now is that, when the GICs matured, the proceeds were incorrectly deposited into the general Estate bank account. Karen Brown and Gordon Elliott opened the GIC Account in trust for Barbara Elliott in the amount of approximately $50,000 (representing the value of the GICs), around January 12, 2006, over a year after the death of Jean Elliott, to correct the error.

Analysis

22 The legal issues that must be determined concern the origin and future of the GIC Fund currently being held by Karen Brown and Gordon Elliott in trust for Barbara Elliott in the GIC Account at the Kawartha Credit Union.

23 Since I have accepted that the GIC Fund originated from the GICs, I must consider whether the setting aside of the GICs by Jean Elliott and Robert Elliott was meant to establish an *inter vivos* trust for Barbara Elliott, a gift to her, or neither. For the reasons that follow, I have determined that the Elliott parents meant to create, and did in fact create, a discretionary *inter vivos* trust in respect of the GICs for the benefit of Barbara Elli- ott.

A. Was an Express Trust Created for Barbara Elliott?

24 As a matter of law, the creation of a valid express trust requires the following:

1. the person creating the trust (the settlor) and the trustee must have capacity;
2. the three certainties must be met:
    a. certainty of intention to create a trust;
    b. certainty of subject matter; and
    c. certainty of objects;
3. the trust must be constituted, that is, the trust property must be transferred to the trustee; and
4. any necessary formal requirements must be met.

See: A.H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials*, 6th ed. (Toronto: Thomson Canada Limited, 2004) at 161.

25 In this case, the evidence is that Robert Elliott and Jean Elliott set aside the GICs for the benefit of Barbara Elliott. Both parents, until their deaths (Robert Elliott predeceasing Jean Elliott), were holding the GICs for the benefit of Barbara Elliott. Thus, Robert Elliott and Jean Elliott could be both the settlors and the trustees. The parties agree, and there is no evidence to the contrary, that Robert Elliott and Jean Elliott were not minors, mentally incompetents, or bankrupt at the time they set aside the GICs. The putative settlors and the trustees had the requisite capacity.

26 Certainty of intention to create a trust is to be "inferred from the nature and manner of the disposition considered as a whole": Oosterhoff, *supra*, at 167. When there is no clear trust documentation, *Byers v. Foley* (1993), 16 O.R. (3d) 641 (Ont. Gen. Div.) at 645 provides the following guidance:

> In the absence of formal trust documentation, the court must look at the surrounding circumstances and the evidence as to what the parties intended, as to what was actually agreed and as to how the parties conducted themselves to determine whether there was "certainty of intention": see *Lev v. Lev* (1992), 40 R.F.L. (3d) 404 (Man. C.A.); *McEachren v. Royal Bank of Canada* (1990), 78 Alta. L.R. (2d) 158, 111 A.R. 188, 2 C.B.R. (3d) 29, [1991] 2 W.W.R. 702 (Q.B.); and *Fraser v. Minister of National Revenue* (1991), 91 D.T.C. 5123, 41 F.T.R. 255.

27 The *Byers v. Foley*, *supra*, case has been followed consistently in Ontario. See *Granite Insurance Co. v. Toronto Dominion Bank*, [2006] O.J. No. 5148 (Ont. S.C.J.) at para. 79; *Lilly v. Phillips*, [2006] O.J. No. 3410 (Ont. S.C.J.) at para. 23; *Canada (Attorney General) v. Ristimaki* (2000), 46 O.R. (3d) 721 (Ont. S.C.J.) at para. 12; *Transamerica Occidental Life Insurance Co. v. Toronto Dominion Bank*, [1998] O.J. No. 1273 (Ont. Gen. Div.) at para. 24. See generally D.W. Waters, *The Law of Trusts in Canada*, 3d ed. (Toronto: Carswell, 2005) at 132.

28 In *Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.* (2002), 61 O.R. (3d) 296 (Ont. C.A.) at para. 63, the Ontario Court of Appeal confirmed that the trial judge was entitled to take into account evidence of the conduct of the settlor (who was also the trustee) and the beneficiary in determining certainty of intention.

29 Certainty of intention is a question of fact, and, in making this determination, the Court may examine what a deceased settlor said prior to his or her death: *Jones v. Lock* (1865), (1865-66) L.R. 1 Ch. App. 25 (Eng. Ch. App.); *Paul v. Constance*, [1977] 1 All E.R. 195 (Eng. C.A.).

30 This Court must consider all of the circumstances, including the words and conduct of Robert Elliott and Jean Elliott, to determine if certainty of intention exists. All of the parties recognize the intent of Robert Elliott and Jean Elliott to have the GICs, and the money resulting from the GICs, benefit Barbara Elliott.

31 Robert Elliott and Jean Elliott displayed careful planning in having the Barbara Elliott Trust Fund and the Agreement set up for Barbara Elliott's benefit. They knew of Barbara Elliott's mental limitations and the fact that these limitations would not improve in the future. They were also aware of the impact a gift might have on Barbara Elliott's Ontario Disability Support Program payments. Their words and conduct show that a simple gift of the GICs to Barbara Elliott was not intended since the GICs were not delivered to her: see Waters, *supra*, at 175. Their words and conduct were only consistent with an intention to create an express trust in respect of the

GICs for Barbara Elliott.

32 Certainty of subject matter concerns certainty of the trust property itself and how it is to be divided if there is more than one beneficiary. Here, the trust property was the GICs, and they were held in their entirety for Barbara Elliott alone.

33 Certainty of objects is the last certainty to be considered. According to the supplementary affidavit of Karen Brown, dated September 19, 2008, Jean Elliott expressed her intention to have the GICs pay for events and occasions above and beyond Barbara Elliott's bare necessities, which are covered by her Ontario Disability Support Program benefits. This evidence has not been disputed and is corroborated by the conduct of Jean Elli- ott.

34 During her lifetime Jean Elliott took care of these extra expenses for Barbara Elliott on a discretionary basis. She paid for Barbara Elliott's outings and vacations, which included accommodations, travel expenses and food. In Karen Brown's words, she paid "for the events and occasions to which Barbara Elliott has become accustomed and quite enjoys." She did not use funds for Barbara's "maintenance." These are the objects of the trust.

35 The trust is discretionary if the trust leaves a determination of *how* to distribute the income or capital of the trust in the discretion of the trustee: Oosterhoff, *supra*, at 15, 136. The beneficiary has no ability to compel the trustee to make payments to the beneficiary, such that the trust funds are beyond the reach of the beneficiary: *Ontario (Director of Income Maintenance, Ministry of Community & Social Services) v. Henson* (1987), 28 E.T.R. 121 (Ont. Div. Ct.), aff'd in (1989), 36 E.T.R. 192 (Ont. C.A.); *Ontario (Director of Income Maintenance, Ministry of Community & Social Services) v. Powell* (1989), 38 E.T.R. 205 (Ont. Div. Ct.); *Guy v. Northumberland (County) Department of Social Services* (2001), 201 D.L.R. (4th) 752 (Ont. Div. Ct.). In other words, there is no positive obligation on the trustee to disburse the trust funds for the maintenance of the beneficiaries: *Ozad v. Ontario (Director of Income Maintenance, Ministry of Community & Social Services)*, [1998] O.J. No. 6498 (Ont. Div. Ct.).

36 I find that the trust here is discretionary based on the actions of Jean Elliott during her lifetime. She had full discretion to determine when to use the funds for the benefit of Barbara Elliott, and chose not to use the funds for the basic maintenance of Barbara Elliott.

37 An express trust must be duly constituted. Constitution may take place in various forms, but the method applicable to this case is by declaration of one's self as trustee, which is sometimes also referred to as automatic constitution. This type of constitution occurs when the settlor and the trustee are the same person. The settlor effectively declares himself or herself to be trustee of a trust for someone else. Since the settlor is already the owner of the trust property, no physical transfer is necessary as title is already vested in the owner. Such declaration means that the owner is thereafter divested of title in equity in favour of the beneficiary: Waters, *supra*, at 172.

38 There is often difficulty in determining whether or not the owner actually intended to become a trustee. According to Waters, *supra*, at 192, "[t]he burden of proof that the donor intended to make himself a trustee is on those who allege such a trust and many factors may reveal the true intent. The cases often arise in circumstances where the alleged donor is deceased and is thus no longer available to corroborate the evidence" [footnotes omitted].

39 The case of *Paul v. Constance*, *supra*, is helpful. It stands for the proposition that, for a declaration of

self as trustee, there must be sufficient evidence of a manifestation of the intention to become a trustee, but no technical words are required. In this case, a man received damage payments and went with his girlfriend, with whom he was living with, to deposit the money into the bank. After discussions with the bank manager, they decided to open the account in the man's name only. However, the man told the girlfriend on many occasions that "[t]his money is as much yours as mine." Further amounts were deposited into the account, including some joint bingo winnings of the man and his girlfriend. There was one withdrawal from the account before the man died, which was shared by the man and his girlfriend. The trial judge agreed with the girlfriend that an express trust was created. He found that the words of the man conveyed a present declaration that the fund was as much the girlfriend's as the man's funds. The Court of Appeal, Civil Division found that the trial judge was justified and correct in making this finding.

40 Another useful case is *Mellen, Re*, [1933] O.J. No. 45 (Ont. H.C.), aff'd on other grounds [1933] O.J. No. 68 (Ont. C.A.). In this case, the deceased held fifteen $1,000 bonds in four separate envelopes, which were deposited in her safety deposit box at the Toronto General Trusts Corporation. The bonds were all registered in the deceased's name, with her handwritten endorsements on each of the envelopes as follows: "The contents of this envelope are to be used solely for the benefit of my dearly beloved son, Edward Mellen, Jr., by the Toronto General Trusts Corporation, No. 58 Bay Street, corner Melinda Street, Toronto." (para. 6). Kingston J. found an express trust created by the deceased and held in trust by her for her son. The endorsements were evidence that the deceased "constituted herself a trustee by the language she used in the said endorsements on the said envelopes." (para. 11).

41 Difficulties of proof arise here since the alleged settlors/trustees, Robert Elliott and Jean Elliott, are deceased. The examination of their intention to create a trust, set out above, is also applicable to the constitution requirement. Their intention to declare themselves as trustees is apparent on this evidence. Although Robert Elliott and Jean Elliott still held legal title to the GICs during their respective lifetimes, the beneficial interest in the GICs was that of Barbara Elliott.

42 Finally, the formality requirements of an express trust must also be met. These depend on the type of trust that is alleged to be created. An *inter vivos* trust that does not deal with land or an interest in land has no formality requirements and it may be made orally or in writing. See *Statute of Frauds*, R.S.O. 1990, c. S.19, ss. 4, 9-11; Oosterhoff, *supra*, at 244-52. A discretionary trust may also be made orally: Waters, *supra*, at 35. The existence of a trust made orally, as evidenced by the discussion on intention above, may be more difficult to prove, but in this case has been proven.

43 For the reasons set out above, I find that the GIC Fund constituted a discretionary *inter vivos* trust for Barbara Elliott created by Robert Elliott and Jean Elliott, who also acted as trustees, for the objects discussed above. This status accordingly also attaches to the funds in the GIC Account at the Kawartha Credit Union.

B. Effect of Robert Elliott and Jean Elliott's Death on the GIC Fund

44 Since an *inter vivos* trust was created, the Court must now examine what happened to the trust in respect of the GIC Fund and the GIC Account upon the deaths of the trustees, Robert Elliott and Jean Elliott.

45 The parties differ. The position of Karen Brown and Shirley Flagler is that the GIC Account does not form part of either the Estate or the Barbara Elliott Trust Fund, which are both to be managed by Mr. Holek pursuant to the consent order. They say that Karen Brown should administer the GIC Account by virtue of her appointment as guardian of property and personal care of Barbara Elliott under the Order of Justice D. Gunsolus,

dated September 21, 2007. Gordon Elliott agrees that the GIC Fund was not intended to form part of the Estate, but takes the position in his affidavit, sworn September 17, 2008, quoted more fully above: "My mother intended that this sum should be added to the trust fund at the same time or after the estate funds had been disbursed."

46 What favours the approach proposed by Gordon Elliott is the fact that the purpose of the GIC Fund, as explained by Karen Brown, is similar to the purpose of the Barbara Elliott Trust Fund, quoted above. It is unlikely that Jean Elliott intended to permanently create two distinct funds with precisely the same purposes for the benefit of Barbara Elliott. It is also evident that she was trying to preserve symmetry among the siblings while taking care of Barbara Elliott's special needs and circumstances, so that the GIC Fund later transferred into the GIC Account was never intended to form part of the Estate. The GIC Fund lacks the termination provision of the Barbara Elliott Trust Fund, which requires disbursement of any unused proceeds at Barbara Elliott's death to those of Jean Elliott's grandchildren then living. Jean Elliott might well have wanted the same disbursement of any balance of the GIC Fund. But these observations are not sufficient for me to conclude that Jean Elliott intended the two funds to merge. Regrettably, she failed to turn her mind fully to these issues and it is not in my authority to remedy any omission.

47 The *Trustee Act* creates statutory rules regarding the continuation of a trust upon the death of a trustee. Upon the death of Robert Elliott, subsection 3(1) of the *Trustee Act* applied, and provided that, absent a different procedure in the trust instrument, the surviving or continuing trustee, Jean Elliott, could have appointed another person or persons to be a trustee or trustees of the GIC Fund in place of herself and her deceased husband:

> **Power of appointing new trustees**
>
> 3.(1) Where a trustee dies...the person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may by writing appoint another person or other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee dying...

48 There is no evidence that Jean Elliott exercised her power to appoint another trustee of the GIC Fund. She remained as sole trustee until her death.

49 Where a sole trustee dies, subsection 3(2) of the *Trustee Act* provides that the personal representatives of the last surviving trustee are capable of exercising the powers of the last surviving trustee:

> **Survivorship**
>
> 3.(2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or where there were two or more trustees, of the last surviving or continuing trustee, are or is capable of exercising or performing any power or trust that was given to or capable of being exercised by the sole or last surviving trustee.

50 Section 1 of the *Trustee Act* also defines a "personal representative" to mean "an executor, an administrator, or an administrator with a will attached". Thus, as co-executors of the Estate of Jean Elliott, Karen Brown and Gordon Elliott were capable of exercising or performing any power that Jean Elliott was able to exercise or perform as trustee of the GIC Fund. They had the power to, by writing, appoint another person or persons to replace themselves as trustees. I find, however, that they did not exercise their power of appointment under sub-

section 3(1) of the *Trustee Act* in respect of the GIC Fund and the GIC Account prior to the appointment of Mr. Holek to succeed them.

51 Since Mr. Holek will be the sole executor of Jean Elliott's Estate, only he will be capable of exercising or performing any power that Jean Elliott was able to exercise or perform as trustee of the GIC Fund (now held in the GIC Account) under subsection 3(2) of the *Trustee Act*. He may even appoint himself to be the actual trustee under subsection 3(1) of the *Trustee Act*. Although the trust consisting of the GIC Fund (now held in the GIC Account), on the one hand, and the Barbara Elliott Trust Fund, on the other hand, will not technically "merge", Mr. Holek may, in effect, act as the trustee for both trusts.

52 Perhaps it is needless to say, but this decision does not change the status of Karen Brown under the order of Justice D. Gunsolus referred to above. She remains guardian of property and personal care of Barbara Elliott and will no doubt continue to discharge her responsibilities in the admirable way that she has to date. She is not, however, the trustee of the trust consisting of the GIC Fund (now held in the GIC Account).

53 In light of these reasons, it is ordered that:

(a) The current executors of the Estate of Jean Elliott, namely Gordon Elliott and Karen Brown, shall be removed and replaced by Edward Holek. Edward Holek shall not be required to provide security.

(b) Gordon Elliott and Karen Brown shall pass their accounts in the form required by Rule 74.17 within four weeks of this order. That accounts shall include all assets held jointly with third parties on the date of death of Jean Elliott. The account shall cover the period between January 12, 2005 and the date of this order.

(c) All Estate assets shall be transferred and delivered to Edward Holek including Kawartha Credit Union (this account shall not include Kawartha Credit Union Acct. 1087782, which is dealt with below).

(d) There shall be no executor's fees payable to Karen Brown or Gordon Elliott.

(e) The trustees of the Barbara Elliott Trust, being Karen Brown and Gordon Elliott as named in the Agreement dated February 11, 1993, shall be replaced by Edward Holek. Edward Holek shall establish and administer the Barbara Elliott Trust Fund based upon the terms of the Agreement.

(f) Edward Holek shall retain the portion of the beneficiaries' shares of the Estate required by paragraph 1 of the 1993 Agreement respecting Karen Brown, Shirley Flagler, Margaret Delorey, and Kathryn Lee, and shall pay the proceeds into the Barbara Elliott Trust Fund. Edward Holek shall collect an equivalent contribution pursuant to the Agreement from Gordon Elliott.

(g) The GIC Account, being Kawartha Credit Union Acct. 1087782, shall be held in trust for Barbara Elliott to fund expenses similar to those that are to be funded by the Barbara Elliott Trust Fund.

(h) Edward Holek shall have all the powers of a sole trustee of the GIC Account by his position as sole personal representative of the Estate of Jean Elliott under subsection 3(2) of the *Trustee Act*.

(i) All receipts and expenses claimed to date by Karen Brown with regard to payments made for the benefit of Barbara Elliott shall be provided to Edward Holek for his approval to be paid from either the Barbara Elliott Trust Fund or the GIC Account, as he may determine.

(j) The Estate shall pay costs in the amount of $6,500 plus GST to each of David O'Neill, James Hauraney, and John McGarrity at the time that funds are disbursed to the beneficiaries.

(k) No further legal fees will be paid from the Estate with respect to the parties within.

Order accordingly.

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TAB 4

Conclusion

65 The Credit Union's claims against 3A and D2 for judgment on the Guarantees, inclusive of interest, are made out. The counterclaims by 3A and D2 are dismissed. The parties may speak to me regarding costs, if they are unable to agree.

Action allowed; counterclaim dismissed.

[Indexed as: **Infoplace Ticket Centres Ltd., Re**]

IN THE MATTER OF THE BANKRUPTCY OF INFOPLACE TICKET CENTRES LTD. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Ontario Superior Court of Justice [Commercial List]

Cumming J.

Heard: December 22, 2009

Judgment: December 24, 2009

Docket: 31-1156030

David S. Ward for Appellant, City of Mississauga
John D. Marshall for Trustee

Bankruptcy and insolvency — Proving claim — Disallowance of claim — Appeal from disallowance — General principles — Bankrupt distributed city transit tickets and passes — Bankrupt entered bankruptcy and returned unsold tickets and passes — Trustee refused city's claim for amounts received from sold passes — City appealed — Appeal dismissed — Funds from passes were not held in trust — No intention to create trust existed — Funds from pass sales were commingled in accounts of bankrupt — Bankrupt was described as independent contractor who purchased and sold tickets in exchange for commission — Agreement stated that passes were to remain property of city at all times, and consignment did not create trust relationship — Only debtor creditor relationship only existed — No constructive trust existed — Money was in possession of bankrupt — Jurisdiction reason, being contract between parties, existed whereby bankrupt possessed funds.

Estates and trusts — Trusts — Constructive trust — General principles — Bankrupt distributed city transit tickets and passes — Bankrupt entered bankruptcy and returned unsold tickets and passes — Trustee refused city's claim for amounts received from sold passes — City appealed — Appeal dismissed — Funds from passes were not held in trust — No intention to create trust existed — Funds from pass sales were commingled in accounts of bankrupt — Bankrupt was described as independent contractor who purchased and sold tickets in exchange for commission — Agreement stated that passes were to remain property of city at all times, and consignment did not create trust

relationship — Only debtor creditor relationship only existed — No constructive trust existed — Money was in possession of bankrupt — Jurisdiction reason, being contract between parties, existed whereby bankrupt possessed funds.

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 67(1)(a) — considered
s. 81 — pursuant to

APPEAL by creditor from determination of receiver regarding claim for funds.

***Cumming J.*:**

The Motion

1 The City of Mississauga ("City") moves by way of an appeal the disallowance by Grant Thornton Limited in its capacity as the Trustee in bankruptcy of Infoplace Ticket Centres Ltd. ("Infoplace"), pursuant to s. 81 of the *Bankruptcy and Insolvency Act* ("*BIA*") of a claim of the City.

2 The City claims to have a trust interest (whether by express, implied or constructive trust) within the ambit of s. 67 (1) (a) of the *BIA* in certain funds such that those funds should not form part of Infoplace's estate in bankruptcy.

3 To constitute a trust an arrangement must include the "three certainties" of a trust, being: certainty of intent, of subject matter and of object.

4 The only criterion in issue on this appeal is that of "certainty of intent". That is, does the evidence establish on a balance of probabilities on an objective test, that there was certainty of intent to create a trust?

The Evidence

5 Infoplace carried on the business as a retail seller of tickets, including tickets and weekly passes on the City's transit system. There is no issue in respect of the tickets. The only issue on the appeal relates to the passes.

6 The passes were received on consignment. The Trustee has returned unsold passes. The City claims the return of $86,500. from the sale of its passes by Infoplace prior to the point in time of the assignment into bankruptcy.

7 In my view, and I so find, there was no certainty of intent to create a trust. Therefore, the monies in issue were not held in trust, either by way of an express or an implied trust, by Infoplace for the City. My reasons follow.

8 Prior to its assignment into bankruptcy, Infoplace maintained a variety of bank accounts which received the funds from the sales of its various clients' tickets. The accounts were not designated as trust accounts. The Trustee concluded that there was a commingling of large amounts of proceeds from sources that are clearly not trust funds. There is no express provision requiring Infoplace to segregate the proceeds of sale, to hold them in trust or to remit them to the

City. Thus, the basis on which the monies from the sale of passes was held does not support the City's submission that the monies were held in trust. Rather, the manner of holding the monies from the sale of passes tends to contradict the assertion that there was a trust arrangement.

9 The so-called "Agent Agreement" between the City and Infoplace as an "independent contractor" dated December 15, 2003 provides that Infoplace shall sell tickets and passes to the public in return for a commission equal to 1.5% of the authorized price for each sale.

10 Article A. (a) of Appendix "A" of the written "Agent Agreement" provides that "Infoplace "*shall purchase*" (my emphasis) the City's tickets and passes for the current face value. Article D. (a) and (b) provides for invoices to be issued by the City at the time of delivery to Infoplace. Payment is to be made at the time of delivery of the invoices (except for weekly passes, the payment therefore being at the next regular delivery of tickets and passes after the weekly pass has expired). All passes remain the property of the City at all times: Article D. (g). Thus, title to the passes remains with the City but the contract between the City and Infoplace is in the nature of a contract for the sale of goods (ie. tickets and passes). The fact of consignment of the passes in itself does not render the proceeds from the sale of the passes to be held under a trust arrangement.

11 In my view, the City transferred passes to Infoplace under a contract of sale whereby the sale between the City and Infoplace was completed at the point of the sale by Infoplace to transit customers. At that point a creditor (City) and debtor (Infoplace) relationship was in place, with Infoplace owing monies to the City as its debtor (not holding monies as trustee for the City as beneficiary).

Disposition

12 In my view, the evidence establishes that the legal relationship between the City and Infoplace was simply that of independent, contracting parties as seen by the written Agent Agreement and the practice of their business relationship. The City was the seller, and Infoplace was the buyer, of the City's tickets.

13 There is no evidence to support the claim by the City of an express or implied trust interest under s. 67(1) (a) of the *BIA* in respect of funds held by the Trustee.

14 This leaves the issue of the alternative argument of a constructive trust. Infoplace held some $2,628,661.11 in its bank accounts at the time of bankruptcy. There is common ground that Infplace received funds in trust well in excess of this amount from some of its clients which monies were deposited to the bank accounts. Thus, the parties agreed that all of the monies in the bank accounts at the time of bankruptcy were trust monies.

15 A constructive trust is a remedy in a situation of unjust enrichment. The constructive trust assertion has no force in the present situation, for two reasons. First, as I have held, Infoplace held the monies from the sale of passes pursuant

to the sale contract with the City. That is, there was no unjust enrichment because there was a juristic reason (the contract between the City and Infoplace) whereby Infoplace received the funds form the sale to transit customers of the passes. Second, all monies in the "fund" ie. the $2,628,661.11 were held in trust by Infoplace for clients of it as beneficiaries of the trust relationships. None of the monies of the "fund" were held by Infoplace for its own account.

16 Therefore, having found that the City was not the beneficiary of an express or implied trust with Infoplace as trustee, the claim of the City is simply that of a creditor of Infoplace. The "fund" in its entirety by agreement of all the parties with claims consists of monies held in trust. Thus, Infoplace has no monies of its own and there is no unjust enrichment.

17 For the reasons given, the appeal is dismissed.

Appeal dismissed.

TAB 5

(2) — Certainty of Intent

In order for a trust to be validly constituted, there must be a clear intention to create it: *Re Ont. Worldair Ltd.* (1983), 45 C.B.R. (N.S.) 116; affirmed (1983), 48 C.B.R. (N.S.) 112 (Ont. C.A.). The language of the settlor must be imperative: *Re Allan Realty of Guelph Ltd.* (1979), 29 C.B.R. (N.S.) 229 (Ont. S.C.).

The intention of the settlor of a trust must be ascertained as at the time of settling the property upon the trustee: *Re New Home Warranty of British Columbia Inc.* (2002), 33 C.B.R. (4th) 257, 2002 CarswellBC 629, 2002 BCSC 439, 100 B.C.L.R. (3d) 515 (B.C. S.C.).

For a valid trust, the certainty of intent must be made known to the trustee: *Re New Home Warranty of British Columbia Inc.* (2000), 29 C.B.R. (4th) 232, 2000 CarswellBC 2749, 2000 BCSC 1879 (B.C. S.C.), overturned on other grounds (2004), 2004 CarswellBC 678, [2004] 6 W.W.R. 419, 50 C.B.R. (4th) 224, 196 B.C.A.C. 34, 322 W.A.C. 34, 46 B.L.R. (3d) 105, 33 C.L.R. (3d) 146, 238 D.L.R. (4th) 13, 26 B.C.L.R. (4th) 203, 2004 BCCA 186 (B.C. C.A.).

The words "in trust" or "as trustee for" are neither conclusive nor indispensable: *Re Allan Realty of Guelph Ltd.*, *supra*; *Re Ont. Worldair Ltd.*, *supra*; *Re Can Corp Financial Services Ltd.* (1991), 6 C.B.R. (3d) 216, 1991 CarswellOnt 193 (Ont. Gen. Div.). Similarly, the mere fact that a bank account has been designated as a "special trust account" or a "trust account" is not in itself sufficient to create a trust: *James F. Lawrie & Co. v. Moffat* (1951), 31 C.B.R. 197 (Ont. C.A.); *Re Ontario Worldair*, *supra*. The existence of a trust may be inferred from an examination of the agreement between the parties: *Bank of Nova Scotia v. Societe General (Canada)* (1988), 68 C.B.R. (N.S.) 1; *Bank of Montreal v. Abacus Cities Ltd.* (1982), 43 C.B.R. (N.S.) 292, 40 B.C.L.R. 39 (S.C.). If the agreement permits the alleged trustee to commingle its funds with the trust funds, this agreement is not necessarily fatal to the existence of a trust, particularly if the trustee is forbidden to use the funds for its own purposes: *Bank of Nova Scotia v. Societe General (Canada)*, *supra*. A provision that the trustee shall pay interest on money belonging to a beneficiary if the moneys are not paid forthwith to the beneficiary is not necessarily fatal to the existence of a trust: *Bank of Nova Scotia v. Societe General (Canada)*, *supra*; *McEachren v. Royal Bank* (1990), 2 C.B.R. (3d) 29, 78 Alta. L.R. (2d) 158, 111 A.R. 188, 1990 CarswellAlta 234 (Q.B.).

Where the settlor had no intention to create a trust but perpetrated a fraudulent scheme, no trust was created: *Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of)* (1993), 23 C.B.R. (3d) 161, 1 E.T.R. (2d) 1, 1993 CarswellOnt 251 (Ont. Gen. Div.); affirmed (1997), 50 C.B.R. (3d) 79, 1997 CarswellOnt 4609 (Ont. C.A.).
Notwithstanding that interest is to be paid, in considering whether there was an intention to create a trust, all the circumstances must be considered, such as the amount of money paid, the time that is to elapse before the payee is to be called upon to perform the agreement, the relations between the parties, their respective callings, and the usage or custom in similar circumstances: *McEachren v. Royal Bank, supra.*

No trust exists if the recipient is to take absolutely and is merely put under a moral obligation as to what is to be done with the property: *Re Allan Realty of Guelph Ltd., supra.*
For a valid trust, there must be an intention that the subject matter of the trust is to be held by the trustee exclusively for the benefit of the beneficiary: *Re Payne* (2001), 29 C.B.R. (4th) 153, 2001 CarswellAlta 1379, 2001 ABQB 894, 41 E.T.R. (2d) 45 (Alta. Q.B.).

If the trustee retains full control over the alleged trust and can do whatever it wishes with it and the beneficiary is never informed of the trust, there is no certainty of intent: *Re Lynn Holdings Ltd.* (1996), 76 B.C.A.C. 219, 1996 CarswellBC 881 (C.A.).

If the agreement between the parties provides that all moneys received by the debtor shall be held in trust, this provision will be cogent evidence of an intention to create a trust, even though the debtor has not kept the funds in a separate trust account but has deposited them into his general operating account: *C.P. Air Lines Ltd. v. C.I.B.C.* (1987), 71 C.B.R. (N.S.) 40 (Ont. S.C.). A failure to keep funds segregated or designated for or on behalf of the principal will be evidence of an intention not to create a trust: *Re Agritrans Logistics Ltd.* (2003), 2003 CarswellMan 316, 176 Man. R. (2d) 67, [2003] 10 W.W.R. 497, 45 C.B.R. (4th) 1, 2003 MBQB 177 (Man. Q.B.).

The British Columbia Supreme Court held that in order to establish that the subject property interest was held by the debtor in trust for a transferee who was a related party and is thereby not divisible among the creditors of the debtor under s. 67(1)(a), the language of an alleged settlor in the documentation establishing the trust must be imperative as well as the subject matter and the object of the trust must be certain. A trust is not established from restrictions imposed on the debtor's use of the property. Further, the court held that a proof of claim in respect of specific property of a debtor ought not be filed pursuant to s. 81 of the *BIA* where the debtor is not in physical possession of such property at the time of the debtor's bankruptcy: *Re Tong* (2006), 2006 CarswellBC 1556, 2006 BCSC 962, 23 C.B.R. (5th) 82 (B.C. S.C. [In Chambers]).

Where moneys paid by customers for airline tickets were paid into unsegregated bank accounts and used to meet whatever obligations of the bankrupt company were pressing, it was held that there was no intention to create a trust: *Re Points of Call Holidays Ltd.* (1991), 5 C.B.R. (3d) 299, 41 E.T.R. 56, 54 B.C.L.R. (2d) 384, 1991 CarswellBC 471 (S.C.).

In *Zolinski v. Zolinski* (1992), 16 C.B.R. (3d) 255, 1992 CarswellMan 24 (Man. Q.B.), a wife agreed to join in a mortgage on the matrimonial home and the husband gave her a promissory

note for one-half of the amount of the mortgage for signing the document. The husband subsequently went into bankruptcy. The wife claimed that the husband's interest in the matrimonial home was held in trust for her. The trust claim was rejected, the court holding that in the circumstances the wife was only an unsecured creditor for the amount of the promissory note. There was never any intent that the home would be held in trust for the wife.

The collection of taxes under the *Tobacco Tax Act* of British Columbia does not create a trust, since under the legislation there is no intention to create a trust relationship: *British Columbia v. National Bank of Canada* (1992), 16 C.B.R. (3d) 263, 75 B.C.L.R. (2d) 35, [1993] 3 W.W.R. 371, 1992 CarswellBC 536 (S.C.); affirmed (1994), 30 C.B.R. (3d) 215, 1994 CarswellBC 639 (B.C. C.A.); leave to appeal to the S.C.C. refused (1995), 34 C.B.R. (3d) 302 (note) (S.C.C.).

The Ontario Superior Court of Justice dismissed the appeal of a creditor of a proof of property claim. The creditor claimed to have a trust interest pursuant to s. 67(1)(a) of the *BIA* in certain funds such that those funds should not form part of the bankrupt estate. To constitute a trust, an arrangement must include the three "certainties" of a trust: certainty of intent, of subject matter and of object. The only criterion in issue on the appeal was that of "certainty of intent". The trustee had concluded that there was a commingling of large amounts of proceeds from sources that were clearly not trust funds. Further, there was no express provision requiring the bankrupt to segregate the proceeds of sale, to hold them in trust or to remit them to the creditor. Justice Cumming reviewed the agency agreement between the creditor and the bankrupt and concluded that the fact of consignment in itself did not render the proceeds from the sale of transit passes to be held under a trust agreement. The creditor transferred passes to the bankrupt under a contract of sale whereby the sale was completed at the point of the sale by the bankrupt to customers; at that point, a debtor-creditor relationship was in place, not a trust: *Re Infoplace Ticket Centres Ltd.* (2009), 2009 CarswellOnt 8082, 62 C.B.R. (5th) 135 (Ont. S.C.J. [Commercial List]).

(8) — Constructive Trusts

Constructive trusts may apply in bankruptcy. If, in a bankrupt estate, the requirements for a constructive trust are met, the beneficiary of the trust will receive payment out of a fund that would otherwise form part of the assets of the bankrupt estate: *Barnabe v. Touhey* (1995), 37 C.B.R. (3d) 73, 26 O.R. (3d) 477, 10 E.T.R. (2d) 68, 1995 CarswellOnt 167 (C.A.).

The purpose of a constructive trust is to prevent unjust enrichment in whatever circumstances it occurs. There are three requirements for a constructive trust: (a) an enrichment, (b) a corresponding deprivation, and (c) an absence of any juristic reason for the enrichment: *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384; *Re Ascent Ltd.* (2006), 2006 CarswellOnt 116, 18 C.B.R. (5th) 269 (Ont. S.C.J.); *General Motors Corp. v. Peco Inc.* (2006), 2006 CarswellOnt 987, 19 C.B.R. (5th) 224 (Ont. S.C.J.). A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her wrongful conduct: *Re Associated Investors of Canada Ltd.* (1992), 17 C.B.R. (3d) 303, 7 Alta. L.R. (3d) 212, 1992 CarswellAlta 302 (Q.B.); *Orr & Co. v. Saskatchewan Economic Development Corp.* (1994), 24 C.B.R. (3d) 196, 1994 CarswellSask 16 (Sask. Q.B.).

Absence of juristic reason means that a claimant is under no obligation, contractual, statutory or otherwise to provide work or services to the person alleged to be subject to the constructive trust: *Peter v. Beblow*, [1993] 1 S.C.R. 980, [1993] 3 W.W.R. 337, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, 1993 CarswellBC 44, 1993 CarswellBC 1258, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621; *Chevron Canada Resources v. Nesi Energy Marketing Canada Ltd. (Trustee of)* (1998), 7 C.B.R. (4th) 143, 224 A.R. 103, 1998 CarswellAlta 531 (Q.B.). An obligation to make the contribution that leads to the enrichment — whether that obligation arises in a debtor-creditor or other contractual context or whether by reason of principles of common law or equity or by way of statutory provisions — may constitute a juristic reason: *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 33 C.B.R. (3d) 161, 1995 CarswellOnt 318 (Ont. Gen. Div.).

The fundamental question to ask in considering whether there is an absence of juristic reason for the enrichment is: What were the legitimate or reasonable expectations of the parties when the deal or occurrence took place? Where a bank advances money to a creditor pursuant to a line of credit, there is a juristic reason for the enrichment, and consequently the doctrine of constructive trust has no application: *Baltman v. Coopers & Lybrand Ltd.* (1996), 43 C.B.R. (3d) 33, 1996 CarswellOnt 4337 (Ont. Gen. Div.).

Protection of the interests of all creditors is a juristic reason for permitting an enrichment of a bankrupt estate. Where, as a result of s. 70(1) of the *Bankruptcy and Insolvency Act*, the claim of an execution creditor, which had been given an undertaking that its claim would be paid from the sale of property of the bankrupt, was not paid but the proceeds were paid to the trustee for distribution to all creditors, the court held that there was a juristic reason for the enrichment: *Re MacKay* (2003), 41 C.B.R. (4th) 144, 2003 CarswellBC 599, 2003 BCSC 413 (B.C. S.C.).

Similarly, the valid security interest of a secured lender constitutes a juristic reason for permitting the enrichment of the secured lenders and the corresponding deprivation of unsecured

claimants in a *CCAA* proceeding thus claimants had not made out the elements of claims for unjust enrichment: *Re Mosaic Group Inc.* (2004), [2004] O.J. No. 2323, 2004 CarswellOnt 2254, 3 C.B.R. (5th) 40 (Ont. S.C.J.).

For a juristic reason to exist for a payment, there is no necessity for the payee to prove that there was a contractual obligation between the payor and the payee to make the payment; nor does there have to be an enforceable obligation at the time of the payment. If the payee has a commercially reasonable expectation of receiving the money that is sufficient to constitute a legitimate juristic reason for the payee's enrichment: *Toronto Dominion Bank v. Carotenuto* (1998), 101 B.C.A.C. 216, 164 W.A.C. 216, 154 D.L.R. (4th) 627, 1998 CarswellBC 23 (C.A.).

When a husband-wife relationship exists and the wife advances moneys to her husband on a number of occasions without considerations, there is an absence of juristic reason for the advances: *Re Patrick Estate* (1999), 9 C.B.R. (4th) 64, 1999 CarswellSask 74 (Sask. Q.B.); reversed (1999), 16 C.B.R. (4th) 266, 1999 CarswellSask 251, 183 Sask. R. 221 (Q.B.); but restored and affirmed (2000), 16 C.B.R. (4th) 270, 2000 CarswellSask 120, 189 Sask. R. 272, 16 W.A.C. 272 (C.A.).

In order for there to be an unjust enrichment, there must be some specific property of the bankrupt that is the subject of the enrichment: constructive trust cannot be imposed over all the property of a bankrupt: *Barnabe v. Touhey* (1995), 37 C.B.R. (3d) 73, 26 O.R. (3d) 477, 10 E.T.R. (2d) 68, 1995 CarswellOnt 167 (C.A.); *Bassano Growers Ltd. v. Price Waterhouse Ltd.* (1997), 6 C.B.R. (4th) 188, 214 A.R. 380, 1997 CarswellAlta 1182 (Q.B.); affirmed (1998), 6 C.B.R. (4th) 199, 66 Alta. L.R. (3d) 296, 216 A.R. 328, 1998 CarswellAlta 555, 175 W.A.C. 328 (C.A.). The applicant must reasonably expect to obtain an actual proprietary interest as opposed to monetary relief: *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 33 C.B.R. (3d) 161, 1995 CarswellOnt 318 (Ont. Gen. Div.). There must be a causal connection between the contributions made by the claimant to the bankrupt and the assets alleged to be subject to the constructive trust: *Re Patrick Estate*, *supra*.

The Ontario Superior Court of Justice held that a court should not exercise its discretion and impose a constructive trust where an applicant investor is not a creditor of a bankrupt investment broker, and that to allow the applicant investor to obtain a proprietary right to trace certain investment funds that became part of a ponzi investment scheme (a scheme whereby returns are paid to earlier investors entirely out of money paid into the scheme by new investors) to the exclusion of the other creditors of the bankrupt investment broker, will be inequitable and otherwise upset the distribution scheme in the *BIA*. The requirements for use of a constructive trust to remedy wrongful conduct (other than as may have resulted in an unjust enrichment) include the following: (1) the defendant must have been 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 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; (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 that would render the imposition of a constructive trust unjust in all the circumstances of the case. Here, the court was not satisfied that there had been sufficient wrongful conduct to

engage the court's conscience to impose a constructive trust. The court also held that the plaintiff had not met the test for unjust enrichment as a ground for imposition of a constructive trust, specifically: an enrichment of the defendant; a corresponding deprivation of the plaintiff; and the lack of a juristic reason for the enrichment. The court found that while the bankrupt was enriched and the plaintiff suffered a deprivation, that amount did not correspond due to the intervention of another party as a conduit for the flow of funds. The court declined to pierce the corporate veil of the investment transaction in the circumstances and allow the plaintiff to obtain a proprietary right: *Re White* (2006), 2006 CarswellOnt 6424, 25 C.B.R. (5th) 282 (Ont. S.C.J.).

The New Brunswick Court of Queen's Bench held that the standard of proof in establishing the existence of a constructive trust in a bankruptcy setting is high, and four elements must be proven to invoke a remedy of constructive trust: an enrichment, a corresponding deprivation; the absence of any juristic reason for the enrichment; and a causal connection between the non-titled party and the assets in dispute. The court held that equity must follow the law unless strict observance would result in an injustice. Here, the applicant did not meet the standard of proof. The court held that given that the *BIA* provides a code by which legislators have balanced the interests of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize the constructive trust. The court further held that to confer an advantage on the spouse of a bankrupt by way of a constructive trust over other creditors in the absence of exceptional circumstances is neither just nor equitable, and declined to find the constructive trust: *Re McKinnon* (2006), 2006 CarswellNB 158, 19 C.B.R. (5th) 253, 2006 NBQB 108 (N.B.Q.B.).

If a person receives money from the bankrupt that he or she knows or ought to have known were trust moneys, he or she will hold the funds as a constructive trustee: *C.P. Air Lines Ltd. v. C.I.B.C.* (1987), 71 C.B.R. (N.S.) 40; affirmed (1990), 4 C.B.R. (3d) 196, 71 O.R. (2d) 63, 1990 CarswellOnt 155 (Ont. C.A.).

A constructive trust is normally created only when it is just to give the plaintiff the additional benefits that flow from recognition of a right of property. This trust usually occurs in the context of a fiduciary relationship but the remedy may also be appropriate where there is a pre-existing special relationship between the parties: *British Columbia v. National Bank of Canada* (1992), 16 C.B.R. (3d) 263, 75 B.C.L.R. (2d) 35, [1993] 3 W.W.R. 371, 1992 CarswellBC 536, [1992] B.C.J. No. 258, 349 E.T.R. 77 (B.C. S.C.); affirmed (1994), 1994 CarswellBC 639, 99 B.C.L.R. (2d) 358, [1995] 2 W.W.R. 305, 119 D.L.R. (4th) 669, 30 C.B.R. (3d) 215, 6 E.T.R. (2d) 109, 52 B.C.A.C. 180, 86 W.A.C. 180, 2 G.T.C. 7348 (B.C. C.A.); leave to appeal to S.C.C. refused 34 C.B.R. (3d) 302 (note), 9 E.T.R. (2d) 117 (note), 9 B.C.L.R. (3d) xxxi (note), 126 D.L.R. (4th) vii (note), [1995] 9 W.W.R. lxxix (note), 63 B.C.A.C. 159 (note), 104 W.A.C. 159 (note), 196 N.R. 240 (note) (S.C.C.), applying *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, 69 O.R. (2d) 287, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57 (S.C.C.).

A constructive trust did not arise in favour of a residual beneficiary (a parishioner of a bankrupt pastor) merely because the beneficiary paid a small amount of money to the bankrupt and assisted the bankrupt in paying premiums under the life insurance policy that formed the bulk of his estate with no expectation of reward: *Kratko (Trustee of) v. Kratko Estate* (2003), 2003

CarswellSask 545, (sub nom. *Kratco (Bankrupt), Re)*) 237 Sask. R. 228, 4 E.T.R. (3d) 243, 46 C.B.R. (4th) 70, 2003 SKQB 341 (Sask. Q.B.); affirmed (2003), 2003 CarswellSask 665, 242 Sask. R. 85, 46 C.B.R. (4th) 88, 2003 SKQB 440, 6 C.C.L.I. (4th) 313 (Sask. Q.B.).

For there to be an "enrichment", it must be contrary to "equity and good conscience" for the recipient to be allowed to retain the money or property that it has received. Where a secured creditor receives a payment under a security agreement that accords with the priority provisions of the *Bankruptcy and Insolvency Act*, the secured creditor has not been enriched: *British Columbia v. National Bank of Canada* (1994), 30 C.B.R. (3d) 215, 1994 CarswellBC 639 (B.C. C.A.).

Constructive trust is not restricted to unjust enrichment. Constructive trust may also be used to right wrongful conduct. For a constructive trust to be imposed for wrongful conduct, the following conditions must be satisfied: (1) the bankrupt must have been under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the property in the hands of the bankrupt must be shown to have resulted from deemed or actual agency activities of the bankrupt in breach of his or her equitable obligation to the claimant; (3) the claimant must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the bankrupt remain faithful to their duties; and (4) there must be no factors that would render imposition of a constructive trust unjust in all the circumstances of the case: *Soulos v. Korkontzilas* (1997), 46 C.B.R. (3d) 1, 1997 CarswellOnt 1489, 16 E.T.R. (2d) 89, 146 D.L.R. (4th) 214, 212 N.R. 1, 100 O.A.C. 241, 9 R.P.R. (3d) 1, 32 O.R. (3d) 716 (headnote only) (S.C.C.). For a discussion of these conditions and the necessity for a connection between the assets over which it is sought to impose a constructive trust and the misconduct of the trustee, see *Ontario (Director, Real Estate & Business Brokers Act) v. NRS Mississauga Inc.* (2003), 40 C.B.R. (4th) 127, 2003 CarswellOnt 1239, 49 E.T.R. (2d) 256, 8 R.P.R. (4th) 13, 170 O.A.C. 259 (Ont. C.A.); additional reasons at 2003 CarswellOnt 1888, 42 C.B.R. (4th) 280 (Ont. C.A.).

If chattels are conveyed or money is paid under a mistake of fact so that the person making the conveyance or payment is entitled to restitution, the transferee or payee holds the chattels or money under a constructive trust. If the transferee or payee is insolvent, a court of equity will enforce a constructive trust by decreeing specific restitution. Tracing is permitted to bring about this result: *Chase Manhatten Bank N.A. v. Israel — British Bank (London) Ltd.*, [1981] Ch. 105, [1980] 2 W.L.R. 202, [1979] 3 All. E.R. 1025.

In *Donald Developments Ltd. v. Nova Scotia Power Corp.* (1989), 71 C.B.R. (N.S.) 230, 32 C.L.R. 214, 89 N.S.R. (2d) 96, 227 A.P.R. 96 (C.A.), the bankrupt, a contractor, was performing a contract for the Nova Scotia Power Commission. Under the contract, the Commission was entitled to retain ten percent of the progress payments for a period of 45 days after completion of the contract. The subcontractors under the contract claimed that the holdback was impressed with a constructive trust for them. It was held that there was no constructive trust and the holdback was payable to the trustee in bankruptcy.

The court will not find a constructive trust where there are juristic reasons for the deprivation, specifically, where a lessor agreed to the debtor's sale of leased equipment and subsequent

retention of the equity and where senior lenders enjoyed priority because of the failure of the lessor to perfect its security on receiving notice that the debtor intended to sell the equipment. The court further held that a remedial constructive trust will be imposed only if it is required in order to do justice between the parties in circumstances where good commercial conscience determines that the enrichment has been unjust; but it is a discretionary remedy that will not be imposed without taking into account the interests of others who may be affected by granting the remedy: *Caterpillar Financial Services Ltd. v. 360networks Corp.* (2007), 2007 CarswellBC 29, 2007 BCCA 14, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311 (B.C. C.A.).

If a trustee in bankruptcy receives the proceeds of the sale of property on which a secured creditor holds valid security, the trustee holds the proceeds as constructive trustee for the secured creditor: *Price Waterhouse Ltd. v. St. Louis* (1990), 78 C.B.R. (N.S.) 204, 1990 CarswellOnt 124; affirmed (1993), 19 C.B.R. (3d) 126, 1993 CarswellOnt 206 (Ont. C.A.).
If an owner of land purchases the property at a tax sale in order to defeat the claims of a mortgagee, the owner will be deemed to hold the property as a constructive trustee for the mortgagee to the extent of the amount owing on the mortgage: *Unsworth v. Grant*, [1969] 1 O.R. 713, 3 D.L.R. (3d) 689 (C.A.). If a debtor uses a tax sale to defeat the claims of creditors, the same principle applies, and the purchaser is deemed to hold the property as constructive trustee for the creditors: *Chow v. Pearson*, 12 C.B.R. (3d) 226, 69 B.C.L.R. (2d) 117, [1992] 5 W.W.R. 569, 1992 CarswellBC 495 (S.C.).

If a person, such as a banker, assists with knowledge in a dishonest and fraudulent design on the part of the trustees of a trust fund, he or she will be liable as a constructive trustee with the trustees for breach of trust. The doctrine of wilful blindness applies in these circumstances: *McEachren v. Royal Bank* (1990), 2 C.B.R. (3d) 29, 78 Alta. L.R. (2d) 158, 111 A.R. 188, 1990 CarswellAlta 234 (Q.B.).

In *Sharby v. N.R.S. Elgin Realty Ltd. (Trustee of)* (1991), 3 O.R. (3d) 129, 1991 CarswellOnt 534, 35 C.C.E.L. 305, Killeen J. of the Ontario Court (General Division) held that if a real estate agent was an independent contractor and if the broker who provided office facilities for the agent was not the owner of the deposit moneys but a mere conduit for their distribution, the real estate agent was a trust claimant and could claim on the basis of constructive trust. See also *Re Beynon* (2003), 2003 CarswellOnt 3515, 45 C.B.R. (4th) 172 (Ont. S.C.J).

The spouse of a bankrupt claimed a proprietary interest in certain property. The bankrupt had developed machinery and processes and registered patent applications under his name and with his common-law spouse started a production business. There was no written agreement between the spouses that dealt with what assets they owned equally; how the assets were to be managed, including the authority that one party would have to pledge an asset as security; how any revenues or income arising from the assets were to be shared; or how to divide the assets on dissolution. The court held that the constructive trust remedy is discretionary and the authorities have expressed reservations as to the availability of a constructive trust where creditors and third party interests are affected. The court did not find evidence sufficient to find enrichment of the bankrupt and corresponding deprivation of his spouse; and after considering the facts giving rise to the granting of the security over the patent assets, the court found that there was a juristic

reason for the transaction such that it defeated the spouse's entitlement to a remedial constructive trust: *Melchior v. Cable Estate* (2007), 2007 CarswellBC 164, 30 C.B.R. (5th) 123, 2007 BCSC 136 (B.C. S.C.).

If the indebtedness to a creditor arises from the bankrupt's breach of contract, the doctrine of constructive trust has no application. Constructive trust cannot be used where the relationship giving rise to the indebtedness is contractual: *Pikalo v. Morewood Industries Ltd. (Trustee of)* (1991), 7 C.B.R. (3d) 209, 1991 CarswellOnt 212 (Ont. Gen. Div.); *Confederation Life Insurance Co. v. Waselenak* (1997), [1998] 5 W.W.R. 712, 57 Alta. L.R. (3d) 38, 210 A.R. 241, [1998] I.L.R. I-3526, 49 C.C.L.I. (2d) 215, 1997 CarswellAlta 1032 (Q.B.); *General Publishing Co., Re* (2002), 2002 CarswellOnt 1889, 34 C.B.R. (4th) 186, 161 O.A.C. 202 (Ont. C.A.); *Bremner v. Larabie* (2003), 41 C.B.R. (4th) 1, 2003 CarswellBC 629, 2003 BCSC 67 (B.C. Master).

Where a contract provided that 20% of the contract price was to be payable to the debtor company on delivery of approved drawings and this amount was paid by the creditor but the debtor company did not perform the rest of the contract, the court refused to find a constructive trust with respect to the money that the creditor had paid. There was an enrichment of the debtor, but the enrichment was just by the terms of the contract. The contract provided a juristic reason for the payment. To permit a sophisticated commercial entity, such as the creditor, to recast the terms of a contract would, the court said, be against sound commercial conscience: *Bank of Nova Scotia v. Altex Heat Exchanger Ltd.* (2002), 33 C.B.R. (4th) 29, 2002 CarswellAlta 615, 2002 ABQB 466 (Alta. Q.B.).

A constructive trust in an account receivable will not be implied in order to give a creditor priority over a perfected security interest in accounts receivable held by another creditor, even though the creditor claiming the constructive trust performed the work that created the account receivable. The creditor should have obtained a subordination agreement from the secured creditor before performing the work: *Orr & Co. v. Saskatchewan Economic Development Corp.* (1994), 24 C.B.R. (3d) 196, 1994 CarswellSask 16 (Sask. Q.B.).

In *Re Ellingsen* (2000), 2000 BCCA 458, 19 C.B.R. (4th) 166, 2000 CarswellBC 1684, 7 B.L.R. (3d) 12, 190 D.L.R. (4th) 47 (C.A.), the purchaser of a truck was unable to complete the purchase because third party financing could not be arranged. The purchaser made an assignment in bankruptcy. The British Columbia Court of Appeal held that the *PPSA* had no application since a security interest had not been created by the transaction and there was no enforceable interest on which the vendor could have sued the purchaser. The vendor contended that it was entitled to the proceeds of the sale of the truck on the basis of constructive trust. A constructive trust must come into existence before the date of bankruptcy. The court found that a constructive trust arose when it became clear that the purchase could not obtain the financing and that this trust occurred before the date of bankruptcy. It was appropriate to impose a constructive trust to prevent an unjust enrichment. See article "The Unwelcome Intrusion of the Remedial Constructive Trust in Personal Property Security Law: *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd.*" by Jacob S. Ziegel, 34 Can. Bus. J. 460.

If the enrichment to the debtor results from a contractual commitment and the creditor receives what it was to receive under the contractual commitment, the doctrine of constructive trust has no application. In addition, a contractual debtor-creditor relationship constitutes a juristic reason for the enrichment and on this basis also constructive trust does not apply: *Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of)* (1993), 23 C.B.R. (3d) 161, 1 E.T.R. (2d) 1, 1993 CarswellOnt 251 (Ont. Gen. Div.); affirmed (1997), 50 C.B.R. (3d) 79, 1997 CarswellOnt 4609 (Ont. C.A.).

Where a bank knew that another bank was holding a general assignment of accounts receivable and s. 88 security of a customer and permitted the customer to deposit a cheque from an account receivable and to use part of the proceeds, it was held that the bank was liable to the other bank as a constructive trustee. In the circumstances, an honest reasonable banker should have been put on inquiry whether a breach of trust was being committed: *Bank of Nova Scotia v. Bank of Montreal* (1982), 43 C.B.R. (N.S.) 269 (Ont. S.C.).

Although a wife of a bankrupt may be entitled on the basis of constructive trust to moneys received from her husband, if there has been a pooling of resources by the parties, the court can determine the extent of the trust interest of the wife and order that the husband's share be paid to the trustee in bankruptcy of the husband: *Re Roberts Estate* (1998), 3 C.B.R. (4th) 318, 23 E.T.R. (2d) 248, 1998 CarswellOnt 1193 (Ont. Gen. Div.).

In *Caterpillar Financial Services Ltd. v. 360networks corp.* (2004), 2004 CarswellBC 1835, 7 P.P.S.A.C. (3d) 1, 35 B.C.L.R. (4th) 145, 2004 BCSC 1066, 10 E.T.R. (3d) 59, 4 C.B.R. (5th) 4 (B.C. S.C.), the court-sanctioned plan did not compromise post-filing claims. An issue arose as to whether an equipment lessor had post-filing claims on the basis that the company had breached a constructive trust in favour of the lessor over proceeds from the sale of the equipment. The court concluded that a constructive trust had arisen in favour of the lessor with respect to certain sale proceeds. The deposit by the company of the proceeds of one of the units that was subject to the trust into an overdrawn account after the filing date constituted a breach of trust and a post-filing claim.

Where a vesting order relating to the sale of a commercial property specifically excluded trusts that existed at the time the order was made, in a later motion the court held that the order did not apply to subsequent constructive trust claims that arose on newly discovered or committed breaches of fiduciary duty, and refused to discharge a certificate of pending litigation against the commercial property subject to new trust claims: *Toronto Dominion Bank v. Preston Springs Gardens Inc.* (2004), 4 C.B.R. (5th) 126, 2004 CarswellOnt 2584 (Ont. S.C.J.).

The Ontario Superior Court of Justice reviewed the requirements to establish a remedy for a constructive or resulting trust in the context of the financial failure of a school that had accepted funds for pre-paid tuition. The court held that the parents did not have an arguable claim that they were entitled to a constructive trust. Constructive trusts are generally imposed in two situations: (i) as a remedy to unjust enrichment; and (ii) as a remedy for certain wrongs. Neither of those circumstances applied here. To prove unjust enrichment, the parents would have to prove that the school or secured creditor received a benefit and that the parents suffered a corresponding deprivation, and that there was no juristic reason for the enrichment. These

preconditions were found not to be present: *New Solutions Financial Corp. v. 952339 Ontario Ltd.* (2007), 2007 CarswellOnt 46, 29 C.B.R. (5th) 222 (Ont. S.C.J. [Commercial List]).

The British Columbia Supreme Court considered whether the elements of a constructive trust were present in respect of a claim by a supplier of environmental remediation services for GST credits that were recovered by the receiver/trustee appointed after a failed *CCAA* proceeding. The GST billed by the applicant supplier to the debtor rendered the supplier liable to remit the tax even though it had never received the GST from the receiver. The receiver recovered tax credits for GST totalling $550,000, the amount approximated the total amount the supplier billed for GST on those invoices. The court rejected an unjust enrichment argument because the enrichment of the receiver and the deprivation of the supplier arose from separate events, it was doubtful that they could be fairly described as "corresponding", a necessary underpinning of an unjust enrichment claim. The court held that to the extent that the receiver was enriched by receiving input tax credits from CRA, any deprivation suffered by the supplier was not directly connected to those receipts as the receiver would have received the same credits whether or not the supplier had been paid. The court held that even if the enrichment and the deprivation corresponded sufficiently to meet the unjust enrichment test, the law regarding priorities between secured and unsecured creditors provided a juristic reason for such an enrichment. The receiver recovered money as a result of making statutorily required filings with respect to the debtor company and retaining and applying the money for the benefit of the unpaid secured creditors. This reason is a recognized juristic reason and hence cannot amount to an unjust enrichment. The court noted that such a situation occurs frequently in *BIA* proceedings; creditors who have not been paid for overdue GST accounts remain primarily liable for payment of those amounts to CRA and are unable to claim the tax credits received by the debtor company's trustee or receiver. The creditor is an unsecured creditor for the amount of the GST, while CRA is a debtor of the debtor company's trustee or receiver with respect to the GST credits. No constructive trust relationship arises: *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.* (2007), 2007 CarswellBC 1323, 34 C.B.R. (5th) 94, 2007 BCSC 808 (B.C. S.C.).

The New Brunswick Court of Queen's Bench held that a settlement agreement entered into by the bankrupt to settle family property claims was of no legal effect as it was not executed by the trustee. Section 71 provides that on bankruptcy, the property of the bankrupt vests in the trustee and the court seized with the bankruptcy held that if the family division judge hearing the application declares that the bankrupt's portion of the net proceeds of sale is subject to constructive trust, it would prevent this asset from forming part of the bankrupt's estate. Conversely, if the constructive/resulting trust claim with respect to the net proceeds of sale is rejected, then 50% of the net sale proceeds would vest in the trustee pursuant to s. 71 of the *BIA*and an order should then so issue. Until such determination is made in family court, the net proceeds of sale were to be held in trust until further order of the court: *Garnett (Trustee of) v. Ewart* (2007), 2007 CarswellNB 394, 2007 NBQB 279, 35 C.B.R. (5th) 299 (N.B. Q.B.).

The registrar considered the issue of whether the refund of softwood lumber duties returned to the now bankrupt importer of record should form part of its estate or whether a trust should be recognized. Registrar Bray was of the view that an express trust can be contingent, dependent for its operation on a foreseen probability as long as the subject matter is identifiable. In this case, the amounts transmitted for anti-dumping duty payments were clearly definable, and the subject

matter was sufficiently certain for a trust to be founded. The registrar held that all the elements of a constructive trust had been established and the funds had to be returned to the original seller: *Re Ridgewood Forest Products Ltd.* (2007), 2007 CarswellNB 671, 45 C.B.R. (5th) 68 (N.B. Q.B.).

The Ontario Superior Court of Justice considered whether certain receivables were the property of the debtor or whether they were subject to an implied or constructive trust. The parties had entered into two written agreements, a distribution agreement and a letter agreement; however, neither of the two written agreements provided that the accounts receivable collected by the bankrupt would be held in trust for the applicant, nor was there any evidence of an oral agreement or discussions to such effect. In the absence of formal trust documentation, the court must consider the circumstances and evidence as to what the parties intended, what was actually agreed to, and how the parties conducted themselves to determine if the requisite clear intention to create a trust is present. In this case, the factors to consider included the content of any agreements between the parties, whether the alleged trust property was held in a separate account, whether the alleged trustee is permitted to commingle the alleged trust funds with his or her own funds or use the funds for his or her own general business purposes, and past events and conduct that may suggest that the parties treated the funds as trust funds. Here, the court held that since there was no intention to create a trust, there could be no implied trust and further, that there was a juristic reason for the deprivation such that there was no constructive trust claim: *Citizens Bank of Rhode Island v. Paramount Holdings Canada Co.* (2008), 2008 CarswellOnt 1615, 41 C.B.R. (5th) 131 (Ont. S.C.J.).

A constructive trust assertion will have no force where there is no unjust enrichment and where there is a juristic reason, such as a contract between a creditor and the bankrupt, whereby the bankrupt received the funds from a sale to customers: *Re Infoplace Ticket Centres Ltd.* (2009), 2009 CarswellOnt 8082 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice allowed a creditor's appeal of the disallowance of its property claim. The court was satisfied that funds in the hands of the bankrupt company should be the subject of a constructive trust. The audited financial statements of the bankrupt disclosed no significant contingent liabilities; and while they made reference in a note to a decision of a hearing panel of the Investment Dealers Association (IDA) that found the company guilty of failing to provide information and documents and fined it $50,000, the note advised that an appeal panel of the IDA had reversed the conviction and fine; it did not disclose that the IDA investigation was continuing and thus that there were contingent liabilities. In addition, the bankrupt was named in a lawsuit in the United States which, if successful, would have resulted in a significant judgment against it and this contingent liability was not disclosed in the financial statements. The court held that civil fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless of whether it is true or false. Here, but for the deceit, the debtor would not have been lent money. The court held that trying to characterize a "loan" as equity was at odds with the subordination agreement, the fact that it was not convertible, the multiple references to debt in the documents and the provision for interest. The court in equity will impose a constructive trust to permit a fraud victim to recover property lost as a result of a fraud, provided the property is traceable in equity, and here, the amount invested that was traceable should be the subject of a constructive trust in

favour of the investor in order to prevent the unjust enrichment of the bankrupt company: *Re Credifinance Securities Ltd.* (2010), 2010 CarswellOnt 830, 63 C.B.R. (5th) 250 (Ont. S.C.J. [Commercial List]).

On appeal, the Ontario Court of Appeal upheld the decision of the judge who had allowed the appeal of a creditor who had filed a s. 81 *BIA* property proof of claim. In doing so, the court provided guidance as to when it was appropriate for the court to impose the remedy of a constructive trust. The court held that constructive trust principles can be applied in bankruptcy proceedings, however, those principles are applied only in the most extraordinary cases, referencing *Re Ascent Ltd.* (2006), 2006 CarswellOnt 116, 9 P.P.S.A.C. (3d) 176, 18 C.B.R. (5th) 269 (Ont. S.C.J.). The test for proving the existence of a constructive trust in a bankruptcy setting is high. A constructive trust can be ordered to remedy an injustice. The trustee in bankruptcy must act in an equitable manner. Here, the constructive trust granted by the judge was just in the circumstances of this case and did not unjustly deprive creditors of their rights under the *BIA*. LaForme J.A. concluded that it was within the judge's jurisdiction to grant the remedy and there was ample evidence on which the judge could rely to make the findings. A constructive trust is a discretionary remedy; and in a bankruptcy, there are creditor interests to consider besides those of the defrauder and the defraudee. These stakeholders were considered by the judge, who concluded that a rigid formulaic approach, strictly relying on the letter of the *BIA*, would produce an unjust result: *Re Credifinance Securities Ltd.* (2011), 2011 CarswellOnt 1218, 74 C.B.R. (5th) 161, 2011 ONCA 160 (Ont. C.A.).

The Ontario Superior Court of Justice dismissed the appeal of Canada Revenue Agency in respect of a s. 81 *BIA* property proof of claim. The test for establishing unjust enrichment was met; however, a constructive trust was not imposed as CRA had no property interest over the asset in question. A constructive trust is a remedy that may be ordered in appropriate cases for compensating an unjust enrichment. It is a proprietary concept. Justice Newbould observed that the critical issue is whether there is a direct link between the plaintiff's contribution and the subject of the trust being claimed; here, there was no such connection: *Canada (Revenue Agency) v. TNG Acquisitions Inc. (Trustee of)* (2011), 2011 CarswellOnt 3908, 2011 ONSC 3129 (Ont. S.C.J. [Commercial List]).

TAB 6

[Indexed as: **Citizens Bank of Rhode Island v. Paramount Holdings Canada Co.**]

Citizens Bank of Rhode Island (Appellant / Applicant) and Paramount Holdings Canada Company, Paramount Holdings Canada Company II and Image Craft Inc. (Respondents)

Ontario Court of Appeal

D. O'Connor A.C.J.O., D. Doherty, M. Rosenberg JJ.A.

Heard: December 19, 2008

Oral reasons: December 19, 2008

Docket: CA C48693, 2008 ONCA 891

Alan J. Butcher for Appellant, Transcorp Distribution Inc.
Harvey G. Chaiton, Maria Konyukhova for Respondents

Bankruptcy and insolvency —— Property of bankrupt — Trust property — General principles —— Creditor's motion for declaration that accounts receivable held by debtor were impressed with trust in favour of creditor was dismissed — Creditor appealed — Appeal dismissed — At hearing before motion judge, creditor took position that there were not material facts in dispute and it did not press for trial of issue — It was not open to creditor to now seek trial of issue when it was not sought on motion — There were no material facts in dispute — There were juristic reasons for deprivation.

Cases considered:

Canada (Attorney General) v. Confederation Life Insurance Co. (1995), 8 C.C.P.B. 1, 1995 CarswellOnt 318, 1995 C.E.B. & P.G.R. 8227 (headnote only), 33 C.B.R. (3d) 161, 8 E.T.R. (2d) 72, 31 C.C.L.I. (2d) 77, 24 O.R. (3d) 717, [1995] O.J. No. 1959 (Ont. Gen. Div.) — referred to

Canada (Attorney General) v. Confederation Life Insurance Co. (1997), 32 O.R. (3d) 102, 14 C.C.P.B. 1, 41 C.C.L.I. (2d) 1, 145 D.L.R. (4th) 747, (sub nom. *Confederation Life Insurance Co. (Liquidation), Re)* 97 O.A.C. 18, 1997 CarswellOnt 62, 1997 C.E.B. & P.G.R. 8308 (headnote only), [1997] O.J. No. 123 (Ont. C.A.) — referred to

1213763 Ontario Inc. v. Shopsy's Hospitality Inc. (2008), 2008 CarswellOnt 7774, 2008 ONCA 863 (Ont. C.A.) — referred to

APPEAL by creditor from decision reported at *Citizens Bank of Rhode Island v. Paramount Holdings Canada Co.* (2008), 2008 CarswellOnt 1615, 41 C.B.R. (5th) 131 (Ont. S.C.J.), dismissing creditor's motion for order that certain assets of debtor were subject to trust.

***Per curiam*:**

1 The appellant submits that there were material facts in dispute and that the motion judge should have directed a trial of the issue. At the hearing before the motion judge the position taken by the appellant was that there were no material facts in dispute and it did not press for a trial of an issue. It is not open to the appellant to now seek trial of an issue when it was not sought on the motion: see *1213763 Ontario Inc. v. Shopsy's Hospitality Inc.*, 2008 ONCA 863 (Ont. C.A.) at para. 25.

2 In any event, we are satisfied that there were no material facts in dispute. On the facts not in dispute, there were juristic reasons for the deprivation. As the motion judge noted, the debtor/creditor relationship, the manner in which the funds were dealt with, the existence of the bankruptcy proceedings and the general insolvency nature of the proceedings were juristic reasons: see *Canada (Attorney General) v. Confederation Life Insurance Co.*, [1995] O.J. No. 1959 (Ont. Gen. Div.)(affirmed (1997), 32 O.R. (3d) 102 (Ont. C.A.) at para. 220.

3 Accordingly, the appeal is dismissed with costs fixed in the amount of $12,000 inclusive of disbursements and G.S.T.

Appeal dismissed.

TAB 7

[Indexed as: **White, Re**]

In the Matter of the Bankruptcy of Steven Mathew White, of the City of Toronto, in the Province of Ontario, Estate No.: 31-428403

In the Matter of the Bankruptcy of Marla White, of the City of Toronto, in the Province of Ontario, Estate No.: 31-442550

Ontario Superior Court of Justice

Reg. S.W. Nettie

Heard: September 15, 2006

Judgment: October 20, 2006

Docket: Toronto Estate Nos. 31-428403, 31-442550

Irving Marks, Cara Shamess for Moving Party
Fred Tayar for Respondent

Bankruptcy and insolvency — Proving claim — Disallowance of claim — Appeal from disallowance — General principles — Creditor company's principals were informed by third party friend of investment opportunity with bankrupt — Creditor invested $500,000 with bankrupt via term loan to third party — Creditor obtained promissory note from third party in exchange for $500,000 — Same day that creditor gave promissory note to third party, third party advanced same amount to bankrupt — Bankrupt made assignment in bankruptcy — Creditor's proof of claim for recovery of funds was dismissed by trustee — Creditor brought appeal from trustee's decision — Appeal dismissed — Trustee reasonably dismissed creditor's proof of claim — Creditor had claim against third party, not bankrupt — To allow creditor to obtain proprietary right to significant sum to exclusion of other creditors would be inequitable — Creditor did not intend to lend money to bankrupt directly, but in such manner as to engage liability for loan upon third party — Court drew adverse inference from creditor's failure to adduce evidence showing money loaned actually flowed through third party's account — Third party might not even have lent creditor's funds to bankrupt, but rather its own funds.

Cases considered by *Reg. S.W. Nettie*:

Ascent Ltd., Re (2006), 2006 CarswellOnt 116, 9 P.P.S.A.C. (3d) 176, 18 C.B.R. (5th) 269 (Ont. S.C.J.) — distinguished

Becker v. Pettkus (1980), 1980 CarswellOnt 299, 1980 CarswellOnt 644, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) — followed

Brown & Collett Ltd., Re (1996), 11 E.T.R. (2d) 164, 1996 CarswellOnt 619, [1996] O.J. No. 625 (Ont. Gen. Div. [Commercial List]) — considered

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241, [1997] S.C.J. No. 52 (S.C.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to
Pt. XII — referred to
s. 81 — referred to
s. 81(3) — referred to
s. 163(2) — considered
s. 253 "securities firm" — referred to
s. 253 "security" — referred to

APPEAL by creditor from trustee's dismissal of proof of claim.

***Reg. S.W. Nettie*:**

1 This was an appeal by Caicos Building and Loan Corporation ("Caicos"), pursuant to s. 81 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

2 On March 21, 2006, Caicos delivered two Proofs of Claim (Property), one in each of the Estates of Steven Mathew White and Marla White. These were responded to by Zeifman Partners Inc., trustee in bankruptcy for both estates, (the "Trustee"), with Notices of Dispute. Caicos appeals from said Notices of Dispute. The appeals proceeded on the same material, and it was agreed that as the facts in each appeal are identical, the submissions in and disposition of each appeal would also be identical. Accordingly, these Reasons apply to each Estate noted above.

Facts

3 Caicos is an offshore corporation. Its principals include two brothers, Timothy Kempe and William Kempe ("Timothy" and "William" or the "Kempes" collectively).

4 The Kempes have, as a long time friend, one Michael Rothfeld ("Rothfeld"). The Kempes, individually and collectively, have been friends with Rothfeld for at least 20 years.

5 In early 2002, Rothfeld revealed to the Kempes that he was then primarily in the business of sourcing investors for Steven White ("Steven"), and had been for some time. Rothfeld also advised the Kempes that he had, for the four-year period prior to that, been investing both his own money and that of his spouse's family with Steven. Rothfeld had, apparently, been investing the sum of $10,000,000.00 with Steven, with great success in terms of financial reward. Rothfeld also, at that time, and throughout 2002, described Steven as a uniquely skilled investor and that investing with Steven was an opportunity to earn a high rate of return with no risk to the invested principal.

6 By March, 2003, the Kempes had become convinced that such an investment as had been described by Rothfeld was right for their company, Caicos, and agreed to invest US$500,000.00. The Kempes, in their materials herein, make it abundantly clear that they believed that they were investing this money with Rothfeld *and* Steven. The Kempes also make it clear in their materials that they caused Caicos to make the investment in reliance upon the Kempes' relationship of trust with Rothfeld; Rothfeld's representations to them regarding Steven and his skills and position with ScotiaMcLeod; and the terms of the investment itself.

7 With respect to the actual investment and its terms, the promissory note obtained by Caicos in exchange for its US$500,000.00 is reproduced in the materials. In essence, it is a term loan by Caicos to Rothfeld and a corporation known as Eyerock Holdings Inc. ("Eyerock"). The note from Rothfeld and Eyerock, to Caicos, was due on or before September 22, 2003, and bore interest at 15% per annum, calculated monthly, not in advance.

8 The stated reason for the loan being made by Caicos to Rothfeld and Eyerock, and not to Steven, is that the Kempes were advised, by their long time, trusted friend, Rothfeld, that he would be handling the non-resident withholding tax due on the interest payment on behalf of Steven, given that Caicos is a British West Indies corporation.

9 The evidence indicates that the same day that the Eyerock note was given, and funds advanced by Caicos to Eyerock, a note was given to Eyerock by Steven, also in the amount of US$500,000.00, on more or less identical terms, but bearing interest at an annual rate of 18%. Apparently the Kempes had been advised that Rothfeld would be earning 3% per annum for introducing them to the investment.

10 No particular form or vehicle appears to have been specified for the investment of the Caicos money. There is certainly no evidence on the appeal that the advance of funds by Caicos to Eyerock and Rothfeld was on condition of it flowing through to Steven. The cross-examination of Timothy on his affidavit indicates that he, and Caicos, were of the understanding that Eyerock was a company owned by Rothfeld, and his "partner" Steven.

11 The closing of the above described transactions took place March 25, 2003, at the offices shared by Rothfeld and Steven. According to the evidence, and it seems that the appellant has taken great pains to set this out, Timothy met Steven only briefly on the day of closing. The meeting took place only because Rothfeld, with whom Timothy expected to close the transaction, it being, as he has testified and I so find, a transaction that he and Caicos thought was being entered into with Rothfeld and Rothfeld's "partner" Steven, was late. As well, the appellant has very clearly set out that William met Steven directly on only two occasions over the course of the year long period from when Rothfeld first broached the subject of this investment to the March 25, 2003, closing date.

Nowhere in the materials does Caicos or the Kempes, on its behalf, indicate that Caicos was induced to invest as a result of any representations of Steven. All of the representations appear, and I so find, to have come to Caicos and its principals from Rothfeld. The interaction between Timothy and Steven on the closing date was, I find, brief, and only served to have Steven reiterate that which Rothfeld had already told the Kempes, and which had already induced them to cause Caicos to make the investment.

12 Shortly after the closing date, Caicos and its principals discovered that Steven had lost his position with ScotiaMcLeod, and became concerned with the safety of the investment. Contact was had with Rothfeld, who seemed just as concerned. Although not explained in the materials, Caicos seemed most concerned with the financial demise of Steven, perhaps fueled by certain media reports concerning Steven's direct investors who had been left holding the proverbial bag. Given the lengths to which the Kempes and Caicos have gone to make it clear that they invested with and on the representations of Rothfeld, I am not at all sure why they were concerned with Steven's financial failure. Their debt was still due, and not yet been called or matured, from Eyerock and Rothfeld. No evidence was led to indicate that those two parties were not or are not able to honour the Eyerock/Rothfeld note, other than as may be inferred from the Statement of Claim filed, against, *inter alia*, Eyerock.

13 In any event, concerned they were, and were apparently able to determine that the sum of US$500,000.00 was deposited to Steven's joint account with his now bankrupt spouse, Marla White ("Marla"), at The Toronto-Dominion Bank, (the "TD Account"). Said deposit was made scant days after Caicos advanced that amount to Eyerock, and Eyerock in turn advanced a like amount to Steven. Caicos concludes from this series of transactions that such of the US$500,000.00 as was left in the TD Account, on a rateable basis as determined by recent deposits to the TD Account, was property of Caicos in the hands of the bankrupts, Steven and Marla, and now in the possession of the Trustee. It is on that basis that the Proofs of Claim (Property) were advanced, and these appeals launched.

Issues

14 Caicos argues that it is entitled to succeed as a property claimant under s. 81 BIA on the basis of constructive trust, and the use of tracing principles to follow what it claims is its money in the TD Account by following or tracing it through Eyerock's hands into Steven's hands, where it was at the time of bankruptcy. Caicos does not argue express or legal trust in respect of the funds.

15 Constructive trust being an equitable remedy, requiring an exercise of discretion by the Court, is it appropriate that this Court find a constructive trust in favour of Caicos over all or any of the funds in the TD Account?

Analysis

16 Caicos is clear in its position — it claims status as beneficiary of a constructive trust. As indicated above, that is an equitable remedy. Before delving further into the analysis of the requirements to be met to find such a trust, it is important to acknowledge that the facts in this matter cry out for equitable relief, on their face. Caicos, albeit a sophisticated lender, lent money, in the honest belief that it would be repaid. It does not appear to have been repaid, although it might, in fact, have other remedies yet available to it to recover its funds. That said, it is clear, at least for the purposes of these appeals, that Steven is a rogue, and that he was likely involved in some sort of a ponzi scheme, which collapsed just as Caicos entered the scene. Caicos has no apparent legal remedy against the funds in the TD Account, and equity will always try to make right what legal remedies cannot.

17 It is clear, in Canada, that a constructive trust may be founded on both the older English principles of constructive trust, and the unjust enrichment principles classically enunciated in *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.). That this proposition is true is clearly set out in a more recent decision of the Supreme Court of Canada — *Soulos v. Korkontzilas* (1997), 146 D.L.R. (4th) 214 (S.C.C.), at para. 25.

18 Turning first to the constructive trust as found in the English authorities, and which is still the law of our Dominion and of our Province, what is a constructive trust? It is, at best, vaguely defined, and seems to be the quintessence of equity in that it changes its shape and appearance as is required to give effect to what has been called good conscience, or in an insolvency setting, commercial morality. I find that *Soulos* provides us with a good picture of this nebulous concept, at para. 29:

> Good conscience as the unifying concept underlying constructive trust has attracted the support of many jurists. Edmund Davis L.J. suggested that the concept of a "want of probity" in the person upon whom the constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts": *Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276 (C.A.). Cardozo J. similarly endorsed the unifying theme of good conscience in *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378(1919), at p. 380:
>
> > A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. [Emphasis added.]

19 A constructive trust is a way for equity to accomplish its goal of righting a legal wrong. The Supreme Court having, in *Pettkus*, set out the requirements for the use of a constructive trust where unjust enrichment has occurred, set out in *Soulos* four conditions for the use of constructive trust to remedy wrongful con-

duct, other than as may have resulted in an unjust enrichment. The two are not mutually exclusive, and the former often results in the latter. Those conditions, at para. 45 of *Soulos*, are:

> (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 the imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of the intervening creditors must be protected.

20 Applying these considerations to the case at bar, I am not convinced that there has been sufficient wrongful conduct to engage the Court's conscience, and impose a constructive trust.

21 Firstly, while Steven no doubt owed a duty or obligation to use his supposedly unique skill and expertise to wisely invest monies lent to him for that purpose, and if his activities are found to have been fraudulent, he would certainly have failed in that obligation, he did not owe it to Caicos. At best he owed it to Eyerock, but it has not advanced a Proof of Claim (Property).

22 Similarly, with respect to the second condition, Steven did not acquire the asset in question (the funds in the TD Account) as a result of activities in breach of his obligation to either Eyerock or Caicos (if he even had any obligation to Caicos). He acquired the funds in the lawful carrying out of the contract with Eyerock to borrow said funds, and return them at a later date with interest. Both Eyerock and Steven (and, for that matter Caicos) intended Steven to have the funds, at least until he further put them to use to earn a return. However, in all honesty, neither Eyerock nor Caicos would have had any interest in what Steven did with the funds, so long as he repaid them on time with interest. He could lawfully have left them on deposit in the TD Account, and paid the interest from his personal funds, if he so desired. Nothing in either promissory note, or any of the evidence as to Caicos' understanding of the investment bound or obligated Steven to do anything other than receive the funds and repay them with interest in six months time. Even the allegations that he was to deposit them to his personal account with ScotiaMcLeod do not persuade me otherwise, as I see no material difference to the facts if they were in his deposit account with The Toronto-Dominion Bank or ScotiaMcLeod when his financial carousel stopped turning.

23 Turning to the third condition, I do not find any evidence of a legitimate reason for Caicos to seek a proprietary remedy here, other than to bootstrap itself ahead of the other creditors of Steven and Marla, and otherwise upset the scheme of orderly distribution of the BIA. This does not engage the Court's conscience.

24 Fourthly, I find that the intervening insolvency is a factor which would render the imposition of a constructive trust unjust. As I did in *Ascent Ltd., Re* (2006), 18 C.B.R. (5th) 269 (Ont. S.C.J.), I have considered the principles of commercial morality, and the decision of Winkler J, as he then was, in *Brown & Collett Ltd., Re* (1996), 11 E.T.R. (2d) 164 (Ont. Gen. Div. [Commercial List]). Notwithstanding, I distinguish the case at bar from *Ascent Ltd., Re*, and do not find it appropriate to alter the BIA scheme of distribution, even if the other factors had been found by me, which they are not.

25 Turning to unjust enrichment as a ground for imposition of constructive trust, I do not find that Caicos meets the test there either.

26 It is by now trite law that unjust enrichment requires three elements: i) an enrichment of the defendant; ii) a corresponding deprivation of the plaintiff; and iii) the lack of a juristic reason for this state of affairs.

27 There is no doubt that Steven was enriched by the amount of US$500,000.00, and that Caicos has suffered a deprivation of like amount. I do not find that the amounts correspond, however, due to the intervention of Eyerock.

28 Caicos argues that Eyerock was merely a conduit for tax purposes. However, that flies in the face of its own evidence as to the import placed upon its relationship with Rothfeld and Rothfeld's, not Steven's, representations about Steven and the investment. It does not lie in Caicos' mouth, in my view, for it also to claim, when convenient, that Eyerock and Rothfeld are but conduits between it and Steven. The more so when Caicos has provided no evidence, other than the barely legible back of its negotiated draft in favour of Eyerock, that its money was even the same money as Eyerock advanced to Steven. Even that evidence only indicates that the draft may have been deposited to the same bank account as the Eyerock cheque to Steven was drawn upon, not that the funds flowed through thereto. Section 81(3) BIA makes it very clear, for very good policy reasons, that the onus in this matter is on Caicos. I do not accept the argument that Caicos could not have obtained evidence from Eyerock relating to the flow of funds allegedly through it from Caicos to Steven. I do not accept this for two reasons: the evidence of the relationship between the principals of Caicos and the principal of Eyerock (who turned over certain transaction evidence in April, 2003, immediately upon being asked for it); and s. 163(2) BIA. Caicos argued that it could not obtain evidence under s. 163(2) BIA because the Trustee not only rejected its Proof of Claim (Property), but also rejected its claim as an unsecured creditor of Steven and Marla. The section clearly indicates that it is

available not only to the Superintendent and creditors but to other interested persons, and there was no evidence that such a motion had been rejected by the Court. Section 163(2) BIA would have permitted a request of the Court to examine Rothfeld under oath to determine the flow of funds through Eyerock's account.

29 In order to succeed on unjust enrichment, the Court would have to pierce the paper veil of this transaction. I have considered this at some length. I recognize that equity exists to permit such a piercing, if the Court is convinced that that is necessary to give effect to what the intention of the parties was or if good conscience requires it to right a wrong or to accomplish what legal remedies cannot. I simply cannot conclude, on the evidence before me, that any of those apply.

30 I am satisfied that Caicos intended to lend the money not to Steven directly, but to him in such a manner as to engage liability for the loan upon the long time friend of its principals — Rothfeld, and his company. Even though Timothy thought that Eyerock was owned by both Rothfeld and Steven, Caicos was careful, I find, to ensure that not only Eyerock, but Rothfeld personally would be liable to it on the loan. I draw an adverse inference from the failure to adduce evidence that the Caicos money actually flowed through the account of Eyerock in any manner. For all this Court can determine, Eyerock may have kept Caicos' funds for its own purposes. After all, the evidence indicates that Rothfeld and his family were lending amounts to Steven in the many millions of dollars. It might not even have lent the Caicos funds to Steven, but its own funds. There is simply no evidence on the point, despite the statutory burden on Caicos in this appeal.

31 I should also indicate that I have considered the argument on the issue of whether or not Caicos needs to establish a trust in its favour over the funds in Eyerock's hands in order to trace them to the TD Account, in the event that I conclude, as I have, that a constructive trust with Steven as the trustee is not appropriate. In applying the same rationale as above, I do not find Eyerock to have engaged in wrongful conduct sufficient to support the imposition of a constructive trust. In fact, no wrongdoing is alleged by Caicos against it or Rothfeld anywhere in the materials. I also do not find that unjust enrichment exists in the relationship between Eyerock/Rothfeld and Caicos, for the very simple reason that, as numerous authorities have established, including *Ascent Ltd., Re*, the existence of a debtor-creditor relationship is juristic reason for enrichment and deprivation flowing from that relationship. The parties expect to be respectively enriched and deprived for at least the period contemplated for the credit granting. Eyerock is not the constructive, or other, trustee of Caicos. It is, subject to any defenses it may have on its note, clearly the debtor of Caicos, and there is no trust imposed on the funds in Eyerock's hands which Caicos could argue follows the funds into the hands of Steven, if it was even proved herein that those funds so flowed. It was not, as indicated above.

32 Finally, in coming to my decision herein, I have also kept in mind not only the considerations mentioned in paragraph 16, above, but the fact also, as argued by counsel for Caicos, that to permit the US$500,000.00 in the TD Account to remain with the Trustee for the benefit of the creditors will result in a continuance of the ponzi scheme. Steven will have managed, in other words, to extract a further sum from yet another party to fund his previous borrowings and "investments". However, this has not persuaded me that it is any more equitable to place this burden on any other creditor. After all, it is the nature of such a house of cards that, inevitably, someone is the last one to advance funds to the rogue, just before it all falls apart. In my view, the BIA is the most equitable scheme for distributing the assets of these two bankrupts. The more so when I consider the evidence that Caicos has no direct claim on Steven, and still retains all of its legal and other claims against Eyerock and Rothfeld.

33 For all of those reasons, I do not find it appropriate to exercise my discretion and find or impose a constructive trust in this matter. I find that for the purposes of this appeal, Caicos is a creditor of Eyerock and Rothfeld, and not of Steven, and to allow it to obtain a proprietary right to a significant sum, to the exclusion of other creditors would not, in itself, be equitable

34 Although not necessary to decide the appeal, I will deal also with the submission of counsel for the Trustee that Part XII BIA provides a code for dealing with the insolvency of a securities firm, as defined therein, and ousts the law of trust for other than "customer named securities" in such an insolvency. With the greatest of respect to counsel, while that may be so, there is no evidence before me to conclude that Steven, although registered to sell securities, was carrying on business as a securities firm, as defined in Part XII BIA. The transaction in question certainly involved a security as defined therein, the definition including, as it does, "notes", but he was not engaged in the buying and selling of these notes, and there is no evidence as to what he did with the funds. In a pure ponzi scheme, as alleged in argument, he might simply having been paying out old loans with new loans, with or without a skimming off the top for himself. It is conceivable that there were not even any underlying investments. Accordingly, I would not have dismissed the appeal on the basis of this argument. I do not need, therefore, to address Mr. Marks' concerns that this point was not raised in the Notices of Dispute filed by the Trustee herein.

35 Finally, I would add that given my finding on the imposition of a constructive trust, it is not necessary to deal with the submissions of the availability of the equitable remedy of tracing to follow the funds through Eyerock's hands into the TD Account, or the submissions on the appropriate division of the TD Account to satisfy such a trust claim.

36 The appeals are dismissed. The parties are free to appear in front of me on the issue of costs, either in writing, or on a date to be arranged by them with the Court office.

Appeal dismissed.

TAB 8

[Indexed as: **Credifinance Securities Ltd., Re**]

In the Matter of the Bankruptcy of Credifinance Securities Limited

Ontario Superior Court of Justice [Commercial List]

F. Marrocco J.

Heard: December 15, 2009; January 6, 2010

Judgment: February 16, 2010

Docket: 31-1249035, 2010 ONSC 984

Gregory Sidlofsky for Appellant

Catherine Francis for Trustee, Deloitte & Touche Inc.

Bankruptcy and insolvency — Proving claim — Disallowance of claim — Appeal from disallowance — Grounds — C Ltd. made assignment in bankruptcy in August 2009 — D Corp. filed proof of claim in amount of $400,000 in September 2009 — D Corp. maintained that sum of $310,500 in C Ltd.'s possession was its property — Trustee denied claim in full — D Corp. appealed, claiming to be victim of fraud and alleging that $310,500 amount was directly traceable to $400,000 loan — Appeal allowed — L, representative of D Corp., was deceived by B, of C Ltd. — B did not inform L of contingent liabilities when, to B's knowledge, there was outstanding investigation which could potentially result in charges against C Ltd. — In addition, there was outstanding U.S. lawsuit in which plaintiffs were seeking millions from defendants, one of which was C Ltd. — L would not have entered into agreement but for deceit and would not have loaned C Ltd. $400,000 — Evidence showed that $310,500 was traceable to $400,000 and funds should be subject of constructive trust in favour of D Corp. in order to prevent further unjust enrichment of C Ltd..

Cases considered by *F. Marrocco J.*:

Ascent Ltd., Re (2006), 2006 CarswellOnt 116, 9 P.P.S.A.C. (3d) 176, 18 C.B.R. (5th) 269 (Ont. S.C.J.) — considered

Confederation Life Insurance Co. v. Waselenak (1997), 57 Alta. L.R. (3d) 38, [1998] 5 W.W.R. 712, [1998] I.L.R. I-3526, 49 C.C.L.I. (2d) 215, 1997 CarswellAlta 1032, 210 A.R. 241 (Alta. Q.B.) — distinguished

DSLC Capital Corp. v. Credifinance Securities Ltd. (2009), 2009 CarswellOnt 2032 (Ont. S.C.J. [Commercial List]) — referred to

Goodbody v. Bank of Montreal (1974), 47 D.L.R. (3d) 335, 4 O.R. (2d) 147, 1974 CarswellOnt 308 (Ont. H.C.) — referred to

Holmes v. Amlez International Inc. (2009), 2009 CarswellOnt 6595 (Ont. S.C.J.) — referred to

Ontario (Securities Commission) v. Greymac Credit Corp. (1986), 55 O.R. (2d) 673, 1986 CarswellOnt 158, 17 O.A.C. 88, 23 E.T.R. 81, 30 D.L.R. (4th) 1, 34 B.L.R. 29 (Ont. C.A.) — referred to

Peek v. Derry (1889), 14 H. of L. 337, 38 W.R. 33, 1 Megones Companies Act Cas 292, L.R. 14 App. Cas. 337, [1886-1890] All E.R. Rep. 1, 58 L.J. Ch. 864, 61 L.T. 265, 54 J.P. 148, 5 T.L.R. 625, 14 A.C. 337 (U.K. H.L.) — followed

Pikalo v. Morewood Industries Ltd. (Trustee of) (1991), 7 C.B.R. (3d) 209, 1991 CarswellOnt 212, [1991] O.J. No. 1632 (Ont. Bktcy.) — distinguished

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

APPEAL by claimant from trustee's dismissal of claim.

F. Marrocco J.:

1 Credifinance Securities Limited made an assignment in accordance with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, on August 24th, 2009. DSLC Capital Corp. filed a proof of claim in the amount of $400,000 on September 9, 2009. In its proof of claim, DSLC Capital Corp. maintained that the sum of $310,500 in the possession of Credifinance Securities Limited was its property. On September 25, 2009, Deloitte & Touche Inc., in its capacity as Trustee of the estate of Credifinance Securities Limited, denied the claim in full. DSLC Capital Corp. appeals that decision in this proceeding.

2 On this appeal, the position of DSLC Capital Corp. is that it is the victim of a fraud at the hands of Georges Bennaroch and that, as a result of that fraud, it loaned $400,000 to Credifinance Securities Limited. According to DSLC Capital Corp., the $310,500 is directly traceable to that $400,000 loan and, therefore, should be impressed with a constructive trust in favor of DSLC Capital Corp.

3 This appeal proceeded as a hearing *de novo*. Two witnesses were called and cross-examined. They were John Lorenzo and Robert Carbonaro. As well, previous examinations and cross-examinations of individuals were received as their evidence on appeal. Those witnesses were David Carbonaro, Robert Carbonaro, John Lorenzo, Georges Bennaroch, Marjorie Ann Glover and Alistair Crawley. In addition, affidavits and supplementary affidavits of the same persons, as well as Charles B. Wagner, were received as evidence.

4 I found the evidence of John Lorenzo and Robert Carbonaro to be believable. I found Mr. Lorenzo's evidence to be more helpful.

5 Mr. Lorenzo's interest in this matter is relatively straightforward. He has a Master's degree in Economics and, since his graduation from the American University in Beirut, he has been an independent business person. He came to Canada in 1971 and he has been involved with a number of companies in Canada during his time here.

6 Mr. Lorenzo formulated a business plan. He knew of several investors who resided outside of Canada and who were looking for a boutique investment advisor to provide them with personalized investment advisor services. He was looking for a fully-licensed vehicle so the advice could be legally given. The revenue stream of the vehicle was not important.

7 Mr. Lorenzo was introduced to Georges Bennaroch by a friend, David Carbonaro, in 2007. Georges Bennaroch controlled Credifinance Securities Limited. After meeting with Georges Bennaroch on August 20, 2007, it appeared to Mr. Lorenzo that Credifinance Securities Limited was the vehicle he was looking for. The company had only a few retail accounts and it was in the process of winding them down. Georges Bennaroch indicated that he wished to move to Paris to be closer to his daughter who was studying there and was, therefore, willing to make Credifinance Securities Limited available to Mr. Lorenzo.

8 The March 31, 2007 audited financial statements of Credifinance Securities Limited disclosed no significant contingent liabilities. Those audited financial statements made reference in a note to a decision of a hearing panel of the Investment Dealers Association ("IDA"), which found the company guilty of failing to provide information and documents and fined it $50,000, plus $15,000 costs. The note also informed the reader that, on July 15, 2007, an appeal panel of the IDA had reversed the conviction and fine.

9 At some point, the IDA became the Investment Industry Regulatory Organization of Canada ("IIROC"). I will refer to the regulator as the IDA throughout.

10 After reading the note, Mr. Lorenzo asked Georges Bennaroch about the IDA investigation and he was informed that the case was closed. This was not true. In fact, Georges Bennaroch, Ms. Ann Glover, the CFO of Credifinance Securities Limited, and Credifinance Securities Limited itself were still under investigation. Georges Bennaroch knew this because the IDA had written to Ms. Ann Glover on July 17 and 27, 2007 reminding her that it had previously informed her that it had commenced an investigation into Credifinance Securities Limited and Mr. Georges Bennaroch and asking for information. There was no dispute about the fact that Georges Bennaroch knew about the July correspondence. Accordingly, when Georges Bennaroch met with Mr. Lorenzo on August 20, 2007, he knew that the IDA investigation was continuing.

11 Georges Bennaroch attempted to suggest, in his affidavit and cross-examination, that Mr. Lorenzo knew about the ongoing IDA investigation. Counsel for the Trustee also articulated this possibility, but not as an advocate for Georges Bennaroch.

12 I completely reject this suggestion; it is simply unbelievable. I do not believe that Mr. Lorenzo would solicit the interest of friends in a licensed entity which was under investigation and could be publicly embarrassed by the laying of charges at any time. In addition, the deal made between Mr. Lorenzo and

Georges Bennaroch allowed Georges Bennaroch to continue as Chairman of the board. It is not reasonable to believe that Mr. Lorenzo would have permitted Georges Bennaroch to remain associated with Credifinance Securities Limited if he had known that Georges Bennaroch was under investigation by the IDA and could be charged at any time. Charges against Credifinance Securities Limited, or its Chairman, would completely discredit the company in the eyes of potential investors and undermine Mr. Lorenzo's business plan.

13 It was also suggested that David Carbonaro knew about the IDA investigation. It was suggested that another company, known as Foundations, did not purchase an interest in Credifinance Securities Limited due to the outstanding IDA investigation. It was suggested that Mr. Lorenzo knew this because he had invested $100,000 in Foundations and because his friend, David Carbonaro, was active in Foundations' affairs.

14 Mr. Lorenzo testified that Foundations never completed its agreement with Credifinance Securities Limited because Foundations lost interest in the transaction after deciding that it did not need Credifinance Securities Limited. David Carbonaro was examined prior to this motion. He is a lawyer at Heenan Blaikie LLP. At one point, he acted for Georges Bennaroch. He is a friend of John Lorenzo and the brother of Robert Carbonaro. He testified that he was involved with the group at Foundations. He testified that the only investigation he knew about was the IDA charge, which had been successfully appealed. He said he would not have involved his brother and his friend, Mr. Lorenzo, in a matter that could have been problematic due to an ongoing securities regulator investigation.

15 In addition, Credifinance Securities Limited was named in a lawsuit in the United States. This lawsuit, if successful, would have resulted in a significant judgment against Credifinance Securities Limited and other defendants. In such a case, Credifinance Securities Limited would have been compelled to rely upon an indemnity given to it by another one of the defendants in the lawsuit. This contingent liability was not disclosed in the audited financial statements of Credifinance Securities Limited. It is common ground that it was not disclosed to Mr. Lorenzo.

16 Mr. Lorenzo had no reason to invest his money and time in a company that could be wiped out by an IDA investigation or a significant judgment in a U.S. lawsuit should its indemnity prove unenforceable. The only reason he did so was because he knew about neither.

17 Unaware of the IDA investigation and unaware of the U.S. lawsuit, Mr. Lorenzo made a deal with Mr. Georges Bennaroch to invest in Credifinance Securities Limited. Mr. Lorenzo would arrange for a $400,000 loan to Credifinance Securities Limited to cure the fact that it was undercapitalized as far as the IDA was concerned. In addition, for a nominal sum of $1,000, it would receive 9.1%

of the equity in Credifinance Securities Limited. The $400,000 loan was actually the first installment of a $2 million loan. In order to receive IDA approval of the transaction, it was necessary for the loan to be subordinated to the creditors of Credifinance Securities Limited. Mr. Lorenzo used DSL Capital Corp. as the corporate vehicle for this transaction.

18 According to Mr. Lorenzo, the $400,000 was to be kept in a segregated account. It was not to be used to fund operating expenses. Operating expenses were to be paid by means of a $50,000 per month payment. Mr. Lorenzo was to arrange $25,000 per month and Georges Bennaroch was to arrange $25,000 per month.

19 Georges Bennaroch did not prove to be helpful to Mr. Lorenzo in his efforts to implement his business plan and so a second deal was made, whereby Mr. Lorenzo would end up owning approximately 80% of Credifinance Securities Limited. This transaction failed to close because Georges Bennaroch was charged by the IDA.

20 Initially, the $400,000 was kept in a segregated account. However, after the second share purchase agreement collapsed due to the IDA charges, the $400,000 was used to pay expenses until Mr. Justice Cameron made an order, on April 20, 2009 [2009 CarswellOnt 2032 (Ont. S.C.J. [Commercial List])], that the remaining funds ($310,500) were to be paid into court pending the ultimate disposition of an application by DSLC Capital Corp. for relief against Georges Bennaroch and Credifinance Securities Ltd., Donabo Inc. (the corporate vehicle of Georges Bennaroch), Ms. Ann Glover and Credifinance Capital Corp.

21 The test for civil fraud is that stated by Lord Herschell in *Peek v. Derry* (1889), 14 A.C. 337 (U.K. H.L.) at 374:

> ...fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states...if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

22 I am satisfied, on a balance of probabilities, that Mr. Lorenzo was deceived by Georges Bennaroch. Specifically, the deceit was that there were no contingent liabilities when, to Georges Benarroch's knowledge, there was an outstanding IDA investigation which could potentially result in charges against Credifinance Securities Limited, as well as himself and the CFO of Credifinance Securities Limited, Ms Ann Glover. In addition, there was an outstanding U.S. lawsuit in which the plaintiffs were seeking millions of dollars from the defendants, one of which was Credifinance Securities Limited.

23 I am also satisfied, on a balance of probabilities, that, but for the deceit, Mr. Lorenzo would not have entered into any agreement concerning Credifinance Securities Limited, would not have lent Credifinance Securities Limited $400,000, and Credifinance would not have $310,500 in its bank account.

24 At present, it appears that Georges Bennaroch and a company he controls, Credifinance Capital Corp., have filed secured claims in the bankruptcy of Credifinance Securities Limited. It appears that the other creditors are lawyers who acted for Credifinance Securities Limited in the litigation against DSLC Capital Corp and its attempts to recover the $400,000 and in the IDA investigations. In this regard, it is also a fact that Georges Bennaroch, through his company, Donabo Inc., has guaranteed the fees of the Trustee.

25 Counsel for the Trustee takes the position that, even if there was a fraudulent misrepresentation, it would not allow DSLC Capital Corp. to bypass the *Bankruptcy and Insolvency Act*. Counsel takes the position, on behalf of the Trustee, that there is no special status accorded to the victim of a fraud. In addition, the Trustee takes the position that DSLC Capital Corp.'s $400,000 loan was subordinated to creditors of Credifinance Securities Limited and, therefore, DSLC Capital Corp. sits behind the interests of genuine creditors of Credifinance Securities Limited.

26 Counsel for the Trustee concedes that there is an exception when constructive trust principles are applied, but suggests that those principles are applied only in the most extraordinary cases. Counsel suggested that the case of *Ascent Ltd., Re* (2006), 18 C.B.R. (5th) 269 (Ont. S.C.J.) was such a case. In that case, a judge of this Court had ordered that funds were to be set aside pending a further order of the Court. That order was breached with the result that the funds ordered set aside and held in trust were available to creditors of the bankrupt. In those extraordinary circumstances, the Court imposed a constructive trust on those funds on the theory that, to permit the creditors access to the money, would result in them being unjustly enriched.

27 Counsel for the Trustee also takes the position that a constructive trust cannot apply to a contract claim. I was referred to the cases of *Pikalo v. Morewood Industries Ltd. (Trustee of)*, 1991 CarswellOnt 212 (Ont. Bktcy.), a decision of this Court for that proposition and, as well, the case of *Confederation Life Insurance Co. v. Waselenak*, 1997 CarswellAlta 1032 (Alta. Q.B.), a decision of the Alberta Court of Queen's Bench.

28 I do not read the decision of Mr. Justice Chadwick, in the *Pikalo v. Morewood* case, as standing for that proposition. In that case, the lessor entered into a written lease agreement with Morewood Homes. The lease was with reference to a parcel of land on which there were two model homes. The lease provided that Morewood Homes would have the option to exchange either model and replace it with another pre-constructed home. If Morewood Homes exercised its right in

this regard, the lessor was required to pay $48,000 toward the cost of constructing the new model home. Morewood Homes exercised its right and the lessor paid it $48,000. Morewood Homes paid the $48,000 to Morewood Industries Ltd. However, Morewood Industries Ltd. was petitioned into bankruptcy and could not replace the model home which had been removed.

29 Mr. Justice Chadwick found that the relationship between the parties was purely contractual. He found that there was no evidence of bad faith on the part of anyone. Because the relationship was purely contractual, Chadwick J. came to the conclusion that it was not appropriate to impose a constructive trust upon certain monies in Morewood Industries Ltd.'s bank account. I did not read the decision as laying down a general rule that there can never be a constructive trust ordered where the contract has been entered into as a result of a fraud.

30 In *Confederation Life Insurance Co. v. Waselenak*, *supra*, the defendant received disability payments from the plaintiff and failed to account to the plaintiff for disability payments which the defendant received from the Workers Compensation Board. The Court ruled that the defendant's bankruptcy did not relieve the defendant of its obligation to repay the plaintiff. It declined in those circumstances to place a constructive trust upon assets of the defendant because it was of the view that the relationship between the plaintiff and the defendant was purely contractual. Once again, there was no suggestion that the contract of insurance was entered into as a result of a fraud. Rather, the contract was entered into in good faith and simply breached.

31 The $400,000 payment was characterized by the parties to the subordination agreement as a loan. However, the IDA cancelled the loan April 1, 2009 months before the assignment (August 24, 2009). Trying to characterize the "loan" as equity is at odds with the subordination agreement, the fact that it was not convertible, the multiple references to debt in the documents and the provision for interest. In addition, there was a subscription agreement signed in November, 2007, whereby DSLC Capital Corp. subscribed to 9.1% of the equity for $1,000. I am not persuaded that the $400,000 was other than what Mr. Lorenzo said it was: namely, the first installment of a $2 million loan.

32 A court of equity will impose a constructive trust to permit a fraud victim to recover property lost as a result of the fraud, provided the property is traceable in equity. See: *Underhill's Law Relating to Trusts and Trustees* (12th ed.) 1979, at p. 243; *Holmes v. Amlez International Inc.*, 2009 CarswellOnt 6595 (Ont. S.C.J.) at para. 7; *Goodbody v. Bank of Montreal* (1974), 47 D.L.R. (3d) 335 (Ont. H.C.); and *Ontario (Securities Commission) v. Greymac Credit Corp.* (1986), 55 O.R. (2d) 673 (Ont. C.A.)

33 I am satisfied that the $400,000 invested by Mr. Lorenzo, through DSLC Capital Corp., is traceable to the $310,500. The finding of Mr. Justice Cameron in this regard is set out at para. 78 of his decision. His decision in that regard has

not been successfully appealed. The evidence before me does not suggest any conclusion other than the fact that the $310,500 is traceable to the $400,000 provided to Credifinance Securities Limited by DSLC Capital Corp.

34 Accordingly, I am satisfied that the only reason Credifinance Securities Limited is in possession of $310,500 is due to the fraud perpetrated on Mr. Lorenzo and DSLC Capital Corp. by Georges Bennaroch. I am satisfied that the $310,500 is traceable to the $400,000 provided by Mr. Lorenzo and DSLC Capital Corp. I am satisfied that those funds should be the subject of a constructive trust in favor of DSLC Capital Corp. in order to prevent the unjust enrichment of Credifinance Securities Limited.

35 Having regard to the fact that the effect of my ruling means that the Estate of Credifinance Securities Limited has virtually no assets, there will be no order concerning costs.

Appeal allowed.

TAB 9

[Indexed as: **McKinnon, Re**]

In the Matter of the bankruptcy of David Michael McKinnon

New Brunswick Court of Queen's Bench

Reg. Bray

Heard: March 17, 2006

Judgment: March 29, 2006

Docket: NB 11715, Estate No. 51-118366, 2006 NBQB 108

Allan Marshall — Trustee in Estate of David Michael McKinnon

Jack M. Blackier for Wendy McKinnon

Bankruptcy and insolvency — Property of bankrupt — Trust property — Property held in trust for spouse — Constructive trust — Bankrupt made assignment into bankruptcy in 2004 — Trustee in bankruptcy opposed discharge pending payment of joint equity for bankrupt's home — Trustee arrived at valuation by using estimated selling price, subtracting legal fees, realty fees and registered mortgages, and taking 50 per cent of balance since home was jointly owned by bankrupt and bankrupt's first wife — During periods of cohabitation and marriage, bankrupt's second wife, WM, had made mortgage payments for home — Trustee disallowed WM's proof of claim for mortgage payments — Issue arose at discharge hearing whether mortgage payments by WM constituted constructive trust giving rise to right to equity in home such that trustee should have allowed WM's claim — Trustee made no error in rejecting WM's claim — Onus of proving constructive trust falls upon claimant and is not lightly undertaken in bankruptcy setting — There was no doubt that WM contributed mortgage payments with both parties contributing and benefiting during cohabitation and marriage — There was no enrichment on evidence — WM suffered no deprivation, but if she did it was not caused by enrichment of bankrupt but by fact of insolvency — It would be neither just nor equitable to confer advantage on WM over creditors without exceptional circumstances.

Cases considered by *Reg. Bray*:

Becker v. Pettkus (1980), [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 1980 CarswellOnt 299, 1980 CarswellOnt 644 (S.C.C.) — considered

Croteau, Re (1985), 50 O.R. (2d) 629, 47 R.F.L. (2d) 45, 1985 CarswellOnt 294 (Ont. H.C.) — referred to

Heffner, Re (1986), 32 D.L.R. (4th) 760, 10 B.C.L.R. (2d) 50, 63 C.B.R. (N.S.) 113, 1986 CarswellBC 497, 63 C.B.R. 113 (B.C. C.A.) — referred to

Peter v. Beblow (1993), [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369, 1993 CarswellBC 44, 1993 CarswellBC 1258, EYB 1993-67100, [1993] S.C.J. No. 36 (S.C.C.) — referred to

Sorochan v. Sorochan (1986), [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289, 29 D.L.R. (4th) 1, 69 N.R. 81, 46 Alta. L.R. (2d) 97, 74 A.R. 67, 23 E.T.R. 143, 2 R.F.L. (3d) 225,

[1986] R.D.I. 448, [1986] R.D.F. 501, 1986 CarswellAlta 714, 1986 CarswellAlta 143, EYB 1986-66946, [1986] S.C.J. No. 46 (S.C.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 49 — referred to
s. 67(1) — referred to
Marital Property Act, S.N.B. 1980, c. M-1.1
Generally — referred to

RULING on trustee in bankruptcy's decision to deny bankrupt's second wife's claim for constructive trust for mortgage payments made on bankrupt's home.

***Reg. Bray*:**

Facts

1 David Michael McKinnon, (the Bankrupt) made an assignment pursuant to section 49 of the *Bankruptcy and Insolvency Act* ("the Act") on November 1, 2004.

2 The firm of Allan Marshall and Associates was appointed Trustee of the Estate of the Bankrupt.

3 The discharge of the Bankrupt, which would otherwise have occurred on August 2, 2005, was opposed by the Trustee *inter alia* pending payment of joint equity in real property located at 5 Forestside Avenue, Rowley, New Brunswick which was valued by the Trustee at $8,066.25.

4 The Trustee arrived at this evaluation using the estimated selling price on appraisal, subtracting legal and realty fees, subtracting registered mortgages and then taking 50% of the balance because the deed indicated joint property.

5 The real property in question is a home originally occupied by the Bankrupt and his first wife, Sharon McKinnon. The Deed to the property at the time of the Bankrupt's assignment showed his name and that of Sharon McKinnon as property owners.

6 The Bankrupt and Sharon McKinnon divorced in 2000 and the latter has never waived her right to the 50% equity in the marital home.

7 The Bankrupt and his present wife, Wendy McKinnon, began a common law relationship in 2000 and married in 2002.

8 During the periods of cohabitation and marriage, Wendy McKinnon made payments to the Royal Bank on a mortgage held on the property in question.

9 Wendy McKinnon has filed a Proof of Claim in the amount of $5,404.00 which has been disallowed by the Trustee.

10 Although brought at the discharge hearing of the Bankrupt and originally framed as an opposition to the suggested equity payment condition, the true na-

ture of the application is an appeal of a Trustee's decision. This application alleges the existence of a constructive trust that would constitute property over which the Trustee does not have a right of distribution.

Issue

11 Do the mortgage payments tendered by Wendy McKinnon constitute a constructive trust giving rise to a right in the equity of the home that should be allowed by the Trustee having regard to the provisions of subsection 67(1) of the Act?

12 It was conceded at the hearing by counsel for Wendy McKinnon that there had been no triggering event that would give rise to any rights pursuant to the *Marital Property Act* and no argument was made on this issue.

13 If Wendy McKinnon has an interest in the equity of the property, how would the value of this be determined?

Analysis

14 The onus of proving a constructive or resulting trust falls upon the claimant and, in a bankruptcy setting, is not lightly undertaken. Furthermore the evidence must be clear, the standard of proof high: *Croteau, Re* (1985), 50 O.R. (2d) 629 (Ont. H.C.) @ p. 632); *Heffner, Re* (1986), 63 C.B.R. (N.S.) 113 (B.C. C.A.).

15 The reason for a more rigorous standard is that it is obviously in the interests of the Bankrupt and his current spouse to plead their intention to create a trust and thus shield a part of the equity in their home from the creditors in the Bankrupt's estate.

16 A constructive trust is usually pleaded when the contributions to the property are indirect and not financial. The case cited by counsel for Wendy McKinnon, that of *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), is the classic example. This was followed by others such as *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.). The years of work on a farm by a spouse without legal title to the property thereof, even in the absence of direct financial contribution, will be construed by the Court as having given rise to a trust. The reason is equitable, and remedial: the denial of unjust enrichment for which there is no juristic reason.

17 In the situation of a constructive trust it is unnecessary to prove intention as is required when pleading a resulting trust which is a right *in rem*. I assume that this was the reason for framing the relief sought in the present instance as a constructive trust. The intention of the parties was not mentioned in the affidavit of Wendy McKinnon. The Bankrupt was not called to testify on this issue and he offered no comment on his own behalf when invited to do so. This is not surprising. In all probability, in a matrimonial or common-law relationship parties do not frequently reflect upon their respective legal entitlements. Few would see their ongoing mutual responsibilities in terms of receiving an entitlement to

compensation, but they would probably have an expectation of sharing assets in the event of dissolution.

18 Four elements must be proven to invoke the remedy of a constructive trust. There must be an enrichment, a corresponding deprivation, an absence of any juristic reason for the enrichment and a causal connection between the non-titled party and the asset in dispute: *Becker v. Pettkus* (supra) @ pp 848 & 852.

19 An additional consideration must be invoked at the outset: the maxim that equity must follow the law unless strict observance would result in injustice. In an insolvency context the Act provides a code by which legislators have balanced the rights of all those adversely affected by the insolvency. The legal rights of creditors established as statutory priorities should not be defeated by the Bankruptcy Court unless it would be unconscionable not to recognize the pleaded equitable remedy. The judicial discretion to grant a remedy by finding a constructive trust to correct an inequity, which may be an obvious solution in a matter involving only two parties in a marital property context, must be exercised with a little more reticence when the rights of *bona fide* third parties come into play: *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.) @ p.1023.

20 On the evidence presented I have difficulty concluding that there was an enrichment. I do not doubt that Wendy McKinnon contributed mortgage payments that were owing upon the house while the Bankrupt made those owing upon the garage. No evidence was given, however, concerning the way in which other household expenses were divided. I would conclude that, during cohabitation and marriage, both parties contributed and both parties benefited from the shared arrangement. There would be, therefore, no deprivation to Wendy McKinnon for the financial input that she made.

21 If a detriment has been suffered by Wendy McKinnon it is not caused by an enrichment to the Bankrupt but rather by the fact of insolvency. The spouse of a bankrupt suffers a detriment as do his creditors. The spouse, however, will generally have benefited from the credit extended to the bankrupt prior to his insolvency. To confer upon this spouse an advantage over the creditors, in the absence of exceptional circumstances, would be neither just nor equitable. The distribution scheme in the Act itself provides a juristic reason for not finding an unjust enrichment and for rejecting an *ex post facto* remedy imposed by the court. Upon the facts presented the equities of Wendy McKinnon, balanced against those of unsecured creditors, do not merit the remedy solicited.

22 Although the findings on the merits in the present instance do not adversely impact other interested parties, it should be noted that unsecured creditors in motions of this nature are normally served with notice of the application.

Conclusion

23 The Trustee made no error in rejecting the claim of Wendy McKinnon to an interest in the equity in the property located at 5 Forestside Avenue, Rowley, New Brunswick.

24 There will be no order as to costs.

Order accordingly.

[Indexed as: **MEI Computer Technology Group Inc., Re**]

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended: MEI Computer Technology Group Inc. (Petitioner) and Ernst & Young Inc. (Monitor)

Quebec Superior Court

Gascon S.C.J.

Heard: April 29, 2005

Judgment: May 6, 2005

Docket: C.S. Montréal 500-11-025430-055

Me Alain Tardif, Me Miguel Bourbonnais for Petitioner

Bankruptcy and insolvency — Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues — Creation of priority charge — Corporation under protection of Companies' Creditors Arrangement Act applied for creation of new priority charge on assets, ranking prior to unsecured creditors, for amount of key employee retention programme — Programme provided that amount covered by charge would be paid regardless of restructuring's outcome — Application dismissed — Charge sought was comparable to DIP financing to allow debtor corporation to continue operating — Review of case law and doctrine on issue of courts' exercise of their inherent jurisdiction to grant DIP financing or priority charges revealed following guidelines: DIP financing or priority charge is extraordinary measure that should be used sparingly and in clear cases; evidence should show that benefits to all parties clearly outweigh potential prejudice to some creditors; charge must be critical to continue operating business and successful restructuring; charge must be urgent need; reasonable prospect of successful restructuring must exist; charge should be available only in limited amounts and for brief period; charge must be just and equitable in circumstances to warrant exercise of inherent jurisdiction powers to order charge — Facts of case did not support exercise of inherent jurisdiction to create employee retention charge — Amount covered by charge would be paid regardless of outcome of CCAA restructuring — Charge would finance "salary increase" for remaining employees by corporation's unsecured creditors, including employees who lost jobs — Charge would create imbalance in same class of creditors as other unsecured creditors were likely to be paid far less than 100 per cent of outstanding claims — Charge

TAB 10

[Indexed as: **Ridgewood Forest Products Ltd., Re**]

In the Matter of the bankruptcy of Ridgewood Forest Products Ltd.

In the Matter of an application by the Trustee for determination of the equitable property and/or trust rights that may be held by Newcastle Lumber Company Limited, Jamestown Lumber Company Limited and Ledwidge Lumber Company Limited in Anti Dumping Duties refunded to or received by the Trustee following resolution of the softwood lumber dispute between Canada and the United States of America

New Brunswick Court of Queen's Bench

Reg. M.J. Bray

Heard: February 8, 2007

Judgment: December 3, 2007

Docket: NB 10959, Estate No. 51-117577, 2007 NBQB 396

Edwin G. Ehrhardt, Q.C. for Newcastle Lumber Company Limited, Jamestown Lumber Company Limited

D. Bruce Clarke for Ledwidge Lumber Company Limited

Walter D. Vail, Q.C., Stephen James Hill for PricewaterhouseCoopers Inc.

Bankruptcy and insolvency — Property of bankrupt — Property in hands of bankrupt agent or broker — General principles.

Bankruptcy and insolvency — Property of bankrupt — Trust property — General principles — Vendor companies ("vendors") retained bankrupt to facilitate exportation of their softwood lumber into U.S. — Part of bankrupt's duties as importer of record was to collect from vendors and remit to U.S. anti-dumping duties ("ADD") imposed on imported lumber — Legal settlement provided that part of ADD collected would be refunded to importer of record — By time refunds were to be processed, bankrupt had made assignment in bankruptcy — Vendors alleged that bankrupt was broker and monies advanced to bankrupt to pay ADD were tendered in trust — Trustee sought declaration as to whether vendors had valid claim to any ADD which might be refunded to Trustee — All ADD refunded to trustee constituted trust for purposes of s. 67(1)(a) of Bankruptcy and Insolvency Act, and was not divisible among general creditors — Brokerage relationship existed — Constructive trust was created as asset was transferred which transferor never intended to benefit transferee — Parties had common intention that ADD amounts, which formed identifiable fund, were handled by bankrupt for specific purpose of meeting tariff requirements — As bankrupt was compensated for ADD disbursements it handled on behalf of vendors, keeping refunds would be enrichment at expense of vendors and would be inequitable — Statutory priorities should be respected unless rejection of equitable right pleaded would be unconscionable, which was situation in present case — Only vendors had right to ADD refunds and there was no juristic reason to deprive them thereof.

Cases considered by *Reg. M.J. Bray*:

Ascent Ltd., Re (2006), 2006 CarswellOnt 116, 9 P.P.S.A.C. (3d) 176, 18 C.B.R. (5th) 269 (Ont. S.C.J.) — considered

Becker v. Pettkus (1980), 1980 CarswellOnt 299, 1980 CarswellOnt 644, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, [1980] S.C.J. No. 103 (S.C.C.) — followed

McKinnon, Re (2006), 2006 NBQB 108, 2006 CarswellNB 158, 19 C.B.R. (5th) 253, 300 N.B.R. (2d) 395, 782 A.P.R. 395 (N.B. Q.B.) — distinguished

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 67(1)(a) — considered

s. 71 — considered

s. 81 — considered

s. 135 — considered

Statute of Frauds, R.S.N.B. 1973, c. S-14

s. 10 — considered

DETERMINATION of whether bankrupt was holding certain sums in trust for vendors.

***Reg. M.J. Bray*:**

Introduction

1 These matters were brought before the Court initially framed as an appeal of a disallowance of a claim by the Trustee. Pursuant to section 135 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("the *Act*") this remedy is available to ordinary, secured or preferred creditors. In the present matter, the applicants actually received Notices of Disallowance before proofs of claim were filed.

2 A second manner of coming before the Court might have been by way of section 81 of the *Act* with a Proof of Claim-Property, except that this relates to property in the possession of the Bankrupt at the time of bankruptcy whereas the funds in question devolved upon the Bankrupt subsequent to the assignment. Ledwidge Lumber Company Limited ("Ledwidge") did consider that this was a section 81 claim and has made arguments in that respect.

3 There might also have been a request to lift the stay and commence an action.

4 Counsel for the Trustee, believing that there would be a more expeditious manner of proceeding, moved that these matters be deemed to be a motion for directions on the part of the Trustee which could be framed as follows: The Trustee seeks a declaration as to whether the named companies have a valid claim to any portion of the Anti Dumping Duties which may now or hereafter be refunded to or received by the Trustee and whether the Trustee is bound by the

allegations of these companies to a trust interest or equitable property right in these funds.

5 Although interested parties such as guarantors and other secured creditors would normally have received notice of a motion brought by the Trustee of the type suggested by the amendment and a determination that the funds in question were impressed with a trust could materially impact the interests of secured creditors, the Court agreed to proceed in the manner suggested.

6 The protection of the interests of creditors not present at the instant hearing and a consideration of their right to be heard will be taken into account in the disposition of this matter. The focus of this hearing is a declaratory order concerning the right of the Trustee to retain these amounts, given that a claim has been made that the funds are in the nature of a trust pursuant to section 67(1)(a) of the *Act* or otherwise subject to an equitable remedy. Any necessary determination as to priority of the interest among creditors can be made subsequently.

Summary

7 Newcastle Lumber Company Limited ("Newcastle"), Jamestown Lumber Company Limited ("Jamestown") and Ledwidge (collectively "the Vendor Companies") retained the services of Ridgewood Forest Products Ltd. ("Ridgewood") to facilitate the exportation of their softwood lumber into the United States ("US"). Effective on or about November 6, 2001 Anti-Dumping Duties ("ADD") of approximately 8.43% of the purchase price were imposed by the US government on imported lumber and were required to be paid prior to entry of the product. Ridgewood was the Importer of Record for the purposes of the US authorities and its responsibilities included paying the ADD, collecting this amount from the purchaser as part of the total purchase price and deducting this amount from the net proceeds payable to Newcastle, Jamestown and Ledwidge.

8 It is argued on behalf of Newcastle, Jamestown and Ledwidge that Ridgewood was simply a broker rather than a purchaser and that the monies advanced as a disbursement to pay ADD were tendered either upon explicit or implicit terms that it constitute a trust. The Trustee's position is that the sums in question were part of the continuum of normal purchase and sale transactions and as such constitute an ordinary debt to which Newcastle, Jamestown and Ledwidge have no better claim than any other creditor.

Facts

9 Ridgewood acted as Importer of Record to facilitate the importation into the US of shipments from Canadian softwood lumber producers such as Newcastle, Jamestown and Ledwidge. Responsibility for quality control remained at all times with the Vendor Companies. The responsibilities of Ridgewood included identifying potential purchasers, arranging transportation, ensuring proper customs documentation and payment of the ADD to American authorities on behalf

of the supplier mills. The ADD amounts were debited directly from Ridgewood by A. E. Derringer, a US customs broker. The US purchaser would pay the full purchase price to Ridgewood which would then remit the net amount to the vendor after deducting its costs, its commission, which averaged about 3%, and any amounts advanced in the payment of the ADD. The Vendor Companies retained the responsibility for full payment of the ADD to Ridgewood by means of deduction and some required Ridgewood to insure the lumber against potential loss from non-payment by purchasers. Financial consequences of any change in the rate or nature of export duties would remain the responsibility of the Vendor Companies as noted in the letter of the President of Ridgewood, Mac Hawkins, to Newcastle dated January 8, 2002.

10 Because the payment of the ADD reduced the net profit of Canadian mills, the Maritime Lumber Bureau, on behalf of suppliers in the Maritime Provinces, participated in legal procedures and negotiations in the attempt to have some or all of such payments repaid or refunded. A settlement was finally reached on October 12, 2006 and, according to its provisions, a portion of the duties collected since 2002 with accrued interest thereon was to be returned. The Importer of Record was identified as the sole agency authorized to make application for refunds.

11 By the time that Export Development Canada was processing and sending refunds to the importers of record, Ridgewood had made an assignment in bankruptcy. Neither the Bankrupt prior to bankruptcy nor the Trustee subsequent to the assignment took any part in the legal procedures seeking return of the sums levied.

Issues

12 Do the ADD amounts returned or refunded to the Trustee constitute a trust that would not be divisible among creditors in terms of subsection 67(1)(a) of the Act?

> 67(1) **Property of Bankrupt** — The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person.

13 Do Newcastle, Jamestown and Ledwidge have equitable property rights to these refunds?

Analysis

14 First one must determine whether there is sufficient evidence in writing for an express trust in terms of section 10 of the *Statute of Frauds*, R.S.N.B. 1973, c.S-14. Section 10 reads as follows:

> No grant or assignment of any trust is valid unless it is in writing, signed by the party granting or assigning the same, or by his last will.

15 The writing should give evidence of the three certainties, those of intention, subject matter, and object. A letter from Ridgewood to Newcastle on January 8, 2002 outlines that the payment of ADD would be the responsibility of the producers and that those amounts paid in advance by Ridgewood would be deducted in establishing the net purchase price. In a letter dated November 6, 2002, Mac Hawkins, President of Ridgewood, undertook to repay Ledwidge in the event that ADD amounts were returned.

16 Whether or not they are sufficient to find an express trust, these two items of correspondence indicate that rights and responsibilities related to ADD were not transferred to Ridgewood by the Vendor Companies. ADD was not a debt owed but rather Ridgewood was acting as a conduit for the tendering of duties and undertook likewise to be a conduit for their return.

17 The ADD was calculated on the net price paid to the vendor and not on the purchaser's price which included Ridgewood's commission. The amount of ADD required by the U.S. authorities impacted the revenue of the vendor company but had no effect on the commission of Ridgewood.

18 Ledwidge submits a further document to *support* its contention that an express trust existed. On a May 20, 2002 letter, from Mac Hawkins to Doug Ledwidge, outlining a cost breakdown of shipments, Mr. Ledwidge had endorsed by hand, "If duty is returned mill is owed $." Mr. Ledwidge deposes that this expressed the agreement reached between the two men during conversations held that month. Although there was no direct *viva voce* or affidavit evidence submitted on behalf of Mr. Hawkins as to whether this accurately reflected his understanding of the agreement, his previously cited letter of November 6, 2002 appears to confirm the understanding, as does that of Douglas Ledwidge, dated September 8, 2004 which states, *inter alia*:

> 2. Ridgewood will act as our agent to arrange for payment of the ADD on our behalf, deducting the amount thereof from our account and remitting it to US Customs through Deringer or similar entity.
>
> 3. If and when the provisional ADD is amended such that a refund is obtainable, Ridgewood will, on our behalf, submit appropriate documentation to arrange for the rebate. Where possible, this rebate will be paid directly to the mill.
>
> 4. If direct payment is not possible, Ridgewood will receive the payments in trust for Ledwidge Lumber, and establish a separate bank account in trust for such payments. The net amount will be paid to us as soon as is practical.

This text was endorsed by Mac Hawkins.

19 It bears considering what weight should be given to the letter of September 8, 2004, since this postdates the bankruptcy assignment. The question is whether it clearly confirms a pre-existing agreement or whether it adds to or modifies that prior understanding. An express trust claimed to be founded upon a document that bootstraps a previously inadequate writing may be open to doubt if

elements of self-interest, including avoiding statutory impositions, are probable in the drafting and signing of the later documents.

20 The statutory rationale for not allowing any change in prior contractual relationships to be assented to by Ridgewood is found in section 71 of the *Act*.

> **Vesting of property in trustee** — On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

21 Whether one is considering an express, resulting or constructive trust, the evidence is clear that there is a certainty as to the object. That object is the Vendor Companies claiming the amount of ADD being returned by virtue of the 2006 agreement, more specifically that coming to the Trustee of Ridgewood.

22 The documentation must be examined for proof of the other two certainties required for the formation of a trust: that of subject matter and that of intention.

23 The position of the Trustee is that certainty of subject matter fails because, whereas it had been hoped by Canadian vendors that the policy of the US would be rescinded and a refund would be forthcoming, there was no assurance that this event would take place. The Vendor Companies submit that the subject matter was ADD funds, that these were clearly definable and the vagueness about the modalities of their eventual repayment is not fatal to the formation of a trust. The Vendor Companies hold that periodic administrative reviews were possible in addition to a global agreement and that any refunds received were to be returned.

24 An express trust can be contingent, dependent for its operation on a foreseen probability as long as the subject matter is identifiable. The amounts transmitted for ADD payments were clearly definable; the quantum thereof is easily established. There is no possibility of their being confused or merged with any other payment category in the transactions between Ridgewood and the Vendor Companies. This is not the same as an expectancy wherein a reversionary or remainder interest resides with a third party. I find the subject matter to be sufficiently certain for a trust to be founded, should the requisite certainty of intention be present.

25 The intention to create a trust must be clear. Often in business circumstances wherein arrangements are made without the benefit of counsel, formal trust documents are not drafted. The word "trust" itself may not be used. The court must then deduce from the circumstances and the evidence what the intention of the parties was and the nature of the agreement.

26 One relevant consideration will be whether the funds were treated separately and not commingled with other amounts used for business expenditures. A sepa-

rate accounting procedure, although not determinative, is a good indicator that the funds were impressed with a trust relationship.

27 A trust situation will often emanate from a principal — agent or a brokerage relationship.

28 Ledwidge contends that sufficient evidence exists to find a trust relationship from the affidavit of Douglas Ledwidge in which he deposes that there was an agreement by Ridgewood to remit any ADD refund to his company and, had there not been this understanding, he would have dealt with another broker. Mr. Ledwidge states that his handwritten notes on the letter of Ridgewood Forest Products Ltd. dated accurately reflect a verbal agreement made during a May 20, 2002 telephone conversation with Mac Hawkins, that Ridgewood claimed no interest in ADD refunds. A letter signed by Mac Hawkins and dated November 6, 2002, previously noted at paragraph 15, says:

> Ridgewood Forest confirms that if the 8.43% Anti-dumping Duties are returned to *The Importer of Record* by US Customs, that we Ridgewood Forest Products Ltd., agree to repay Ledwidge Lumber Co., Ltd, 8.43% deducted from our Purchase Orders beginning, May 22, 2002.

29 Robert Smith, C.A., an agent of the Trustee opines in his affidavit that this agreement does not constitute a trust and further postulates that the post-bankruptcy letter of September 8, 2004 invalidly extends the scope of the agreement to having Ridgewood act as an agent for Ledwidge. Mr. Smith holds the view that the transactions between Ridgewood and the Vendor Companies were simply those of purchase and sale without any provisions for Ridgewood to act as broker or agent. The grounds for his reasoning are that invoices submitted by Ledwidge and Jamestown appear to be regular purchase and sale invoices with no reference to brokerage. Further he adds that payments of ADD were made to A.E. Derringer by Ridgewood from its account and that its responsibility to pay the Vendor Companies was unrelated to its ability to collect receivables from companies in the US. Mr. Smith suggests that title to the product passed to Ridgewood, if not immediately upon receipt of the product, at the latest when the merchandise crossed the Canada/US border. He further adds that the Vendor Companies were not penalized if Ridgewood failed to collect a receivable account from a US purchaser, although it is not clear that an event of this type had ever occurred.

30 What criteria must be found to indicate that a party is a broker rather than a purchaser? That party must be a representative who acts for compensation as an intermediary between vendor and purchaser. The broker deals for another, not itself and, although title to property may on occasion pass through it and it may collect the purchase price, it cannot deal with the product as if it were its own.

31 The facts in the present situation, although not entirely unambiguous, lead more probably to the conclusion that the relationship between Ridgewood and the Vendor Companies was that of brokerage, rather than that of vendor and

purchaser. Ridgewood, after negotiating a mutually agreeable price between the Vendor Companies and purchasers in the US, completed arrangements for the transportation, customs formalities and, starting in 2002, the payment of ADD. It did this for a fixed commission. The title for purposes of US regulations may have passed at the Canada/US border from the Vendor Companies to Ridgewood as importer of record as it appears from the letter of authorization signed by Douglas Ledwidge on November 27, 2001. This necessary formality does not automatically negate what was otherwise a brokerage relationship.

32 The collection of receivables was part of the contract and some, if not all vendor companies required insurance by Ridgewood to ensure no loss at this stage of the transaction. Such insurance was a reasonable provision because not all companies in the brokerage business might have sufficient resources to cover liability for failure to collect payment for a large shipment. This imposition would not likely be placed on a purchaser for value at the production site. Furthermore, sales appear to have been FOB at the mills of the Vendor Companies with the entire cost of transportation from there to the locus of the US purchaser being deducted from the return to the Vendor Companies.

33 The existence of a brokerage relationship such as appears in the present matter makes the existence of a trust more likely but, to prove an express trust, it is still necessary to demonstrate certainty of intention to create such a trust.

34 The only Vendor Company which has a written document referring to a trust is Ledwidge and the word "trust" appears only in a letter post-dating the bankruptcy.

35 The prior correspondence between Ledwidge and Ridgewood fall short of the certainty required to prove the intention to create an express trust. Concerning Newcastle and Jamestown, there is an absence of documentation in this regard.

36 The evidence, however, is convincing that a brokerage relationship was created. Despite the assumption of title by Ridgewood for the requirements of crossing the Canada/US border, the negotiations undertaken by Ridgewood between Vendor Company and US purchaser for a fixed commission, the arranging of transportation FOB the Vendor Company's mill, the arrangement of payment of ADD for which cost the Vendor Companies were responsible and the acceptance of the requirement to insure for protection of the receivables indicate a brokerage function by Ridgewood. Even were one to postulate that, despite these indices, there was doubt about the existence this type of relationship for the totality of the transaction, it is certain that Ridgewood acted as an agent for the payment of ADD. At the very least this is an implied agency based on necessity.

37 Although this relationship, being a business enterprise, did not persuade any party initially to see Ridgewood functioning expressly as a trustee, an implied trust in the nature of a resulting trust for restitution, or a constructive trust was

certainly created because an asset was transferred (payment of that part of Ridgewood's account related to ADD) which the transferor never intended to benefit the transferee.

38 The possibility of a resulting trust was raised but not argued extensively. If one were to limit the requirements of a resulting trust to the receipt of an asset by one not intended to be its beneficial owner, the case would be clearly made here. I am aware, however, that the use of the doctrine of resulting trust has been somewhat sidelined since the rise to prominence of the doctrine of constructive trust in the jurisprudence following the decision in *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.). Resulting trusts are now primarily used in family estate matters to deal with apparent gifts or to deal with remaining assets in the failure of express trusts. The fact that neither of these categories applies to the matter before us is not problematic because the doctrine of constructive trust is sufficient to deal with the question.

39 The amounts advanced for ADD form a readily identifiable fund which was handled by Ridgewood for the specific purpose of meeting tariff requirements. There was a common intention on the part of the parties as to this use. The amount had no effect on the brokerage commission and Ridgewood served only as a vehicle of transmission for these duties. Were it not for its acting as payment agent, Ridgewood would have been in no position to acquire title to these funds. It is trite law that Equity does not assume gifts in business transactions.

40 Had these funds become unnecessary in commerce prior to the bankruptcy, they could not have been exacted by Ridgewood and, had they been thus acquired, Equity would demand that they be returned. Their retention would have constituted an unjust enrichment allowing the invocation of a constructive trust.

41 This court noted in one of the cases pleaded by the Trustee, *McKinnon, Re* (2006), 19 C.B.R. (5th) 253 (N.B. Q.B.) at paras 18 - 19:

> Four elements must be proven to invoke the remedy of a constructive trust. There must be an enrichment, a corresponding deprivation, an absence of any juristic reason for the enrichment and a causal connection between the non-titled party and the asset in dispute: *Becker v. Pettkus* (supra) @ pp 848 & 852.
>
> An additional consideration must be invoked at the outset: the maxim that equity must follow the law unless strict observance would result in injustice. In an insolvency context the Act provides a code by which legislators have balanced the rights of all those adversely affected by the insolvency. The legal rights of creditors established as statutory priorities should not be defeated by the Bankruptcy Court unless it would be unconscionable not to recognize the pleaded equitable remedy. The judicial discretion to grant a remedy by finding a constructive trust to correct an inequity, which may be an obvious solution in a matter involving only two parties in a marital property context, must be exercised with a little more reticence when the rights

> of *bona fide* third parties come into play: *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.) @ p. 1023.

42 Do the intervening circumstances of the bankruptcy and the provisions of the Act constitute a juristic reason negating the unjust enrichment? In other words, does the distribution scheme of the Act place the Vendor Companies in the same situation as all other unsecured creditors with respect to the debtor's estate?

43 The facts in *McKinnon, Re supra* are distinguishable insofar as they relate to a domestic rather than a commercial arrangement, however the Trustee would argue that certain words in paragraph 21 support his position. Paragraph 21 reads as follows:

> If a detriment has been suffered by Wendy McKinnon it is not caused by an enrichment to the Bankrupt but rather by the fact of insolvency. The spouse of a bankrupt suffers a detriment as do his creditors. The spouse, however, will generally have benefited from the credit extended to the bankrupt prior to his insolvency. To confer upon this spouse an advantage over the creditors, in the absence of exceptional circumstances, would be neither just nor equitable. **The distribution scheme in the Act itself provides a juristic reason for not finding an unjust enrichment and for rejecting an *ex post facto* remedy imposed by the court.** Upon the facts presented the equities of Wendy McKinnon, balanced against those of unsecured creditors, do not merit the remedy solicited.
>
> (Emphasis added)

44 The court in *McKinnon, Re* was considering a personal relationship in which there was a commingling of funds with no precise accounting of contributions and expenditures within the global budget. In the case presently before us the funds in dispute were distinct, traceable and conveyed as a specific disbursement, not part of the purchase price.

45 If the funds in question had been a negotiated part of a purchase and sale transaction *inter partes*, one could conclude that the Vendor Companies should rank equally with other creditors. This, however, was not the fact situation which confronts us here.

46 For a constructive trust to be inferred there must be evidence of an enrichment, a corresponding deprivation and no juristic reason for allowing these to exist.

47 As Ridgewood has been compensated for the ADD disbursements that it has handled on behalf of the Vendor Companies, keeping the returns or refunds of this amount would be an enrichment at the expense of the Vendor Companies from the net profit of which these sums already had been deducted. As previously stated this would be inequitable.

48 The Act provides statutory priorities that should be respected unless the rejection of the equitable right pleaded would be unconscionable. I find this to be the situation in the present instance.

49 Other creditors of the Bankrupt would never have had a right to the ADD returns or refunds. These duties had no impact on their lending practices. The Act attempts to protect and balance rights that creditors had at the time of bankruptcy but it does not confer a right that did not previously exist. Only the Vendor Companies had a right to ADD returns and there is no juristic reason for depriving them thereof. To do so would be commercially nonsensical.

50 Newcastle and Jamestown cite the words of Registrar Nettie in *Ascent Ltd., Re* (2006), 18 C.B.R. (5th) 269 (Ont. S.C.J.) where he stated at paragraph 17:

> I am satisfied that it is, in certain cases, appropriate to do injustice to the BIA in order to do justice to commercial morality. After all, the cases are too numerous to cite wherein commercial morality is considered in insolvency settings. It is the clear role of the Bankruptcy Court to act as the arbiter of commercial morality, and I find no offence in equity intervening, even at the expense of the formulaic aspects of the BIA scheme of distribution.

51 Registrar Nettie makes a good point but I do not think the case need be stated so stridently in the present instance. I believe that the recognition of a constructive trust in this situation does justice to commercial morality without undermining the basic provisions of the Act.

Disposition

52 The full amount of the ADD returned or refunded to the Trustee for payments made by Ridgewood as importer of record on behalf of the Vendor Companies constitutes a trust for the purposes of section 67(1)(a) of the Act and these sums are not divisible among the general body of the creditors.

53 The precise value of the amounts in question were not certain at the time of the hearing and a further application may be made for this determination if necessary prior to the issuance of any formal order.

Order accordingly.

TAB 11

Re Barnabe et al. and Touhey et al.

Touhey et al. v. Barnabe et al.; Canadian Imperial Bank of Commerce, Intervenor

[Indexed as: Barnabe v. Touhey]

[18 O.R. (3d) 370]

Restitution — Unjust enrichment — Constructive trust — Partnership dispute — Departing partners of law firm establishing new firm and using assets from old firm — Judge erring by holding that unjust enrichment established and by imposing constructive trust — Inappropriate to impose constructive trust on grounds of unjust enrichment where specific property not being held in deprivation of person with reasonable expectation of obtaining a property interest — Constructive trust may not be imposed for the sole purpose of depriving creditors of claim to payment.

Trusts and trustees — Constructive trust — Unjust enrichment — Departing partners of law firm establishing new firm and using assets from old firm — Judge erring by holding that unjust enrichment established and by imposing constructive trust — Inappropriate to impose constructive trust on grounds of unjust enrichment where specific property not being held in deprivation of person with reasonable expectation of obtaining a property interest — Constructive trust may not be imposed for the sole purpose of depriving creditors of claim to payment.

While a constructive trust may have the effect of conferring upon the beneficiary of the trust the payment of funds that would otherwise become part of the estate in bankruptcy of the constructive trustee, a constructive trust, otherwise unavailable, cannot be imposed for this purpose.

NOTE: An appeal from the above-cited judgment of the Ontario Court (General Division) was allowed by the Court of Appeal for Ontario (McKinlay, Catzman and Abella JJ.A.) on November 14, 1995. The court's endorsement does not review the facts of the proceedings, which are reported at 18 O.R. (3d) 370. The court's endorsement was as follows:

BY THE COURT: — We agree with counsel for the appellant that the order of Bell J. requiring that property of the bankrupts Touhey and Sigouin be held on a constructive trust in favour of the respondents has the effect of granting to the respondents a floating charge over all of the assets of the bankrupts in priority to the other creditors of the bankrupts.

We are of the opinion that the remedy of constructive trust is not appropriate in the circumstances. To dispose of this appeal, it is not necessary to refer to all of the arguments dealt with by counsel, since we are of the view that the unjust enrichment on which the constructive trust remedy is based does not exist in

this case. To establish the unjust enrichment, there must be some specific property which is the subject of the enrichment, that property must have been retained by the person holding it in deprivation of the party claiming the trust, and there must be no juristic reason for the retention.

As to the first requirement, in this case there is no specific property which is the subject of the trust. The property ordered held comprises all of the property of the bankrupts. This alone would probably be sufficient to decide the appeal. However, we will comment on the other requirements to establish an unjust enrichment.

As to the second requirement — that the property must be held in deprivation of the party claiming the unjust enrichment — it is clear that the parties which are said to hold the trust property — the Canadian Imperial Bank of Commerce (the "Bank") or Messrs. Touhey and Sigouin — do not hold it in deprivation of the respondents. The property said to be the subject of the trust is money which, by the order of Farley J., dated May 17, 1990, should have been paid back to the accountant administering the assets of the original "1986" partnership. The motions judge found that these moneys, which were not paid back as they should have been, were deposited in the Bank and used to support the operations of the new "1990" partnership. There is no evidence which clearly establishes that this money was ever paid into the account of the new partnership at the Bank. However, even if it was, there is no evidence that indicates that the funds remain in the hands of the Bank. Indeed, the account involved has generally been in negative balance, and, since it was an operating account of the new partnership, funds were paid in and out of the account over a period in excess of four years before the motions judge made the order imposing a constructive trust. Under those circumstances it is almost impossible to show any true connection between funds which may have been deposited in the "1990" partnership account and the assets of that partnership or of the bankrupts. To overcome this problem the motions judge imposed a constructive trust over all of the assets of the bankrupts. This is contrary to clear law which requires that a constructive trust be imposed over specific property in which the person claiming the trust has a reasonable expectation of obtaining a property interest. While the respondents may not have succeeded in having funds returned to the accountant by Touhey and Sigouin, as required by the order of Farley J., they were not deprived of any of the assets which were made the subject of the constructive trust. They were merely unsecured creditors of Touhey and Sigouin.

As to the third requirement — that there be no juristic reason for the retention of the property — there are at least two juristic reasons why the Bank should retain the funds involved (if they were in fact deposited in the "1990" partnership account). First, the Bank, through the account of the "1990" partnership, financed at least some of the operations of that partnership. In order to do so, it obtained security over the receivables and other assets of the partnership, which are subject to the order of Bell J. It was in reliance on that security that the Bank financed the operations of the "1990" partnership. It was entitled to retain any funds which may have been paid into the account to reimburse it for payments out of the account, and it was entitled to its security for the purpose of securing payment. The second juristic reason for retention of the funds is that the order of Farley J., by its terms, anticipated that the funds paid over by the accountant administering the assets of the "1986" partnership would be returned only if needed and demanded. Funds were also paid over to the other partners in the "1986" partnership, and none were required by the order to hold any funds in trust; indeed, any such order would have rendered the original payment over of no practical benefit to any of the partners.

While a constructive trust, if appropriately established, could have the *effect* of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that *purpose*. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

The appeal is allowed with costs, and the judgment of Bell J. is set aside to be replaced by a judgment dismissing the application with costs.

Sean E. Cumming and *Percy Ostroff*, for appellant, Canadian Imperial Bank of Commerce.

M. James O'Grady, Q.C., and *Barry Kwasniewski*, for respondent, Jeffrey Barnabe.

John A. Hollander, for respondent, John R. Sigouin.

Case Name:

Barnabe v. Touhey

Jeffrey C. Barnabe Terrill C. Jameson, Timothy D. Ray, William J.S. Devonish, and Derek G. Nicholson

v.

Canadian Imperial Bank of Commerce and John R. Sigouin

[1996] S.C.C.A. No. 26

File No.: 25099

Supreme Court of Canada

Record created: January 12, 1996.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Status:

Notice of discontinuance of application for leave to appeal filed June 24, 1996.

Catchwords:

Commercial law -- Remedies -- Constructive trust -- Unjust enrichment -- Whether the Court of Appeal erred in finding that a constructive trust was not available to the Applicants -- Whether the Court of Appeal erred in finding that none of the elements of unjust enrichment were present.

Counsel:

James O'Grady, Q.C. (O'Grady & Young), for the motion. Percy Ostroff (Goldberg, Shinder, Gardner & Kronick), contra.

Chronology:

1. Application for leave to appeal:

   FILED: January 12, 1996. S.C.C. Bulletin, 1996, p. 6. SUBMITTED TO THE COURT: May 24, 1996. S.C.C. Bulletin, 1996, p. 939.
   Before: L'Heureux-Dubé, Sopinka and McLachlin JJ.

2. Notice of discontinuance of application for leave to appeal filed June 24, 1996. S.C.C. Bulletin, 1997, p. 70.

Procedural History:

Judgment on application: Applicants' motion for declaratory relief allowed.
Ontario Court (General Division), Bell J., May 4, 1994.
18 O.R. (3d) 370; [1994] O.J. No. 906.

Judgment on appeal: Appeal allowed.
Ontario Court of Appeal, McKinlay, Catzman and Abella JJ.A., November 14, 1995.
26 O.R. (3d) 477; [1995] O.J. No. 3456.

TAB 12

Fotios Korkontzilas, Panagiota Korkontzilas and Olympia Town Real Estate Limited *Appellants*

v.

Nick Soulos *Respondent*

Indexed as: Soulos *v.* Korkontzilas

File No.: 24949.

1997: February 18; 1997: May 22.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

Trusts and trustees -- Constructive trust -- Agency -- Fiduciary duties -- Real estate agent making offer to purchase property on behalf of client -- Vendor rejecting offer but advising agent of amount it would accept -- Agent buying property for himself instead of conveying information to client -- Market value of property decreasing from time of agent's purchase -- Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

Real property -- Remedies -- Constructive trust -- Agency -- Real estate agent making offer to purchase property on behalf of client -- Vendor rejecting offer but

advising agent of amount it would accept -- Agent buying property for himself instead of conveying information to client -- Market value of property decreasing from time of agent's purchase -- Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

K, a real estate broker, entered into negotiations to purchase a commercial building on behalf of S, his client. The vendor rejected the offer made and tendered a counteroffer. K rejected the counteroffer but "signed it back". The vendor advised K of the amount it would accept, but instead of conveying this information to S, K arranged for his wife to purchase to property, which was then transferred to K and his wife as joint tenants. S brought an action against K to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in his community. He abandoned his claim for damages because the market value of the property had decreased from the time of the purchase by K. The trial judge found that K had breached a duty of loyalty to S, but held that a constructive trust was not an appropriate remedy because K had not been "enriched". The Court of Appeal, in a majority decision, reversed the judgment and ordered that the property be conveyed to S subject to appropriate adjustments.

Held (Sopinka and Iacobucci JJ. dissenting): The appeal should be dismissed.

Per La Forest, Gonthier, Cory, McLachlin and Major JJ.: The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they

should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.

The following conditions should generally be satisfied before a constructive trust based on wrongful conduct will be imposed: (1) the defendant must have been under an equitable obligation 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.

Here K's breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust. First, K was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted a breach of his equitable duty of loyalty. Second, the assets in K's hands resulted from his agency activities in breach of his equitable obligation to S. Third, a constructive trust is required to remedy the deprivation S suffered because of his

continuing desire to own the particular property in question. A constructive trust is also required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty. Finally, there are no factors which would make imposition of a constructive trust unjust in this case.

Per Sopinka and Iacobucci JJ. (dissenting): The ordering of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. The trial judge's decision not to order such a remedy should be overturned on appeal only if the discretion has been exercised on the basis of an erroneous principle. The trial judge committed no such error here. He considered the moral quality of K's actions and there is thus no room for appellate intervention on this ground. He was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which is a correct statement of the law. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In this case, S withdrew his claim for damages. While compensatory damages were unavailable since no pecuniary loss was suffered, S could have sought exemplary damages. His decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust. The trial judge also considered deterrence, but held that it alone could not justify a remedy in this case.

Even if appellate review were appropriate, the remedy of a constructive trust was not available on the facts of this case. Recent case law in this Court is very clear that a constructive trust may only be ordered where there has been an unjust enrichment, and there was no enrichment, and therefore no unjust enrichment, here. The unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role and supported by specific consideration of the

principles set out in *Lac Minerals*. Deterrence does not suggest that a constructive trust should be available even where there is no unjust enrichment. Despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not held it to be necessary where a tort duty or a contractual duty has been breached to order remedies even where no loss resulted. There is nothing which would justify treating breaches of fiduciary duties any differently in this regard. In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not have any significant effect on deterrence. Exemplary damages are available if deterrence is deemed to be particularly important, and an unscrupulous fiduciary has to reckon with the possibility that if there were gains in value to the property, he or she would be compelled to pay damages or possibly give up the property.

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By McLachlin J.

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Marketing Board v. Royal Bank of Canada (1984), 9 D.L.R. (4th) 729; *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269.

By Sopinka J. (dissenting)

Donkin v. Bugoy, [1985] 2 S.C.R. 85; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729; *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269; *Reading v. The King*, [1948] 2 All E.R. 27, aff'd [1949] 2 All E.R. 68, aff'd [1951] 1 All E.R. 617; *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592; *Phipps v. Boardman*, [1965] 1 All E.R. 849, aff'd [1966] 3 All E.R. 721; *Lee v. Chow* (1990), 12 R.P.R. (2d) 217.

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221, reversing a decision of the Ontario Court (General Division) (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205, dismissing the respondent's action against the appellants for conveyance of a property. Appeal dismissed, Sopinka and Iacobucci JJ. dissenting.

Thomas G. Heintzman, Q.C., and *Darryl A. Cruz*, for the appellants.

David T. Stockwood, Q.C., and *Susan E. Caskey*, for the respondent.

The judgment of La Forest, Gonthier, Cory, McLachlin and Major JJ. was delivered by

MCLACHLIN J. --

I

1 This appeal requires this Court to determine whether a real estate agent who buys for himself property for which he has been negotiating on behalf of a client may be

required to return the property to his client despite the fact that the client can show no loss. This raises the legal issue of whether a constructive trust over property may be imposed in the absence of enrichment of the defendant and corresponding deprivation of the plaintiff. In my view, this question should be answered in the affirmative.

II

2 The appellant Mr. Korkontzilas is a real estate broker. The respondent, Mr. Soulos, was his client. In 1984, Mr. Korkontzilas found a commercial building which he thought might interest Mr. Soulos. Mr. Soulos was interested in purchasing the building. Mr. Korkontzilas entered into negotiations on behalf of Mr. Soulos. He offered $250,000. The vendor, Dominion Life, rejected the offer and tendered a counter-offer of $275,000. Mr. Soulos rejected the counter-offer but "signed it back" at $260,000 or $265,000. Dominion Life advised Mr. Korkontzilas that it would accept $265,000. Instead of conveying this information to Mr. Soulos as he should have, Mr. Korkontzilas arranged for his wife, Panagiota Goutsoulas, to purchase the property using the name Panagiot Goutsoulas. Panagiot Goutsoulas then transferred the property to Panagiota and Fotios Korkontzilas as joint tenants. Mr. Soulos asked what had happened to the property. Mr. Korkontzilas told him to "forget about it"; the vendor no longer wanted to sell it and he would find him a better property. Mr. Soulos asked Mr. Korkontzilas whether he had had anything to do with the vendor's change of heart. Mr. Korkontzilas said he had not.

3 In 1987 Mr. Soulos learned that Mr. Korkontzilas had purchased the property for himself. He brought an action against Mr. Korkontzilas to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He

asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in the Greek community of which he was a member. However, Mr. Soulos abandoned his claim for damages because the market value of the property had, in fact, decreased from the time of the Korkontzilas purchase.

4 The trial judge found that Mr. Korkontzilas had breached a duty of loyalty to Mr. Soulos, but held that a constructive trust was not an appropriate remedy because Mr. Korkontzilas had purchased the property at market value and hence had not been "enriched": (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205 (hereinafter cited to O.R.). The decision was reversed on appeal, Labrosse J.A. dissenting: (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221 (hereinafter cited to O.R.).

5 For the reasons that follow, I would dismiss the appeal. In my view, the doctrine of constructive trust applies and requires that Mr. Korkontzilas convey the property he wrongly acquired to Mr. Soulos.

III

6 The first question is what duties Mr. Korkontzilas owed to Mr. Soulos in relation to the property. This question returns us to the findings of the trial judge. The trial judge rejected the submission of Mr. Soulos that an agreement existed requiring Mr. Korkontzilas to present all properties in the Danforth area to him exclusively before other purchasers. He found, however, that Mr. Korkontzilas became the agent for Mr. Soulos when he prepared the offer which Mr. Soulos signed with respect to the property at issue. He further found that this agency relationship extended to reporting the vendor's response to Mr. Soulos. This relationship of agency was not terminated when

the vendor made its counter-offer. The trial judge therefore concluded that Mr. Korkontzilas was acting as Mr. Soulos' agent at all material times.

7 The trial judge went on to state that the relationship of agent and principal is fiduciary in nature. He concluded that as agent to Mr. Soulos, Mr. Korkontzilas owed Mr. Soulos a "duty of loyalty". He found that Mr. Korkontzilas breached this duty of loyalty when he failed to refer the vendor's counter-offer to Mr. Soulos.

8 The Court of Appeal did not take issue with these conclusions. The majority did, however, differ from the trial judge on what consequences flowed from Mr. Korkontzilas' breach of the duty of loyalty.

IV

9 This brings us to the main issue on this appeal: what remedy, if any, does the law afford Mr. Soulos for Mr. Korkontzilas' breach of the duty of loyalty in acquiring the property in question for himself rather than passing the vendor's statement of the price it would accept on to his principal, Mr. Soulos?

10 At trial Mr. Soulos' only claim was that the property be transferred to him for the price paid by Mr. Korkontzilas, subject to adjustments for changes in value and losses incurred on the property since purchase. He abandoned his claim for damages at an early stage of the proceedings. This is not surprising, since Mr. Korkontzilas had paid market value for the property and had, in fact, lost money on it during the period he had held it. Still, Mr. Soulos maintained his desire to own the property.

11 Mr. Soulos argued that the property should be returned to him under the equitable doctrine of constructive trust. The trial judge rejected this claim, on the ground that constructive trust arises only where the defendant has been unjustly enriched by his wrongful act. The fact that damages offered Mr. Soulos no compensation was of no moment: "It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none" (p. 69). Furthermore, "it seems simply disproportionate and inappropriate to utilize the drastic remedy of a constructive trust where the plaintiff has suffered no damage" (p. 69). The trial judge added that nominal damages were inappropriate, damages having been waived, and that Mr. Soulos had mitigated his loss by buying other properties.

12 The majority of the Court of Appeal took a different view. Carthy J.A. held that the award of an equitable remedy is discretionary and dependent on all the facts before the court. In his view, however, the trial judge had exercised his discretion on a wrong principle. Carthy J.A. asserted that the moral quality of the defendant's act may dictate the court's intervention. Most real estate transactions involve one person acting gratuitously for the purchaser, while seeking commission from the vendor. The fiduciary duties of the agent would be meaningless if the agent could simply acquire the property at market value, and then deny that he or she is a constructive trustee because no damages are suffered. In such circumstances, equity will "intervene with a proprietary remedy to sustain the integrity of the laws which it supervises" (p. 261). Carthy J.A. conceded that Mr. Soulos' reason for desiring the property may seem "whimsical". But viewed against the broad context of real estate transactions, he found that the remedy of constructive trust in these circumstances serves a "salutary purpose". It enables the court to ensure that immoral conduct is not repeated, undermining the bond of trust that enables the industry to function. The majority accordingly ordered conveyance of the property subject to appropriate adjustments.

13 The difference between the trial judge and the majority in the Court of Appeal may be summarized as follows. The trial judge took the view that in the absence of established loss, Mr. Soulos had no action. To grant the remedy of constructive trust in the absence of loss would be "simply disproportionate and inappropriate", in his view. The majority in the Court of Appeal, by contrast, took a broader view of when a constructive trust could apply. It held that a constructive trust requiring reconveyance of the property could arise in the absence of an established loss in order to condemn the agent's improper act and maintain the bond of trust underlying the real estate industry and hence the "integrity of the laws" which a court of equity supervises.

14 The appeal thus presents two different views of the function and ambit of the constructive trust. One view sees the constructive trust exclusively as a remedy for clearly established loss. On this view, a constructive trust can arise only where there has been "enrichment" of the defendant and corresponding "deprivation" of the plaintiff. The other view, while not denying that the constructive trust may appropriately apply to prevent unjust enrichment, does not confine it to that role. On this view, the constructive trust may apply absent an established loss to condemn a wrongful act and maintain the integrity of the relationships of trust which underlie many of our industries and institutions.

15 It is my view that the second, broader approach to constructive trust should prevail. This approach best accords with the history of the doctrine of constructive trust, the theory underlying the constructive trust, and the purposes which the constructive trust serves in our legal system.

16 The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment in cases such as *Pettkus v. Becker*, [1980] 2 S.C.R. 834. Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff can demonstrate no deprivation and corresponding enrichment of the defendant.

17 The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

18 While specific situations attracting a constructive trust have been identified, the older English jurisprudence offers no satisfactory limiting or unifying conceptual theory for the constructive trust. As D. W. M. Waters, *The Constructive Trust* (1964), at p. 39, puts it, the constructive trust "was never any more than a convenient and available language medium through which . . . the obligations of parties might be expressed or determined". The constructive trust was used in English law "to link together a number of disparate situations . . . on the basis that the obligations imposed

by law in these situations might in some way be likened to the obligations which were imposed upon an express trustee": J. L. Dewar, "The Development of the Remedial Constructive Trust" (1982-84), 6 *Est. & Tr. Q.* 312, at p. 317, citing Waters, *supra.*

19 The situations in which a constructive trust was recognized in England include constructive trusts arising on breach of a fiduciary relationship, as well as trusts imposed to prevent the absence of writing from depriving a person of proprietary rights, to prevent a purchaser with notice from fraudulently retaining trust properties, and to enforce secret trusts and mutual wills. See Dewar, *supra*, at p. 334. The fiduciary relationship underlies much of the English law of constructive trust. As Waters, *supra*, at p. 33, writes: "the fiduciary relationship is clearly wed to the constructive trust over the whole, or little short of the whole, of the trust's operation". At the same time, not all breaches of fiduciary relationships give rise to a constructive trust. As L. S. Sealy, "Fiduciary Relationships", [1962] *Camb. L.J.* 69, at p. 73, states:

> The word "fiduciary," we find, is *not* definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied. [Emphasis in original.]

Nor does the absence of a classic fiduciary relationship necessarily preclude a finding of a constructive trust; the wrongful nature of an act may be sufficient to constitute breach of a trust-like duty: see Dewar, *supra*, at pp. 322-23.

20 Canadian courts have never abandoned the principles of constructive trust developed in England. They have, however, modified them. Most notably, Canadian courts in recent decades have developed the constructive trust as a remedy for unjust

enrichment. It is now established that a constructive trust may be imposed in the absence of wrongful conduct like breach of fiduciary duty, where three elements are present: (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: *Pettkus v. Becker*, *supra*.

21 This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as *Pettkus v. Becker* should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. The language used makes no such claim. A. J. McClean, "Constructive and Resulting Trusts -- Unjust Enrichment in a Common Law Relationship -- *Pettkus v. Becker*" (1982), 16 *U.B.C. L. Rev.* 155, at p. 170, describes the ratio of *Pettkus v. Becker* as "a modest enough proposition". He goes on: "It would be wrong . . . to read it as one would read the language of a statute and limit further development of the law".

22 Other scholars agree that the constructive trust as a remedy for unjust enrichment does not negate a finding of a constructive trust in other situations. D. M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989), 68 *Can. Bar Rev.* 315, at p. 318, states: "the constructive trust that is used to remedy unjust enrichment must be distinguished from the other types of constructive trusts known to Canadian law prior to 1980". Paciocco asserts that unjust enrichment is not a necessary condition of a constructive trust (at p. 320):

> ... in the largest traditional category, the fiduciary constructive trust, there need be no deprivation experienced by the particular plaintiff. The constructive trust is imposed to raise the morality of the marketplace generally, with the beneficiaries of some of these trusts receiving what can only be described as a windfall.

23 Dewar, *supra*, holds a similar view (at p. 332):

> While it is unlikely that Canadian courts will abandon the learning and the classifications which have grown up in connection with the English constructive trust, it is submitted that the adoption of the American style constructive trust by the Supreme Court of Canada in *Pettkus v. Becker* will profoundly influence the future development of Canadian trust law.

Dewar, *supra*, at pp. 332-33, goes on to state: "In English and Canadian law there is no general agreement as to precisely which situations give rise to a constructive trust, though there are certain general categories of cases in which it is agreed that a constructive trust does arise". One of these is to correct fraudulent or disloyal conduct.

24 M. M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988), 26 *Alta. L. Rev.* 407, at p. 414, sees unjust enrichment as a useful tool in rationalizing the traditional categories of constructive trust. Nevertheless he opines that it would be a "significant error" to simply ignore the traditional principles of constructive trust. He cites a number of Canadian cases subsequent to *Pettkus v. Becker*, *supra*, which impose constructive trusts for wrongful acquisition of property, even in the absence of unjust enrichment and correlative deprivation, and concludes that the constructive trust "cannot always be explained by the unjust enrichment model of constructive trust" (p. 416). In sum, the old English law remains part of contemporary Canadian law and guides its development. As La Forest J.A. (as he then was) states in *White v. Central Trust Co.* (1984), 17 E.T.R. 78 (N.B.C.A.), at p. 90, cited by Litman, *supra*, the courts "will not venture far onto an uncharted sea when they can administer justice from a safe berth".

25 I conclude that the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found

a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence.

VI

26 Various principles have been proposed to unify the situations in which the English law found constructive trust. R. Goff and G. Jones, *The Law of Restitution* (3rd ed. 1986), at p. 61, suggest that unjust enrichment is such a theme. However, unless "enrichment" is interpreted very broadly to extend beyond pecuniary claims, it does not explain all situations in which the constructive trust has been applied. As McClean, *supra,* at p. 168, states: "however satisfactory [the unjust enrichment theory] may be for other aspects of the law of restitution, it may not be wide enough to cover all types of constructive trust". McClean goes on to note the situation raised by this appeal: "In some cases, where such a trust is imposed the trustee may not have obtained any benefit at all; this could be the case, for example, when a person is held to be a trustee *de son tort.* A plaintiff may not always have suffered a loss." McClean concludes (at pp. 168-69): "Unjust enrichment may not, therefore, satisfactorily explain all types of restitutionary claims".

27 McClean, among others, regards the most satisfactory underpinning for unjust enrichment to be the concept of "good conscience" which lies at "the very foundation of equitable jurisdiction" (p. 169):

> "Safe conscience" and "natural justice and equity" were two of the criteria referred to by Lord Mansfield in *Moses v. MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) in dealing with an action for money had and received, the prototype of a common law restitutionary claim. "Good conscience" has a sound basis in equity, some basis in common law, and is wide enough to encompass constructive trusts where the defendant has not obtained a benefit or where the plaintiff has not suffered a loss. It is, therefore, as good

> as, or perhaps a better, foundation for the law of restitution than is unjust enrichment.

28 Other scholars agree with McClean that good conscience may provide a useful way of unifying the different forms of constructive trust. Litman, *supra*, adverts to the "natural justice and equity" or "good conscience" trust "which operates as a remedy for wrongs which are broader in concept than unjust enrichment" and goes on to state that this may be viewed as the underpinning of the various institutional trusts as well as the unjust enrichment restitutionary constructive trust (at pp. 415-16).

29 Good conscience as the unifying concept underlying constructive trust has attracted the support of many jurists. Edmund Davies L.J. suggested that the concept of a "want of probity" in the person upon whom the constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts": *Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276 (C.A.), at p. 301. Cardozo J. similarly endorsed the unifying theme of good conscience in *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (1919), at p. 380:

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. [Emphasis added.]

30 Lord Denning M.R. expressed similar views in a series of cases applying the constructive trust as a remedy for wrong-doing: see *Neale v. Willis* (1968), 19 P. & C.R. 836; *Binions v. Evans*, [1972] Ch. 359; *Hussey v. Palmer*, [1972] 1 W.L.R. 1286. In *Binions*, referring to the statement by Cardozo J., *supra*, Denning M.R. stated that the court would impose a constructive trust "for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject

to which they took the premises" (p. 368). In *Hussey,* he said the following of the constructive trust (at pp. 1289-90): "By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it".

31 Many English scholars have questioned Lord Denning's expansive statements on constructive trust. Nevertheless, he is not alone: Bingham J. similarly referred to good conscience as the basis for equitable intervention in *Neste Oy v. Lloyd's Bank Plc*, [1983] 2 Lloyd's Rep. 658.

32 The New Zealand Court of Appeal also appears to have accepted good conscience as the basis for imposing a constructive trust in *Elders Pastoral Ltd. v. Bank of New Zealand*, [1989] 2 N.Z.L.R. 180. Cooke P., at pp. 185-86, cited the following passage from Bingham J.'s reasons in *Neste Oy*, *supra*, at p. 666:

> Given the situation of [the defendants] when the last payment was received, any reasonable and honest directors of that company (or the actual directors had they known of it) would, I feel sure, have arranged for the repayment of that sum to the plaintiffs without hesitation or delay. It would have seemed little short of sharp practice for [the defendants] to take any benefit from the payment, and it would have seemed contrary to any ordinary notion of fairness that the general body of creditors should profit from the accident of a payment made at a time when there was bound to be a total failure of consideration. Of course it is true that insolvency always causes loss and perfect fairness is unattainable. The bank, and other creditors, have their legitimate claims. It nonetheless seems to me that at the time of its receipt [the defendants] could not in good conscience retain this payment and that accordingly a constructive trust is to be inferred. [Emphasis added.]

Cooke P. concluded simply (at p. 186): "I do not think that in conscience the stock agents can retain this money." *Elders* has been taken to stand for the proposition that even in the absence of a fiduciary relationship or unjust enrichment, conduct contrary to good conscience may give rise to a remedial constructive trust: see *Mogal Corp. v. Australasia Investment Co. (In Liquidation)* (1990), 3 N.Z.B.L.C. 101, 783; J. Dixon,

"The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment" (1992-95), 7 *Auck. U. L. Rev.* 147, at pp. 157-58. Although the Judicial Committee of the Privy Council rejected the creation of a constructive trust on grounds of good conscience in *Re Goldcorp Exchange Ltd. (In Receivership)*, [1994] 2 All E.R. 806, the fact remains that good conscience is a theme underlying constructive trust from its earliest times.

33 Good conscience addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised. As La Forest J. states in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 453:

> The law of fiduciary duties has always contained within it an element of deterrence. This can be seen as early as *Keech* in the passage cited *supra*; see also *Canadian Aero*, *supra*, at pp. 607 and 610; *Canson*, *supra*, at p. 547, *per* McLachlin J. In this way the law is able to monitor a given relationship society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility.

The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

34 It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive

trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

35 Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

36 The situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories. The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. The traditional English institutional trusts largely fall under but may not exhaust (at least in Canada) this category. The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.

37 In England the law has yet to formally recognize the remedial constructive trust for unjust enrichment, although many of Lord Denning's pronouncements pointed

in this direction. The courts do, however, find constructive trusts in circumstances similar to those at bar. Equity traditionally recognized the appropriateness of a constructive trust for breach of duty of loyalty simpliciter. The English law is summarized by Goff and Jones, *The Law of Restitution*, *supra*, at p. 643:

> A fiduciary may abuse his position of trust by diverting a contract, purchase or other opportunity from his beneficiary to himself. If he does so, he is deemed to hold that contract, purchase, or opportunity on trust for the beneficiary.

P. Birks, *An Introduction to the Law of Restitution* (1985) (at pp. 330; 338-43) agrees. He suggests that cases of conflict of interest not infrequently may give rise to constructive trust, absent unjust enrichment. Birks distinguishes between anti-enrichment wrongs and anti-harm wrongs (at p. 340). A fiduciary acting in conflict of interest represents a risk of actual or potential harm, even though his misconduct may not always enrich him. A constructive trust may accordingly be ordered.

38 Both categories of constructive trust are recognized in the United States; although unjust enrichment is sometimes cited as the rationale for the constructive trust in the U.S., in fact its courts recognize the availability of constructive trust to require the return of property acquired by wrongful act absent unjust enrichment of the defendant and reciprocal deprivation of the plaintiff. Thus the authors of *Scott on Trusts* (3rd ed. 1967), vol. V, at p. 3410, state that the constructive trust "is available where property is obtained by mistake or by fraud or by other wrong". Or as Cardozo C.J. put it, "[a] constructive trust is, then, the remedial device through which preference of self is made subordinate to loyalty to others": *Meinhard v. Salmon*, 164 N.E. 545 (1928), at p. 548, cited in *Scott on Trusts*, *supra*, at p. 3412. *Scott on Trusts*, *supra*, at p. 3418, states that there are cases "in which a constructive trust is enforced against a defendant, although

the loss to the plaintiff is less than the gain to the defendant or, indeed, where there is no loss to the plaintiff".

39 Canadian courts also recognize the availability of constructive trusts for both wrongful acquisition of property and unjust enrichment. Applying the English law, they have long found constructive trusts as a consequence of wrongful acquisition of property, for example by fraud or breach of fiduciary duty. More recently, Canadian courts have recognized the availability of the American-style remedial constructive trust in cases of unjust enrichment: *Pettkus v. Becker*, *supra*. However, since *Pettkus v. Becker* Canadian courts have continued to find constructive trusts where property has been wrongfully acquired, even in the absence of unjust enrichment. While such cases appear infrequently since few choose to litigate absent pecuniary loss, they are not rare.

40 Litman, *supra*, at p. 416, notes that in "the post-*Pettkus* v. *Becker* era there are numerous cases where courts have used the institutional constructive trust without adverting to or relying on unjust enrichment". The imposition of a constructive trust in these cases is justified not on grounds of unjust enrichment, but on the ground that the defendant's wrongful act requires him to restore the property thus obtained to the plaintiff.

41 Thus in *Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729 (Ont. C.A.), a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor.

42 Again, in *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C.S.C.), a constructive trust was imposed on individuals who knowingly participated

in a breach of fiduciary duty despite a finding that unjust enrichment would not warrant the imposition of a trust because the plaintiff company could not be said to have suffered a loss or deprivation since its own policy precluded it from receiving the profits. Dohm J. (as he then was) stated that the constructive trust was required "not to balance the equities but to ensure that trustees and fiduciaries remain faithful and that those who assist them in the breaches of their duty are called to account" (p. 302).

43 I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v. Becker*, *supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

44 The process suggested is aptly summarized by McClean, *supra*, at pp. 169-70:

> The law [of constructive trust] may now be at a stage where it can distill from the specific examples a few general principles, and then, by analogy to the specific examples and within the ambit of the general principle, create new heads of liability. That, it is suggested, is not asking the courts to embark on too dangerous a task, or indeed on a novel task. In large measure it is the way that the common law has always developed.

45 In *Pettkus v. Becker*, *supra*, this Court explored the prerequisites for a constructive trust based on unjust enrichment. This case requires us to explore the prerequisites for a constructive trust based on wrongful conduct. Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment", in Andrew Burrows, ed., *Essays on the Law of Restitution* (1991), I would identify four conditions which generally should be satisfied:

(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.

46 Applying this test to the case before us, I conclude that Mr. Korkontzilas' breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust for the following reasons.

47 First, Mr. Korkontzilas was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted breach of his equitable duty of loyalty. He allowed his own interests to conflict with those of his client. He acquired the property wrongfully, in flagrant and inexcusable breach of his duty of loyalty to Mr. Soulos. This is the sort of situation which courts of equity, in Canada and elsewhere, have traditionally treated as involving an equitable duty, breach of which may give rise to a constructive trust, even in the absence of unjust enrichment.

48 Second, the assets in the hands of Mr. Korkontzilas resulted from his agency activities in breach of his equitable obligation to the plaintiff. His acquisition of the property was a direct result of his breach of his duty of loyalty to his client, Mr. Soulos.

49 Third, while Mr. Korkontzilas was not monetarily enriched by his wrongful acquisition of the property, ample reasons exist for equity to impose a constructive trust. Mr. Soulos argues that a constructive trust is required to remedy the deprivation he suffered because of his continuing desire, albeit for non-monetary reasons, to own the particular property in question. No less is required, he asserts, to return the parties to the position they would have been in had the breach not occurred. That alone, in my opinion, would be sufficient to persuade a court of equity that the proper remedy for Mr. Korkontzilas' wrongful acquisition of the property is an order that he is bound as a constructive trustee to convey the property to Mr. Soulos.

50 But there is more. I agree with the Court of Appeal that a constructive trust is required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty: see *Hodgkinson v. Simms*, *supra*, per La Forest J. If real estate agents are permitted to retain properties which they acquire for themselves in breach of a duty of loyalty to their clients provided they pay market value, the trust and confidence which underpin the institution of real estate brokerage will be undermined. The message will be clear: real estate agents may breach their duties to their clients and the courts will do nothing about it, unless the client can show that the real estate agent made a profit. This will not do. Courts of equity have always been concerned to keep the person who acts on behalf of others to his ethical mark; this Court should continue in the same path.

51 I come finally to the question of whether there are factors which would make imposition of a constructive trust unjust in this case. In my view, there are none. No third parties would suffer from an order requiring Mr. Korkontzilas to convey the property to Mr. Soulos. Nor would Mr. Korkontzilas be treated unfairly. Mr. Soulos is content to make all necessary financial adjustments, including indemnification for the loss Mr. Korkontzilas has sustained during the years he has held the property.

52 I conclude that a constructive trust should be imposed. I would dismiss the appeal and confirm the order of the Court of Appeal that the appellants convey the property to the respondent, subject to appropriate adjustments. The respondent is entitled to costs throughout.

The reasons of Sopinka and Iacobucci JJ. were delivered by

53 SOPINKA J. (dissenting) -- I have read the reasons of my colleague McLachlin J. While I agree with her conclusion that a breach of a fiduciary duty was made out herein, I disagree with her analysis concerning the appropriate remedy. In my view, she errs in upholding the decision of the majority of the Court of Appeal to overturn the trial judge and impose a constructive trust over the property in question. There are two broad reasons for my conclusion. First, the order of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. Given that the trial judge did not err in principle in declining to make such an order, appellate courts should not interfere with the exercise of his discretion. Second, even if appellate review were appropriate in the present case, a constructive trust as a remedy is not available where there has been no unjust enrichment. The main source of my disagreement with McLachlin J. arises in consideration of the second point, but in order to address the reasons of the majority in the court below as well, I will consider both of these issues in turn.

Standard of Review and the Exercise of Discretion

54 It is a matter of settled law that appellate courts should generally not interfere with orders exercised within a trial judge's discretion. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: see *Donkin v. Bugoy*, [1985] 2 S.C.R. 85. As acknowledged by the majority in the Court of Appeal ((1995), 25 O.R. (3d) 257, at p. 259), the decision to order a constructive trust is a matter of discretion. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, the majority held that the order of a constructive trust in response to a breach of a fiduciary duty would depend on all the circumstances. La Forest J. stated at p. 674:

> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award.... [A constructive trust] is but one remedy, and will only be imposed in appropriate circumstances.

The discretionary approach to constructive trusts is also consistent with the approach to equitable remedies generally: see *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 585.

55 Given that ordering a constructive trust is a discretionary matter, it is necessary to show an error in principle on the part of the trial judge in order to overturn the judge's decision not to order such a remedy. In my view, the trial judge committed no such error.

56 The majority of the Court of Appeal apparently found that the trial judge erred in failing to consider the moral blameworthiness of the appellants' actions. Similarly, McLachlin J. would hold that a constructive trust was appropriate in the present case simply because of considerations of "good conscience". In my view, the trial judge considered the moral quality of the appellants' actions and thus there is no room for appellate intervention on this ground. He stated ((1991), 4 O.R. (3d) 51, at p. 69) that, while "[n]o doubt the maintenance of commercial morality is an element of public policy and a legitimate concern of the court", morality should generally not invite the intervention of the court, except where it is required in aid of enforcing some legal right. Put another way, in my view the trial judge was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which statement of the law is in my view correct.

57 The majority of the Court of Appeal stated (at pp. 259-60) that the principles set out by the trial judge may be applicable where there are alternative remedies, but are questionable where only one remedy is available, as in the present case. I do not accept this contention. If a constructive trust is held to be inappropriate where there are a variety of remedies available, I cannot understand the principle behind the conclusion that such a remedy may be appropriate where it is the only remedy available. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In the present case, the plaintiff withdrew his claim for damages. While compensatory damages were unavailable since the plaintiff suffered no pecuniary loss (which I will discuss further below in assessing whether a constructive trust could have been ordered), the plaintiff could have sought exemplary damages – his decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust.

58 The trial judge put significant emphasis on the absence of pecuniary gains in concluding that he would not order a constructive trust. For the reasons which I set out in detail below, I am of the opinion that the trial judge was correct in this regard. On the other hand, the majority of the Court of Appeal and McLachlin J. hold that the trial judge erred in improperly appreciating the deterrence role of a constructive trust in the present case. In my view, consideration of deterrence fails to disclose any error in principle on the part of the trial judge. Deterrence, like the morality of the acts in question, may be relevant to the exercise of discretion with respect to the remedy for a breach of a fiduciary duty (see, e.g., *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at pp. 421 and 453), but the trial judge in the present case did not fail to consider deterrence in deciding whether to order a constructive trust. As noted above, he stated that while "maintenance of commercial morality is ... a legitimate concern of the court" (p. 69), it would not alone justify ordering a remedy in the present case. In my view, his mention

of the "maintenance of commercial morality" indicates that the judge considered deterrence, but held that it alone could not justify a remedy in the present case. Thus, even if failure to consider deterrence could be considered an error in principle, the trial judge in the present case did not so err.

59 In my view, the trial judge committed no error in principle which could justify a decision to set aside his judgment and order a constructive trust. Even if the trial judge did commit some error in principle, however, in my view the remedy of a constructive trust was not available on the facts of the present case. That is, even if no deference is owed to the trial judge, the majority below erred in ordering a constructive trust and the appeal should be allowed. The following are my reasons for this conclusion.

Unjust Enrichment and the Availability of a Constructive Trust

60 McLachlin J. would hold that there are two general circumstances in which a constructive trust may be ordered: where there has been unjust enrichment and where there has been an absence of "good conscience". While unjust enrichment and the absence of "good conscience" may both be present in a particular case, McLachlin J. is of the view that either element individually is sufficient to order a constructive trust. By failing to consider the "good conscience" ground on its own, McLachlin J. finds that the trial judge erred. I respectfully disagree with this finding. In my view, recent case law in this Court is very clear that a constructive trust may only be ordered where there has been an unjust enrichment. For example, passages in *Lac Minerals, supra,* set out the circumstances in which an order of a constructive trust might be appropriate. In my opinion, it is clear from that decision that a constructive trust is not available as a remedy unless there has been an unjust enrichment. La Forest J. stated at pp. 673-74:

> This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker*, [[1980] 2 S.C.R. 834], where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker*, *supra*, set out a two-step approach. First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment. In *Hunter Engineering Co. v. Syncrude Canada Ltd.*, a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.
>
> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "The principle of unjust enrichment lies at the heart of the constructive trust": see *Pettkus v. Becker*, at p. 847, the converse is not true. The constructive trust does not lie at the heart of the law of restitution. [Emphasis added.]

La Forest J. added at p. 678:

> Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. [Emphasis added.]

61 In *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87, the majority cited some of the passages above from *Lac* with approval and held at p. 96 that, "[t]he requirement of unjust enrichment is fundamental to the use of a constructive trust."

62 Citing only *Pettkus*, *supra*, specifically, McLachlin J. states at para. 21 that it and other cases should not be taken to expunge from Canadian law the constructive trust in circumstances where there has not been unjust enrichment. With respect, I do not see how statements such as "[t]he requirement of unjust enrichment is fundamental to the use of a constructive trust" could do anything but expunge from Canadian law the use of constructive trusts where there has been no enrichment. Unjust enrichment has been repeatedly stated to be a requirement for a constructive trust; thus to order one where there has been no unjust enrichment would clearly depart from settled law.

63 Even aside from the case law, in my view, the unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role. The respondent submitted that if no remedy is available in the present case, there would inappropriately be a right without a remedy. I disagree. Clearly, the beneficiary has a right to have the fiduciary adhere to its duty, and if damages are suffered, the beneficiary has a right to a remedy. In my view, this is analogous to remedial principles found elsewhere in the private law. Even if a duty is owed and breached in other legal contexts, there is no remedy unless a loss has been suffered. I may owe a duty to my neighbour to shovel snow off my walk, and I may breach that duty, but if my neighbour does not suffer any loss because of the breached duty, there is no tort and no remedy. Similarly, I may have a contractual duty to supply goods at a specific date for a specific price, but if I do not and the other party is able to purchase the same goods at the contract price at the same time and place, the party has not suffered damage and no remedy is available. It is entirely consistent with these rules to state that even if a fiduciary breaches a duty, if the fiduciary is not unjustly enriched by the breach, there is no remedy.

64 Remedial principles generally thus support the rule against a constructive trust where there has been no unjust enrichment. The rule is also supported, in my view, by specific consideration of the principles governing constructive trusts set out in *Lac Minerals*. In *Lac Minerals*, La Forest J. stated that, even where there has been unjust enrichment, the constructive trust will be an exceptional remedy; the usual approach would be to award damages. He stated at p. 678:

> In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, *supra*, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; 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. [Emphasis added.]

65 La Forest J. thus held that generally an aggrieved beneficiary will only be entitled to damages, not to the property itself. This implies that the beneficiary does not generally have a right to the property in question, but rather has a right to receive the value of the gains resulting from the acquisition of the property. Following this reasoning, if the value of the gains is zero, that is, there is no unjust enrichment, the beneficiary will not have a right to a remedy. Consequently, where there has been no unjust enrichment, there is no right to a constructive trust or any other remedy.

66 While, in my view, recent decisions of this Court and the principles underlying them settle the matter, McLachlin J. cites other Canadian case law in concluding that constructive trusts may be ordered even where there has not been unjust enrichment. She cites three lower court decisions which she claims involved the award of a constructive trust absent unjust enrichment. With respect, I do not read any one of these cases as supporting her claim. An unjust enrichment exists where there has been an enrichment of the defendant, a corresponding deprivation experienced by the plaintiff

and the absence of any juristic reason for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. McLachlin J. fails to cite a case where a remedial constructive trust was ordered absent such an enrichment.

67 In *Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729 (Ont. C.A.), a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor. The bank was a secured creditor of the depositor, which depositor was in financial difficulty at the time of the deposits. Clearly, this case involved an unjust enrichment: the bank benefitted by gaining rights over the deposited money, as well as by increasing the likelihood of repayment of the depositor's credit; the plaintiff (a corporation whose agent, the depositor, breached his fiduciary obligations) was deprived of its right to its money; and there was no juristic reason for the enrichment. Thus, the order of a constructive trust responded to an unjust enrichment, whether or not the court adverted to such doctrine.

68 *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C.S.C.) is also, in my view, a case of unjust enrichment. In this case, a fiduciary to a corporation breached his duty by engaging in self-dealing without disclosing his interest. A constructive trust was imposed over the secret profits even though the plaintiff organization, because of its internal policy, could not have realized the profits itself. While the fiduciary was plainly enriched, the trial judge and McLachlin J. conclude that since the plaintiff could not have realized the profits, there was no "corresponding deprivation" and therefore no unjust enrichment.

69 I disagree with McLachlin J. that there was no unjust enrichment in *Binstead.* First of all, courts have consistently treated fiduciaries' profits explicitly as unjust enrichment, whether or not the beneficiary could have earned the profits itself. For example, in *Reading v. The King*, [1948] 2 All E.R. 27 (K.B.D.), aff'd [1949] 2 All E.R. 68 (C.A.), aff'd [1951] 1 All E.R. 617 (H.L.), Denning J. stated at p. 28:

> It matters not that the master has not lost any profit nor suffered any damage, nor does it matter that the master could not have done the act himself. If the servant has unjustly enriched himself by virtue of his service without his master's sanction, the law says that he ought not to be allowed to keep the money.... [Emphasis added.]

In *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, at pp. 621-22, Laskin J., as he then was, stated:

> Liability of O'Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, as based on unjust enrichment, I would not interfere with the quantum. [Emphasis added.]

Reading and *O'Malley* are clear: the characterization of the profits earned by a fiduciary in breach of duty is one of unjust enrichment, whether or not the corporation could have earned the profits itself. Thus, *Binstead* involved unjust enrichment, contrary to McLachlin J.'s assertion.

70 I wish to add that the treatment of the profits as unjust enrichment in *Reading, O'Malley*, and *Binstead* is not inconsistent with the general rules governing unjust enrichment. The plaintiff in each case had a right to have the fiduciary adhere to

his duty. When the defendant breached that duty, the profits earned as a result of that breach are essentially treated in equity as belonging to the corporation, whether or not the corporation could have earned those profits in the absence of the breach. As an example of the proprietary analogy, Denning M.R. stated at p. 856 in *Phipps v. Boardman*, [1965] 1 All E.R. 849 (C.A.), aff'd [1966] 3 All E.R. 721 (H.L), that:

> [W]ith *information or knowledge* which he has been employed by his principal to collect or discover, *or which he has otherwise acquired*, for the use of his principal, then again if he turns it to his own use, so as to make a profit by means of it for himself, he is accountable ... for such information or knowledge is the property of his principal, just as much as an invention is.... [Italics in original; underlining added.]

71 Thus, in *Binstead*, the retention of the profits by the fiduciary would have deprived the corporation of its right to the profits. The deprivation is represented by the monies obtained by the fiduciary as a result of infringing the rights of the plaintiff. In order for there not to have been deprivation and unjust enrichment in circumstances otherwise similar to *Binstead*, the self-dealing could not have resulted in any secret profits – if a remedy were awarded in a case without profit, thus no enrichment nor deprivation, McLachlin J. could well point to the case for support. Given that there was profit in *Binstead*, however, there was unjust enrichment which justified the order of a constructive trust, whether or not the court explicitly relied upon unjust enrichment.

72 In summary, McLachlin J. fails to refer to a single Canadian case where a constructive trust was ordered despite the absence of unjust enrichment. Given this conclusion and given that recent cases of this Court unambiguously foreclose the possibility of ordering a constructive trust in the absence of unjust enrichment, in my view McLachlin J. is in error in concluding that a constructive trust may be ordered in the absence of unjust enrichment.

73 Aside from Canadian case law, McLachlin J. attempts to rely on various scholars and foreign case law as providing support for her conclusion. Because of the clear statement of the law recently set out by this Court, in my view the scholarly writings and foreign cases are only useful in so far as the policy they set out suggests that the law in Canada should be modified. I will therefore simply address the policy upon which McLachlin J. relies, rather than each case and each article she cites.

74 Simply put, McLachlin J., reasoning similarly to the majority below, concludes that to fail to permit the order of a constructive trust where there has been a breach of a fiduciary duty, but no unjust enrichment, would inadequately safeguard the integrity of fiduciary relationships. She says at para. 33 that ordering a constructive trust simply on the basis of "good conscience"

> addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised.... The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

According to McLachlin J., then, deterrence of faithless fiduciaries requires the availability of constructive trust as a remedy even where there has been no unjust enrichment.

75 In my view, deterrence is not a factor which suggests modifying the law of Canada and permitting the order of a constructive trust even where there has been no unjust enrichment. As noted above, despite considerations of deterrence, it is true

throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not, because of concern about protecting the integrity of these duties, held it to be necessary where a tort duty, or a contractual duty, has been breached to order remedies even where no loss resulted. I fail to see what distinguishes the role of fiduciary duties from the very important societal roles played by other legal duties which would justify their exceptional treatment with respect to remedy.

76 In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not, in my opinion, have any significant effect on deterring unfaithful fiduciaries and protecting the integrity of fiduciary relationships. First, if deterrence were deemed to be particularly important in a case, the plaintiff may seek and the trial judge may award exemplary damages; a constructive trust is not necessary to preserve the integrity of the relationship, even if this integrity were of particular concern in a given case. The fact that exemplary damages were not sought in the present case should not compel this Court to order a constructive trust in their place. Second, even if a remedy were unavailable in the absence of unjust enrichment, which is not true given exemplary damages, deterrence is not precluded. Taking a case similar to the present appeal, while an unscrupulous fiduciary would know that he or she would not be compelled to give up the surreptitiously obtained property if there were no gains in value to the property, he or she must also reckon with the possibility that if there were gains in value, and therefore unjust enrichment, he or she would be compelled to pay damages or possibly give up the property. Thus, if the fiduciary were motivated to breach his or her duty because of the prospect of pecuniary gains, which would, I imagine, be the typical, if not the exclusive, motive for such a breach, not ordering a constructive trust where there have been no pecuniary gains does not affect deterrence. I therefore disagree with McLachlin J. that deterrence suggests that a constructive trust should be available even where there is no unjust enrichment.

77 As is clear, I cannot agree with McLachlin J. that a constructive trust could be ordered, and indeed should have been ordered, in the present case even if there was no unjust enrichment. In order to decide whether such a remedy could be ordered, in my view, it must be decided whether there was unjust enrichment in the present case.

Was There Unjust Enrichment?

78 In my opinion, there was no enrichment and therefore no unjust enrichment in the present case. It is first of all plain that there were no pecuniary advantages accruing to the appellants from the purchase of the property. The trial judge stated (at p. 68):

> I now consider the facts of the case at bar. The nature of the duty and of the breach have already been discussed. At an interlocutory stage, the plaintiff abandoned any claim for damages. This step involved no sacrifice because the plaintiff could not have proved any. [Emphasis added.]

Any enrichment from the purchase of the property was not pecuniary, which would suggest that there has in fact been no enrichment and therefore no unjust enrichment.

79 It could, perhaps, be argued that if the property were unique or otherwise difficult to value, the defendant's pecuniary gains may not represent the enrichment of the defendant or the deprivation of the plaintiff. Analogizing to the award of specific performance in contract, where property that is the subject of a contract is unique or otherwise difficult to value, and the contract is breached, it may be held that monetary damages are inadequate and thus a remedy of specific performance must be ordered to compensate the plaintiff adequately. In such cases, pecuniary damages may not represent the loss to the plaintiff or the gain to the defendant from the breach. Thus,

perhaps, an enrichment could be found in the absence of a change in market price if the property were unique or otherwise difficult to value.

80 Whether or not such considerations could be relevant to a finding of an enrichment, the property in question was not found to be unique or otherwise difficult to value in a manner relevant to the remedy. The trial judge noted that the respondent had asserted that the property in question had special value to him given its tenant, a bank, and the significance of being a landlord to a bank in the Greek community. The trial judge (at p. 69) held that such a factor should not be taken into account any more than personal attachment in an eminent domain case. In other words, while there may have been personal motivation for the purchase, this was not relevant to an assessment of the value of the property. This indicates, in my view, that the trial judge did not view the property to be unique in a manner meaningful to the remedial analysis. Such a conclusion is plain in the trial judge's analysis of *Lee v. Chow* (1990), 12 R.P.R. (2d) 217 (Ont. S.C.). In *Lee*, a constructive trust was declared in a property that had been purchased surreptitiously by an agent in a situation similar to the present case. The trial judge in the instant appeal distinguished *Lee* in the following way (at p. 70):

> [The circumstances in *Lee*] included the following: a degree of dependence by the plaintiff which, in my view, is lacking in the case at bar; that it was a residential property meeting the specific requirements of the plaintiff, rather than a commercial property having value only as an investment; and that it appeared probable that the acquisition price represented a bargain, while the property at issue in the case at bar did not. [Emphasis added.]

In *Lee* there were pecuniary gains, thus an enrichment, and the property had unique qualities which helped justify a constructive trust. In the present case there were no pecuniary gains, and the trial judge did not find any meaningful non-pecuniary advantages associated with the property – the property had value "only as an

investment". In my view, given the absence of both pecuniary and non-pecuniary advantages from the property, there was no enrichment and therefore no unjust enrichment.

81 In the absence of unjust enrichment, in my view the trial judge was correct not to order the remedy sought, a constructive trust. The trial judge stated (at p. 69):

> A constructive trust was deemed appropriate in *LAC Minerals*, *supra*, because damages were deemed to be unsatisfactory. It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none.

The trial judge, in the absence of pecuniary damages which might have indicated unjust enrichment, declined to order a constructive trust. Neither the majority of the Court of Appeal nor McLachlin J. raise an error in principle in the trial judge's reasons; indeed, in my view they err in concluding that a constructive trust is available in the present case. Even if the trial judge ignored factors such as the moral quality of the defendants' acts and deterrence, which he did not, and even if this could be construed as an error in principle, the factors to be considered in ordering a constructive trust only become relevant at the second stage of the inquiry when it is decided what remedy is appropriate. Unless unjust enrichment is made out at the first stage of the inquiry, there is no need to consider the factors relevant to ordering a constructive trust. The majority of the Court of Appeal erred in interfering with the trial judge's discretion and in deciding that a constructive trust may be ordered in the absence of unjust enrichment.

Conclusion

82 Since the trial judge did not err in not ordering a constructive trust, but rather the majority of the Court of Appeal did in ordering one, I would allow the appeal, set

aside the judgment of the Court of Appeal and reinstate the judgment of the trial judge. In the circumstances, I would not award costs to the appellants either here or in the Court of Appeal.

Appeal dismissed with costs, SOPINKA *and* IACOBUCCI JJ. *dissenting.*

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IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.

B E T W E E N :

THOMAS COOK CANADA INC. - and - SKYSERVICE AIRLINES INC.

Court File No. CV-10-8647-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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